

Decision Notice

Decision 125/2017: Company X and Dumfries and Galloway Council

Waste: contracts, invoices and data

Reference No: 201700195

Decision Date: 2 August 2017



Scottish Information
Commissioner

Summary

Dumfries and Galloway Council was asked for a range of information about waste management, including contracts, invoices and statistical data.

The Council originally stated that the request was manifestly unreasonable. The Commissioner considered this matter and required the Council to conduct a fresh review. The Council did so, disclosing information under the EIRs and confirming that no further information was held. The Commissioner was asked to consider whether further information was held and whether the Council should have given the applicant further advice and assistance in relation to the request.

The Commissioner investigated and found that the Council had responded to the request in accordance with the EIRs.

Relevant statutory provisions

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (paragraphs (a), (b) and (c) of definition of "environmental information"); 5(1) and (2)(b) (Duty to make available environmental information on request); 9(1) and (3) (Duty to provide advice and assistance); 10(1), (2) and (4)(a) (Exceptions from duty to make environmental information available)

The full text of each of the statutory provisions cited above is reproduced in Appendix 1 to this decision. The Appendix forms part of this decision.

All references in this decision to "the Commissioner" are to Margaret Keyse, who has been appointed by the Scottish Parliamentary Corporate Body to discharge the functions of the Commissioner under section 42(8) of the Freedom of Information (Scotland) Act 2002 (FOISA).

Background

1. On 6 April 2016, solicitors acting on behalf of Company X made a request for information to Dumfries and Galloway Council (the Council). The information requested was:
 - (a) A copy of the contract referred to in correspondence from the Council's [name of officer] to Company X' [name of employee and reference stated] dated 24 January 2014.
 - (b) Copies of:
 - (i) All invoices and/or conveyance notes relating to deliveries made by Oakbank Services ("Oakbank") to the Locharmoss RDF plant during the month of May 2014; and
 - (ii) and any contracts that exist between Oakbank and the Council's Economy, Environmental & Infrastructure Department and DG First for this period.
 - (c) Copies of contracts for each waste stream identified in the table below in respect of the 2013-14 Financial Year. [The waste streams listed in the table were: Mixed to Landfill/Ecodeco; Inert Recycled; Paper and Card; Metal; Plastic; Wood; Others, Asbestos; Green Waste, for each quarter in Financial Year 2013-14.]

- (d) Information as to Council waste received during financial year 2014/15.
 - (e) Copies of the contract or contracts between the Council and Oakbank for 2012 and 2013 relating to or governing:
 - (i) the provision or delivery of waste by or on behalf of Oakbank to the Council; and/or
 - (ii) the collection of waste by Oakbank from the Council; and/or
 - (iii) the delivery of waste to the Locharmoss MBT plant, which is operated by Company X
2. Subsequent references to Company X in this decision shall be deemed to include solicitors acting on Company X's behalf.
 3. On 4 and 5 May 2016 an exchange of clarification emails took place with the Council, in which Company X said it wanted to see "*all of the relevant information even if the delivery location can be overtly identified, as long as it doesn't push the request over the cost threshold.*"
 4. The Council responded on 5 May 2016, refusing the request as manifestly unreasonable under regulation 10(4)(b) of the EIRs. It provided its reasoning, with arguments on where it believed the public interest lay.
 5. On 12 May 2016 Company X wrote to the Council requesting a review of its decision, stating surprise at the refusal on the grounds that it was manifestly unreasonable. Company X believed it had followed the Council's advice on narrowing the terms of a previous request which had also been refused on these grounds.
 6. The Council notified Company X of the outcome of its review on 9 June 2016. It upheld its previous decision, without modification.
 7. Company X applied to the Commissioner for a decision on 27 June 2017. The Commissioner issued her *Decision 231/2016: Company X and Dumfries and Galloway Council*¹ in which she ordered the Council to respond afresh to the requirement for review. She also identified a failure to provide reasonable advice and assistance to Company X in respect of the matters it had raised in its application.
 8. On 16 December 2016, the Council notified Company X of the outcome of its further review. It disclosed some information. It also stated, in accordance with regulation 10(4)(a), that it held no further information, and explained why.
 9. On 27 January 2017, Company X wrote to the Commissioner. Company X applied to the Commissioner for a decision in terms of section 47(1) of FOISA. By virtue of regulation 17 of the EIRs, Part 4 of FOISA applies to the enforcement of the EIRs as it applies to the enforcement of FOISA, subject to specified modifications. Company X stated it was dissatisfied with the outcome of the Council's review because it believed more information was held by the Council and it did not agree with the explanations given by the Council. Company X also submitted that the public interest lay in disclosure of the withheld information, and gave its reasons. It also complained that the Council had not provided sufficient advice and assistance in handling the request.

¹ <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2016/201601178.aspx>

Investigation

10. The application was accepted as valid. The Commissioner confirmed that Company X made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to her for a decision.
11. On 21 February 2017, the Council was notified in writing that Company X had made a valid application. The case was allocated to an investigating officer.
12. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Council was invited to comment on this application and answer specific questions, with reference to the points raised in Company X's application.

Commissioner's analysis and findings

13. In coming to a decision on this matter, the Commissioner considered all of the relevant submissions, or parts of submissions, made to her by both Company X and the Council. She is satisfied that no matter of relevance has been overlooked.
14. Company X has not expressed dissatisfaction in respect of part (e) of the request which need not, therefore, be considered further in this decision.

Application of the EIRs

15. The Commissioner is satisfied that the information covered by this request is environmental information, as defined in regulation 2(1) of the EIRs. The information in question relates to waste management and, as such, the Commissioner is satisfied that it would fall within paragraphs (a), (b) or (c) of the definition of environmental information in regulation 2(1) of the EIRs (reproduced in Appendix 1 to this decision).
16. Company X has not disputed the Council's decision to handle the request under the EIRs and the Commissioner (who has already concluded that this was the appropriate course in relation to this request, in Decision 231/2016) will consider the information in what follows solely in terms of the EIRs.

Regulations 5(1) and 10 of the EIRs

17. Regulation 5(1) of the EIRs requires a Scottish public authority which holds environmental information to make it available when requested to do so by any applicant. This is subject to various qualifications contained in regulations 6 to 12 (regulation 5(2)(b)).
18. It should be borne in mind that this obligation extends to information actually held by an authority when it receives the request, as opposed to information which an applicant believes the authority should hold, but which is not actually held.
19. Under the EIRs, a Scottish public authority may refuse to make environmental information available if one or more of the exceptions in regulation 10 apply and, in all the circumstances of the case, the public interest in making the information available is outweighed by that in maintaining the exception (regulation 10(1)(b)).
20. If no such information is held by the authority, the exception in regulation 10(4)(a) of the EIRs should apply.

21. The Commissioner has taken into account the submissions provided by Company X, in which it provides reasons why it believes the Council should hold more information than has been disclosed already.

Whether more information is held

22. Regulation 10(4)(a) of the EIRs provides that a Scottish public authority may refuse to make environmental information available to the extent that it does not hold that information when an applicant's request is received. The exception in regulation 10(4)(a) is subject to the public interest test.
23. The standard of proof to determine whether a Scottish public authority holds information is the civil standard of the balance of probabilities. In determining where the balance lies, the Commissioner considers the scope, quality, thoroughness and results of the searches carried out by the public authority. She also considers, where appropriate, any reason offered by the public authority to explain why it does not hold the information. While it may be relevant as part of this exercise to explore expectations as to what information the authority should hold, ultimately the Commissioner's role is to determine what relevant information is actually held by the public authority (or was, at the time it received the request).

Submissions from Company X

24. For part (a) of its request, Company X submitted that correspondence disclosed by the Council (dated 24 January 2014) suggested that more information was held. It explained why it believed this correspondence evidenced contractual arrangements in operation at the relevant time.
25. For part (b), which concerns invoices for deliveries by Oakbank, Company X explained that it already had a copy of an agreement between the Council and Oakbank, covering the three year period ending on 31 March 2017. Company X submitted that this evidenced the existence of a different arrangement (circa May 2014) to the one described in the Council's response. On this basis, Company X understood that Oakbank was providing the Council with a service (for which payment would have been expected) at the relevant time.
26. Company X also highlighted correspondence which it believed confirmed this arrangement. It submitted that either Oakbank would have invoiced the Council for providing a service (in which case invoices for the month of May 2014 would exist) or Oakbank was paying the Council for the "right" to deliver its own waste to Locharmoss (in which case the Council would have invoiced Oakbank for May 2014 deliveries). In either scenario, Company X believed that invoices would have been generated and would be held by the Council.
27. For part (c), Company X submitted the information disclosed to date failed to fully address all elements of the request. It suggested that eight types of waste were missing from the table and referred to an extract from a letter disclosed by the Council previously (dated 8 May 2013) which related to waste deliveries to the Ecodeco plant. Company X queried whether the Council simply did not process the other eight types of waste (hence there would be no information held), or whether there were indeed relevant contractual arrangements in place. If there were, Company X argued that it would expect more information to be held.
28. During the investigation, Company X clarified its position on the terms of part (c) of the request. Company X submitted that it had used references to food waste and skip hire in order to challenge the Council's assertions on creating data and undertaking calculations.

Company X stated that examples relating to food waste and skip hire would fall within the scope of this request, but the waste information highlighted had not, as yet, been provided.

29. For part (d) of the request, Company X also characterised the table (identified above) as “illustrative”. Company X believed there were missing details for 2014/15, noting that Oakbank had separate contracts with the Council for food, skip and other waste and submitting that relevant management information (including tonnage detail) must be available.

Submissions from the Council

30. The Council confirmed the searches it had conducted in relevant information systems. It stated that these had included contacting the relevant officers in the departments specified by Company X and in its procurement team, along with searches of its financial management system. Individual databases were searched in the relevant teams but, other than the contract information already disclosed to Company X, no relevant contracts, invoices or data were identified. Also, the relevant staff (who were all knowledgeable and experienced in this area of work) were not aware of any other contracts existing which fell within the scope of the request. The Council was satisfied that it had identified all information caught by the terms of the request.

Part (a)

31. For part (a), the Council explained that, with regard to the correspondence identified by Company X in its application, the arrangements highlighted were “provisional” and never concluded with a written contract. In other words, no contract was prepared.
32. The investigating officer asked the Council whether it had checked correspondence for the creation of a contract (as opposed to one contained in a specific contract document). The Council confirmed (16 June 2017) that staff had checked all correspondence. It highlighted that the staff involved were aware of the different contracts and services provided by those referred to in the request. No correspondence setting up a relevant contract had been identified.

Part (b)

33. With regard to part (b), the Council confirmed that there were 31 deliveries for the month of May 2014 but that no invoices for these were found during its searches. It explained that no invoices were ever raised or issued for these deliveries. The Council stated this was because arrangements were “put on hold” at that time, so there was no need for invoices. The Council stated that any such invoices had “still to be issued”.
34. The Council commented that if any other contracts (falling within the scope of this part) did exist, but were perhaps not identified as such, they would already have been disclosed to Company X in response to its request for correspondence with Oakbank. The Council confirmed, having searched its financial and other systems, that no further contractual information capable of addressing the request was held.

Parts (c) and (d)

35. The Council contended that there were no missing categories of waste. It stated that it did not have a single waste stream contract, as waste was collected “within individual skip hire jobs”. It confirmed it had already provided Company X with the skip hire contract.
36. The Council further explained that the waste stream data was based on data from Oakbank, being the Council’s main skip hire company, and that the Council did not previously (before 1

April 2014) have a contract with Oakbank to deliver waste “on its behalf”. The Council stated that Oakbank collected skips and processed the waste, then provided waste tonnage data to the Council in quarterly reports. Its response had been based on these reports, being the relevant information it held.

Commissioner’s conclusions

37. The Commissioner notes the Council’s descriptions of how it conducted searches, including the staff expertise employed. She understands the logic used by Company X in relation to invoices and contracts, but remains satisfied by the searches and associated explanations given by the Council.
38. In relation to part (d) of the request, the Commissioner acknowledges that the additional categories of waste highlighted by Company X were intended to be illustrative, as a means of prompting further checks on what might be recorded. If Company X had been seeking specific breakdowns, she presumes it would have detailed what was required. In any event, the Council has explained its operational arrangements with Oakbank for these purposes, and the data it obtains, from the external contractor, as part of these arrangements. Whether the Council should be measuring or calculating the tonnages itself is not something on which the Commissioner can comment: having considered the Council’s submissions, she accepts that it does not and therefore holds no relevant recorded information other than that provided by the contractor.
39. Having considered all the relevant submissions and the terms of the request, the Commissioner is satisfied that the Council took adequate, proportionate steps to establish what information it held that fell within the scope of Company X’s request. She accepts that any information relevant to the request would have been identified using the searches described by the Council.
40. The Commissioner can only consider what information is actually held by the Council at the time a request is received, not information it should hold, or that an applicant believes it should hold. She is therefore satisfied, on the balance of probabilities, that the Council does not (and did not, on receiving the request) hold more information than that already disclosed to Company X.

The public interest

41. The exception in regulation 10(4)(a) is subject to the public interest test in regulation 10(1)(b) of the EIRs and so can only apply if, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in making the information available.
42. In this case, for the reasons set out above, the Commissioner is satisfied that the Council does not (and did not, on receiving the request) hold the information to which it applied this exception. Consequently, she accepts that there is no conceivable public interest in requiring the disclosure of such information and finds that the public interest in making the requested information available is outweighed by that in maintaining the exception.
43. The Commissioner concludes that the Council was correct in its application of regulation 10(4)(a) of the EIRs.

Regulation 9 of the EIRs

44. Regulation 9 of the EIRs requires a Scottish public authority, so far as it reasonable to do so, to provide advice and assistance to a person who proposes to make, or has made, a request

for information to it. The Scottish Ministers' Code of Practice on the discharge of Functions by Scottish Public Authorities under the FOISA and the EIRs² ("the Section 60 Code") gives guidance to authorities on providing such advice and assistance.

45. The Section 60 Code states, at paragraph 5.1.1 in Part 2:

"Authorities have a duty to provide advice and assistance at all stages of a request. It can be given either before a request is made, or to clarify what information an applicant wants after a request has been made, whilst the authority is handling the request, or after it has responded."

Paragraph 5.3.3 states:

"If an authority is unclear about what information the applicant wants, it should obtain clarification by performing its duty to provide reasonable advice and assistance to the applicant. Where a request is not reasonably clear, advice and assistance could include:

- providing an outline of the different kinds of information which might meet the terms of the request;*
- providing access to detailed catalogues and indexes, where available, to help the applicant ascertain the nature and extent of the information held by the authority;*
- providing a general response to the request setting out options for further information which could be provided on request;*
- contacting the applicant to discuss what information the applicant wants."*

46. In its previous application, Company X asked the Commissioner to consider the levels of advice and assistance provided by the Council. The Commissioner has already considered matters up to that point (i.e. the date of issue of that decision, 27 October 2016). The Commissioner need not revisit matters already considered in that decision.

47. In its application of 27 January 2017, Company X complained that the Council did not make contact to discuss the request. It submitted that doing so might have reduced the time spent on the request, but failed to expand significantly on the kind(s) of advice and assistance it expected. It referred to information identified during the currency of this and a related request, of which the Council had not provided an outline, but even after further inquiry it was not clear what information Company X had in mind

48. The Commissioner has borne in mind that Company X is represented in this case by a firm of solicitors experienced in this area of law. On the face of it, she can see no obvious requirement for advice and assistance in relation to information which might be held in this case. In the absence of more specific comment from Company X as to what kind(s) of advice and assistance might reasonably have been expected in the circumstances, the Commissioner is satisfied that the Council was not required, in carrying out its review following Decision 231/2016, to provide any advice and assistance to comply with regulation 9.

² <http://www.gov.scot/Resource/0051/00510851.pdf>

Decision

The Commissioner finds that, in respect of the matters specified in the application, Dumfries and Galloway Council complied with the Environmental Information (Scotland) Regulations 2004 in responding to the information request made by Company X.

Appeal

Should either Company X or Dumfries and Galloway Council wish to appeal against this decision, they have the right to appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days after the date of intimation of this decision.

Margaret Keyse
Acting Scottish Information Commissioner
2 August 2017

The Environmental Information (Scotland) Regulations 2004

2 Interpretation

(1) In these Regulations –

...

"environmental information" has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on

-

- (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
- (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in paragraph (a);
- (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in paragraphs (a) and (b) as well as measures or activities designed to protect those elements;

...

5 Duty to make available environmental information on request

(1) Subject to paragraph (2), a Scottish public authority that holds environmental information shall make it available when requested to do so by any applicant.

(2) The duty under paragraph (1)-

...

(b) is subject to regulations 6 to 12.

...

9 Duty to provide advice and assistance

(1) A Scottish public authority shall provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to applicants and prospective applicants.

...

(3) To the extent that a Scottish public authority conforms to a code of practice under regulation 18 in relation to the provision of advice and assistance in a particular case, it

shall be taken to have complied with the duty imposed by paragraph (1) in relation to that case.

...

10 Exceptions from duty to make environmental information available–

- (1) A Scottish public authority may refuse a request to make environmental information available if-
 - (a) there is an exception to disclosure under paragraphs (4) or (5); and
 - (b) in all the circumstances, the public interest in making the information available is outweighed by that in maintaining the exception.
- (2) In considering the application of the exceptions referred to in paragraphs (4) and (5), a Scottish public authority shall-
 - (a) interpret those paragraphs in a restrictive way; and
 - (b) apply a presumption in favour of disclosure.

...

- (4) A Scottish public authority may refuse to make environmental information available to the extent that
 - (a) it does not hold that information when an applicant's request is received;

...

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