

Decision Notice

Decision 134/2017: Mr David Howell and Stirling Council

Request for specific correspondence

Reference No: 201700727

Decision Date: 10 August 2017



Scottish Information
Commissioner

Summary

Stirling Council (the Council) was asked for copies of correspondence between the Council and two named individuals. The Council told the requester that the request was invalid and, on three separate occasions, asked the requester to clarify the terms of the request.

Following an investigation, the Commissioner found that it was not reasonable for the Council to have asked for clarification. She also found the Council had failed to comply with the request and requirement for review within the timescales set down by FOISA and the EIRs.

As the Council issued its review response the day before this decision was issued, the Commissioner did not require the Council to take any further action.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (3) (General entitlement); 8(1)(c) (Requesting information); 10(1) (Time for compliance); 15(1) (Duty to provide advice and assistance); 21(1), (4) and (5) (Review by Scottish public authority)

Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 5(1) and (2)(a) (Duty to make available environmental information on request); 9(1) and (2) (Duty to provide advice and assistance); 16(1), (3), (4) and (5) (Review by Scottish public authority)

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 FOISA

Background

1. On 11 November 2016, Mr Howell asked the Council for:
 1. *A copy of all correspondence, emails, file notes of telephone conversations & memo's between, [named individual and address] with any and all, staff, officials, employee's and councillors of Stirling Council from January 2012 up to the present day.*
 2. *A copy of all correspondence, emails, file notes of telephone conversations & memo's between, [named individual, business and address], with any and all, staff, officials, employee's and councillors of Stirling Council from January 2012 up to the present day.*
2. The Council wrote to Mr Howell on 14 November 2016. It told Mr Howell that, for an information request to be valid, it had to describe the information. It asked Mr Howell if his requests related to a planning application and, if so, which application. The Council told Mr Howell it would respond within 20 working days of him providing these further details.
3. Mr Howell responded the same day. He commented that the planning application mentioned by the Council would be covered by his request, but that he had not limited his request to correspondence about the planning application.

4. On 15 November 2016, the Council wrote to Mr Howell. It told Mr Howell he needed to specify a subject matter for the request to be valid in terms of section 8(1)(c) of FOISA. It suggested how Mr Howell could re-write his request to make it valid. The Council also alerted Mr Howell to the fact that his request might cover environmental information under the EIRs.
5. On 18 November 2016, Mr Howell reworded his request, following some of the guidance the Council had given him.
6. The Council wrote to Mr Howell on 25 November 2016. It again asked Mr Howell to clarify parts of his requests.
7. Mr Howell wrote to the Council on 28 November 2016. He again made some further changes to the wording of his requests in line with suggestions made by the Council.
8. Finally, on 29 November 2016, the Council accepted the request as valid. It informed Mr Howell that, having considered the text from his previous emails, it explained how it had interpreted his requests and provided Mr Howell with a list outlining his requests. It asked him to let it know if he agreed with the list.
9. On 5 December 2016, Mr Howell acknowledged the Council's email of 29 November 2016, agreeing with the Council's interpretation of the information he was now seeking.
10. On 29 December 2016, the Council wrote to Mr Howell and informed him it was unable to respond within the time allowed by the legislation. It explained that his request involved collating information from a number of different sources within the Council. It had now received the last response from the team involved and said that a response to his request was being collated.
11. Despite this, no response was issued. On 18 January 2017, Mr Howell wrote to the Council asking when he could expect a response to his request.
12. The Council responded the following day. It again explained that his request involved collating information from a number of different sources within the Council and that it had received the last response and was at the stage of preparing information for disclosure. It advised him that he was entitled to seek a review of its failure to respond to his request.
13. Mr Howell wrote to the Council on 13 February 2017, and asked it to review its failure to respond to his request.
14. On 16 March 2017, more than four months after Mr Howell had first made a request, and after failing to respond to his request, the Council wrote to Mr Howell advising him that it had not carried out a review within the time allowed by the legislation. It said this was because there were currently a high number of active reviews to deal with. It informed Mr Howell of his right to make an application to the Commissioner.
15. On 20 April 2017, Mr Howell wrote to the Commissioner. Mr Howell 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. Mr Howell was dissatisfied with the outcome of the Council's review because it had failed to respond to his request and request for review, and had engaged in protracted negotiations before it accepted his request for information.

Investigation

16. The application was accepted as valid. The Commissioner confirmed that Mr Howell 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. The case was allocated to an investigating officer.
17. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. On 31 May 2017, the Council was notified in writing that Mr Howell had made a valid application. The Council was invited to comment on this application and answer specific questions.
18. The Council responded, accepting that it had failed to respond to Mr Howell's request and requirement for review.
19. During the investigation, the Council was also asked to explain to the Commissioner why it thought it necessary to seek clarification on more than one occasion for what appeared to be a relatively clear request.
20. The Council told the Commissioner that it had thought it necessary to seek clarification in order to comply with the request. It accepted clarification could have been achieved in a shorter timescale.

Commissioner's analysis and findings

21. In coming to a decision on this matter, the Commissioner considered the relevant submissions, or parts of submissions, made to her by both Mr Howell and the Council. She is satisfied that no matter of relevance has been overlooked.
22. It is apparent from the terms of the refined request that at least some of the information caught by it will be environmental information as defined by regulation 2(1) of the EIRs. In *Decision 218/2007 Professor A D Hawkins and Transport Scotland*¹, the Commissioner confirmed (at paragraph 51) that where environmental information is concerned, there are two separate statutory frameworks for access to that information and, in terms of the legislation, an authority is required to consider the request under both FOISA and EIRs.

FOISA

23. Focussing first on FOISA, these are the provisions which are relevant in this case:
 - (i) section 8(1)(c): for an information request to be valid, it must describe the information requested
 - (ii) section 1(3): if an authority requires further information in order to identify and locate the requested information, and has told the applicant so (specifying what further information is needed), then, provided that the requirement is reasonable, the authority is not obliged to give the requested information until it has the further information
 - (iii) section 15: a public authority must provide reasonable advice and assistance to someone who has made, or who proposes to make, an information request

¹ <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2007/200600654.aspx>

EIRs

24. Turning now to the EIRs, these are the provisions which are relevant in this case:

- (i) regulation 10(4)(c): an authority may refuse to make environmental information available if the request is formulated in too general a manner and the authority has complied with its duty under regulation 9 (there is no direct equivalent of section 8(1)(c) of FOISA in the EIRs)
- (ii) regulation 9(2): where a request has been formulated in too general a manner, the authority must ask the applicant to provide more particulars and assist the applicant in providing those particulars.

Was the original request valid and was clarification reasonable?

25. The Council told Mr Howell that the request he originally made was invalid because it did not describe the information he was requesting. The Council asked Mr Howell to clarify his request. However, the request clearly described the information which Mr Howell wanted. It may have been a wide request, but this does not mean that it was not valid. Both FOISA and the EIRs give public authorities ways of responding to large requests – treating a request as invalid just because of the breadth of the request is not one of them. There is certainly no requirement on requesters to provide a subject matter (where the request is otherwise clear) before a request is valid, as the Council led Mr Howell to believe.
26. Given that Mr Howell's initial request adequately described the information Mr Howell wanted, the Commissioner asked the Council to explain why it thought it reasonable to seek clarification on a number of occasions.
27. As noted above, the Council did not explain why it considered clarification had been necessary.
28. In the circumstances, the Commissioner is satisfied that the request of 11 November 2016 was a valid request for the purposes of both FOISA and the EIRs and that it was not reasonable for the Council to have sought clarification. If anything, the use of clarification appears to have been designed to delay the Council having to respond to the request.
29. The Commissioner notes that the Council, in its correspondence with Mr Howell, gave him advice and assistance in order to narrow the scope of his request, partly because the breadth of the request meant it was possible that it would exceed the maximum cost (currently £600) under FOISA. Although there is no such maximum cost under the EIRs, the Commissioner accepts that it was good practice for the Council to give advice and assistance. However, this does not detract from the fact that the original request was valid and that the Council was obliged to respond to the request within 20 working days of receipt.

Failure to comply with timescales

30. Section 10(1) of FOISA gives Scottish public authorities a maximum of 20 working days following the date of receipt of the request to comply with a request for information. This is subject to qualifications which are not relevant in this case. The same timescale is laid down by regulation 5(2)(a) of the EIRs.
31. The Council accepted that it had failed to respond to Mr Howell's request for information in the time allowed. The Commissioner finds that the Council failed to comply with section 10(1) of FOISA and regulation 5(2)(a) of the EIRs in responding to Mr Pattison's request.

32. Section 21(1) of FOISA gives Scottish public authorities a maximum of 20 working days following the date of receipt of the requirement to comply with a requirement for review. Again, this is subject to qualifications which are not relevant in this case. The same timescale is laid down by regulation 16(4) of the EIRs.
33. In its submissions to the Commissioner, the Council accepted that it had not responded to Mr Howell's requirement for review. It explained that this was due to a high number of requests for review combined with a gap in terms of a Review Officer. It confirmed it was reviewing its processes of dealing with complaints.
34. It is, however, a matter of fact that the Council did not provide a response to Mr Howell's requirement for review within 20 working days, so the Commissioner finds that it failed to comply with section 21(1) of FOISA and regulation 16(4) of the EIRs.
35. The Council responded to Mr Howell's review on 9 August 2017, just as this decision was about to be issued. As a result, the Commissioner does not require the Council to take any further action in relation to the matters raised in Mr Howell's application.
36. The Commissioner notes that the Council has apologised to Mr Howell for its delay in responding. However, given the unreasonable delays in this case, the Commissioner will consider whether to take any further action in line with her Enforcement Policy.

Decision

The Commissioner finds that Stirling Council (the Council) failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 and with the Environmental Information (Scotland) Regulations 2004 in responding to the information request made by Mr Howell.

Mr Howell's request was valid and should have been treated as such. It was not reasonable for the Council to seek clarification. The Council failed to respond to Mr Howell's request and requirement for review within the timescales laid down by FOISA and the EIRs.

Appeal

Should either Mr Howell or Stirling 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

10 August 2017

Appendix 1: Relevant statutory provisions

Freedom of Information (Scotland) Act 2002

1 General entitlement

- (1) A person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority.

...

- (3) If the authority –
- (a) requires further information in order to identify and locate the requested information; and
 - (b) has told the applicant so (specifying what the requirement for further information is),

then provided that the requirement is reasonable, the authority is not obliged to give the requested information until it has the further information.

...

8 Requesting information

- (1) Any reference in this Act to “requesting information” is a reference to making a request which –

...

- (c) describes the information requested.

...

10 Time for compliance

- (1) Subject to subsections (2) and (3), a Scottish public authority receiving a request which requires it to comply with section 1(1) must comply promptly; and in any event by not later than the twentieth working day after-

- (a) in a case other than that mentioned in paragraph (b), the receipt by the authority of the request; or
- (b) in a case where section 1(3) applies, the receipt by it of the further information.

...

15 Duty to provide advice and assistance

- (1) A Scottish public authority must, so far as it is reasonable to expect it to do so, provide advice and assistance to a person who proposes to make, or has made, a request for information to it.

...

21 Review by Scottish public authority

- (1) Subject to subsection (2), a Scottish public authority receiving a requirement for review must (unless that requirement is withdrawn or is as mentioned in subsection (8)) comply promptly; and in any event by not later than the twentieth working day after receipt by it of the requirement.

...

- (4) The authority may, as respects the request for information to which the requirement relates-
 - (a) confirm a decision complained of, with or without such modifications as it considers appropriate;
 - (b) substitute for any such decision a different decision; or
 - (c) reach a decision, where the complaint is that no decision had been reached.
- (5) Within the time allowed by subsection (1) for complying with the requirement for review, the authority must give the applicant notice in writing of what it has done under subsection (4) and a statement of its reasons for so doing.

Environmental Information (Scotland) Regulations 2004

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)-
 - (a) shall be complied with as soon as possible and in any event no later than 20 working days after the date of receipt of the request; and

...

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.
- (2) Where a request has been formulated in too general a manner, the authority shall-
 - (a) ask the applicant as soon as possible, and in any event no later than 20 working days after the date of receipt of request, to provide more particulars in relation to the request; and
 - (b) assist the applicant in providing those particulars.

...

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.

...

- (4) A Scottish public authority may refuse to make environmental information available to the extent that

...

- (c) the request for information is formulated in too general a manner and the authority has complied with its duty under regulation 9;

...

16 Review by Scottish public authority

- (1) Subject to paragraph (2), an applicant may make representations to a Scottish public authority if it appears to the applicant that the authority has not complied with any requirement of these Regulations in relation to the applicant's request.

...

- (3) The Scottish public authority shall on receipt of such representations-
 - (a) consider them and any supporting evidence produced by the applicant; and
 - (b) review the matter and decide whether it has complied with these Regulations.
- (4) The Scottish public authority shall as soon as possible and no later than 20 working days after the date of receipt of the representations notify the applicant of its decision.
- (5) Where the Scottish public authority decides that it has not complied with its duty under these Regulations, it shall immediately take steps to remedy the breach of duty.

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