

Decision Notice 053/2021

Evidence held by a Planning Case Officer

Applicant: The Applicant

Public authority: East Dunbartonshire Council

Case Ref: 202001281



Scottish Information
Commissioner

Summary

The Council was asked for specific information provided to it by a planning applicant. The Council refused to comply with the request, stating the information was already publicly available on the Registers of Scotland website.

The Commissioner investigated and found that the Council had failed to comply with the EIRs in responding to the request. This was because the response did not relate to the specific information sought by the Applicant. As a further response was issued during the investigation, which did address the request, the Commissioner did not require any further action to be taken.

Relevant statutory provisions

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (paragraphs (a) and (c) of definition of "environmental information") (Interpretation); 5(1) (Duty to make available environmental information on request)

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.

Background

1. On 14 August 2020, the Applicant made a request for information to East Dunbartonshire Council (the Council). The Applicant made reference to the earlier correspondence, where he had been informed that a Planning Case Officer was in possession of evidence negating the Applicant's claim that a false declaration has been made to the Planning Authority in respect of a particular planning application. The Applicant asked for the information in the case officer's possession which negated his claim.
2. On 7 September 2020, the Council wrote to the Applicant and sought clarification as to precisely what information he was seeking.
3. Later that day, the Applicant wrote to the Council and clarified that the only information that he was seeking was "the evidence, i.e. information provided by the applicant that negates my allegation that an offence has been committed".
4. The Council responded on 29 September 2020. It advised him that it had interpreted his request as being for a copy of the Land Title documentation relating to the site associated with the planning application. It advised the planning application had been withdrawn and was no longer under consideration by the Council. The title was undergoing formal registration by Registers of Scotland and it considered the information it held to be commercially sensitive and exempt from disclosure under section 33(1)(b) of the Freedom of Information (Scotland) Act 2002 (FOISA). It stated that the information should not be released until the property was formally registered and that, once the registration was complete, the Land Title would be available via Registers of Scotland at <https://www.ros.gov.uk/>
5. On 30 September 2020, the Applicant wrote to the Council requesting a review of its decision, on the basis that he had not sought a copy of the Land Title but had clearly requested the evidence the Case Officer stated he was in possession of, as outlined in the earlier correspondence.

6. The Council notified the Applicant of the outcome of its review on 23 October 2020. It informed the Applicant that section 33(1)(b) of FOISA had been applied incorrectly and did not apply. The request had been for environmental information and the EIRs applied. It advised the Applicant that, as the Land Title was publicly available through the paid search function on the Registers of Scotland website, it was applying regulation 6(1)(b) of the EIRs.
7. On 23 October 2020, the Applicant wrote to the Commissioner, applying 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. The Applicant stated he was dissatisfied with the outcome of the Council's review because the Council had applied an exception to information he had not requested. He stated that the information he sought was not publicly available and confirmed he had not requested a copy of the Land Title.

Investigation

8. The application was accepted as valid. The Commissioner confirmed that the Applicant made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to him for a decision.
9. On 20 November 2020, the Council was notified in writing that the Applicant had made a valid application. The case was then allocated to an investigating officer.
10. 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 to answer specific questions, focusing on whether it had responded properly to the request of 14 August 2020.
11. During the investigation, the Council accepted that more clarity could have been provided to the Applicant to explain what information was held.
12. On 24 March 2021, the Council issued the Applicant with a new review outcome, purporting to answer the specific terms of his request.
13. The Applicant was asked, on 24 March 2021, whether he was content with the response received from the Council, and whether he required a decision notice to be issued. On 25 March 2021, the Applicant responded and confirmed he had received the new review outcome, but remained dissatisfied. Any dissatisfaction with the new review outcome will be considered by the Commissioner, should the Applicant make a new application on that basis.

Commissioner's analysis and findings

14. In coming to a decision on this matter, the Commissioner considered all of the relevant submissions, or parts of submissions, made to him by both the Applicant and the Council. He is satisfied that no matter of relevance has been overlooked.

Application of the EIRs

15. It is clear that any information falling within the scope of the Applicant's request, which relates to aspects of a planning application having a clear impact on the elements of the environment, is properly considered to be environmental information, as defined in regulation 2(1) of the EIRs (the relevant provisions are reproduced in Appendix 1 to this decision). The

Applicant made no comment on the Council's application of the EIRs in this case and the Commissioner will consider the request in what follows solely in terms of the EIRs.

Response issued by the Council

16. 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. It is important to bear in mind that this obligation relates to information actually held by an authority when it receives the request, as opposed to information an applicant believes the authority should hold (but which it does not in fact hold).
17. In its submissions to the Commissioner, the Council accepted that, in responding to the request, more clarity could have been provided to the Applicant to explain what information was held. The Council agreed to issue a substantive review outcome during the investigation, responding to the specific terms of the Applicant's request. As mentioned above, the Council did so on 24 March 2021.
18. It is apparent that the Applicant sought information in specific terms, as described above. It is also apparent that in its response of 29 September 2020 and in its review outcome of 23 October 2020, the Council had interpreted this as a request for a copy of the Land Title, despite being advised by the Applicant that this was not what he had requested.
19. The Commissioner concludes that the Council did not respond to the specific terms of the Applicant's request when it responded to his request or requirement for review. The Council did not explain what information it held falling within the scope of the request submitted by the Applicant. Therefore, the Commissioner finds that the Council failed to respond to the information request in line with regulation 5(1) of the EIRs.
20. As the Commissioner is satisfied that the Council's response of 24 March 2021 did respond to the specific request raised by the Applicant, he does not require the Council to take any action in respect of the above failure, in response to the Applicant's application. Whether the content of that response was compliant with the EIRs can be considered by the Commissioner in a future application, to the extent that the Applicant raises dissatisfaction with that content.

Decision

The Commissioner finds that, by not responding to the specific terms of the Applicant's request, East Dunbartonshire Council (the Council) failed to comply with the Environmental Information (Scotland) Regulations 2004 (and, in particular, with regulation 5(1)).

Given that the Council issued a further specific response to the Applicant during the investigation, the Commissioner does not require the Council to take any action in respect of this failure, in response to the Applicant's application.

Appeal

Should either the Applicant or the 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
Head of Enforcement

21 April 2021

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

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(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;

...

(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.

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