



Scottish Information
Commissioner
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Decision Notice 005/2024

Correspondence relating to Lochore Meadows Country Park

Applicant: The Applicant

Authority: Fife Council

Case Ref: 202200025

Summary

The Applicant asked the Authority for correspondence relating to Lochore Meadows Country Park between two named individuals employed by the Authority. The Authority provided some information, but withheld the remainder as personal information, and some information it regarded as confidential or commercially sensitive. During the Commissioner's investigation, the Authority substantially changed its position – in particular, to give consideration to whether the information requested was environmental information, and therefore should have been dealt with under the EIRs, and also to view it as manifestly unreasonable. In the light of this, the Commissioner found failures to comply with the required timescales and required a fresh review.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2) and (6) (General entitlement); 10(1) (Time for compliance); 21(1) (Review by a Scottish public authority); 39(2) (Health, safety and the environment); 47(1) and (2) (Application for decision by Commissioner)

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (definition of "the Act", "applicant" and "the Commissioner") (Interpretation); 5(1) and 5(2)(a) (Duty to make environmental information available on request); 16(4) (Review by a Scottish public authority); 17(1), (2)(a) and (b) (Enforcement and appeal provisions)

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. The Authority sought clarification from the Applicant on 18 August 2021 for a request made by him on 31 July 2021. On 27 September 2021, the Applicant clarified his request for information: he asked for all email correspondence between the park [Lochore Meadows Country Park] manager and another Authority employee from their first contact until the date of his request.
2. The Authority did not provide a response.
3. On 4 November 2021, the Applicant wrote to the Authority, requesting a review of its handling of his request. The Applicant stated that he was dissatisfied with the Authority's failure to respond to his request.
4. The Authority notified the Applicant of the outcome of its review on 22 December 2021. The Authority apologised for its failure to respond to the Applicant's request. It provided some of the information he had requested, and withheld other information under the exemptions in sections 33(1)(b)(Substantial prejudice to commercial interests), 36(2)(Confidentiality) and 38(1)(b) (Personal information) of FOISA.
5. On 10 January 2022, 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 that he was dissatisfied with the outcome of the Authority's review because he did not agree that the exemptions in sections 33(1)(b), 36(2) or 38(1)(b) had been correctly applied by the Authority. He also did not believe that the Authority had provided all the information it held that fell within the scope of his request. He was dissatisfied with the Authority's failure to respond to his request and request for review within the statutory timescales.

Investigation

6. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
7. On 11 January 2022, the Authority was notified in writing that the Applicant had made a valid application. The Authority was asked to send the Commissioner the information withheld from the Applicant. The Authority provided the information and the case was allocated to an investigating officer.
8. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Authority was invited to comment on this application and to answer specific questions. These related to the searches carried out to identify information falling within the scope of the Applicant's request; the reasons why the Authority considered the exemptions cited applied; and whether the Authority had considered whether any of the information requested could be deemed to be environmental information.
9. The Authority provided submissions to the Commissioner.
10. The Applicant provided the Commissioner with his comments on the public interest, and on the Authority's application of the exemptions in sections 36(2), 33(1)(b) and 38(1)(b) of FOISA.

Commissioner's analysis and findings

11. The Commissioner has considered all of the submissions made to him by the Applicant and the Authority.

Handling of the request – failure to comply with timescales

12. Section 10(1) of FOISA gives Scottish public authorities a maximum of 20 working days following the date of receipt of a request, or receipt of clarification of a request, for information. This is subject to qualifications which are not relevant in this case.
13. Section 21(1) of FOISA gives Scottish public authorities a maximum of 20 working days following the date of receipt to comply with a requirement for review. Again, this is subject to qualifications which are not relevant in this case.
14. In its submissions to the Commissioner, the Authority stated that it had identified failures in the processing of this request and it had apologised for the delay in responding. It highlighted a number of measures that it had taken subsequently to address these matters.
15. As indicated below, the request appears to relate to environmental information, wholly or in part. In [Decision 218/2007](#)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 the EIRs.
16. 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.
17. It is a matter of fact that the Authority did not provide a response to the Applicant's request for information, as clarified on 27 September 2021, within 20 working days, so the Commissioner finds that it failed to comply with section 10(1) of FOISA and regulation 5(2)(a) of the EIRs.
18. 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.
19. It is a matter of fact that the Authority did not provide a response to the Applicant's requirement for review of 4 November 2021 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.
20. The Commissioner has recorded this procedural failure in his management database, which is used to inform and monitor FOI practice by authorities.

The Authority's change of position during the investigation

21. In its submissions to the Commissioner, the Authority stated that it no longer wished to reply on the exemptions in sections 36(2), 33(1)(b) and 38(1)(b) of FOISA, but rather that section 39(2) of FOISA should have been applied and the request should have been, and was now

¹ [Decision 218/2007 | Scottish Information Commissioner \(itspublicknowledge.info\)](#)

being, considered under the EIRs. The Authority also reconsidered the extent of the recorded information held by it that fell within the Applicant's request.

22. The revised withheld information, provided with the Authority's submissions, comprised far less information than was initially provided to the Commissioner. On being asked, the Authority replied that much of the information provided to the Commissioner as withheld information had been out of the scope of the initial request. Information identified as being in scope was information that had been sent directly by one of the named individuals to the other or the other had been copied in.
23. The Authority submitted that it now wished to rely on regulation 10(4)(b) of the EIRs as it considered the Applicant's request to be manifestly unreasonable.
24. Taking account all of the above submissions and explanations from the Authority, the Commissioner must therefore conclude that the Authority failed to comply fully with Part 1 of FOISA and the EIRs in responding to the Applicant's request.
25. The Commissioner does agree with the Authority that some of the information requested by the Applicant, at least, is likely to fall within the terms of the EIRs as environmental information. He makes no finding, however, in this decision on whether all the information that falls within the Applicant's request is environmental information, or on any aspect of the information held or whether it should be disclosed.
26. The Commissioner's view is that the Authority has changed its position to such an extent that the majority of grounds for dissatisfaction expressed in the Applicant's application to the Commissioner are no longer relevant to the case.
27. As a consequence, the Commissioner requires the Authority to provide the Applicant with a new review outcome that explains its position with regard to the recorded information held by the Authority that falls within the scope of the Applicant's request. In the process, it should consider carefully whether it has determined the scope of the request – and identified the information falling within that scope – appropriately. He requires the Authority to do this by 23 February 2024.

Decision

The Commissioner finds that the Authority failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) and the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by the Applicant. By failing to respond to the Applicant's request in accordance with section 10(1) of FOISA and regulation 5(2)(a) of the EIRs, and to the requirement for review in accordance with section 21(1) of FOISA and regulation 16(4) of the EIRs, the Authority failed to comply with Part 1 of FOISA and with the EIRs.

In addition, given its substantially changed position in relation the proper handling of the Applicant's request, the Commissioner must find that the Authority failed to comply with section 1(1) of FOISA or regulation 5(1) of the EIRs in dealing with the request or requirement for review. He therefore requires the Authority to provide the Applicant with a new review outcome, based on its revised position with regard to the Applicant's request (and in terms of section 21 of FOISA and regulation 16 of the EIRs), by 23 February 2024.

Appeal

Should either the Applicant or the Authority 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.

Enforcement

If the Authority fails to comply with this decision, the Commissioner has the right to certify to the Court of Session that the Authority has failed to comply. The Court has the right to inquire into the matter and may deal with the Authority as if it had committed a contempt of court.

Euan McCulloch
Head of Enforcement

9 January 2024

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.
- (2) The person who makes such a request is in this Part and in Parts 2 and 7 referred to as the “applicant.”
- ...
- (6) This section is subject to sections 2, 9, 12 and 14.
- ...

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.
- ...

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.
- ...

39 Health, safety and the environment

- ...
- (2) Information is exempt information if a Scottish public authority-
 - (a) is obliged by regulations under section 62 to make it available to the public in accordance with the regulations; or
 - (b) would be so obliged but for any exemption contained in the regulations.
- ...

47 Application for decision by Commissioner

- (1) A person who is dissatisfied with -
 - (a) a notice under section 21(5) or (9); or
 - (b) the failure of a Scottish public authority to which a requirement for review was made to give such a notice.

may make application to the Commissioner for a decision whether, in any respect specified in that application, the request for information to which the requirement relates has been dealt with in accordance with Part 1 of this Act.

- (2) An application under subsection (1) must -
 - (a) be in writing or in another form which, by reason of its having some permanency, is capable of being used for subsequent reference (as, for example, a recording made on audio or video tape);
 - (b) state the name of the applicant and an address for correspondence; and
 - (c) specify –
 - (i) the request for information to which the requirement for review relates;
 - (ii) the matter which was specified under sub-paragraph (ii) of section 20(3)(c);
and
 - (iii) the matter which gives rise to the dissatisfaction mentioned in subsection (1).

The Environmental Information (Scotland) Regulations 2004

2 Interpretation

- (1) In these Regulations –

“the Act” means the Freedom of Information (Scotland) Act 2002;

“applicant” means any person who requests that environmental information be made available;

“the Commissioner” means the Scottish Information Commissioner constituted by section 42 of the Act;

...

“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;
- (d) reports on the implementation of environmental legislation;
- (e) costs benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in paragraph (c); and
- (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in paragraph (a) or, through those elements, by any of the matters referred to in paragraphs (b) and (c);

...

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

...

16 Review by Scottish public authority

...

- (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.

...

17 Enforcement and appeal provisions

- (1) The provisions of Part 4 of the Act (Enforcement) including schedule 3 (powers of entry and inspection), shall apply for the purposes of these Regulations as they apply for the purposes of the Act but with the modifications specified in paragraph (2).
- (2) In the application of any provision of the Act by paragraph (1) any reference to -
 - (a) the Act is deemed to be a reference to these Regulations;

- (b) the requirements of Part 1 of the Act is deemed to be a reference to the requirements of these Regulations;

...