

Decision Notice



Decision 233/2013 Mr Stuart James and Highland Council

Cost of drainage work

Reference No: 201301605

Decision Date: 22 October 2013

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Scottish Information Commissioner

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Summary

On 15 May 2013, Mr James asked Highland Council (the Council) for information regarding a specific piece of drainage work it had carried out. Mr James was not satisfied that the Council did not hold information on the cost of this work. The Commissioner carried out an investigation and accepted that the Council did not hold this information.

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); 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 the Appendix to this decision. The Appendix forms part of this decision.

Background

1. On 15 May 2013, Mr James wrote to the Council requesting specific information relating to a piece of drainage work carried out by the Council outside his house, including the cost to the Council of this work.
2. The Council responded on 31 May 2013, providing Mr James with some background information on the work in question but stating that the direct cost of the work was not readily available.
3. On 5 June 2013, Mr James wrote to the Council requesting a review of its response. He believed the Council should hold the cost information he was seeking.
4. The Council notified Mr James of the outcome of its review on 12 July 2013. Confirming that any relevant information it held would be environmental information and therefore subject to the EIRs, the Council explained why it did not consider it held the information requested by Mr James and consequently applied regulation 10(4)(a) of the EIRs.



5. On 12 July 2013, Mr James wrote to the Commissioner, stating that he was dissatisfied with the outcome of the Council's review and applying 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 certain specified modifications.
6. The application was validated by establishing that Mr James made a request for information to a Scottish public authority and applied to the Commissioner for a decision only after asking the authority to review its response to that request. The case was then allocated to an investigating officer.

Investigation

7. The investigating officer subsequently contacted the Council, giving it an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking it to respond to specific questions. In particular, the Council was asked to give details of the searches it had carried out for the information requested, with a view to justifying its reliance on regulation 10(4)(a).
8. The Council provided its response to the Commissioner.
9. Mr James also provided further submissions to the Commissioner during the investigation. He did not challenge the Council's decision to deal with the request under the EIRs

Commissioner's analysis and findings

10. In coming to a decision on this matter, the Commissioner considered all of the withheld information and the relevant submissions, or parts of submissions, made to her by both Mr James and the Council. She is satisfied that no matter of relevance has been overlooked.

Regulation 5(1) of the EIRs

11. Regulation 5(1) of the EIRs (subject to the various qualifications contained in regulations 6 to 12) 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 is not in fact held).



12. Under the EIRs, a 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 maintaining the exception or exceptions outweigh(s) the public interest in making the information available. In this case, the outcome of the Council's review was that the exception in regulation 10(4)(a) applied.

Regulation 10(4)(a) of the EIRs

13. 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.

Submissions from the Council

14. The Council explained that it set aside a revenue budget for carrying out drainage work each year. Works such as this were coded against a generic drainage code, which did not enable it to identify the costs of individual projects within its systems. It was considered a minor piece of work, similar to a large number of others carried out in any year. An individual job code would only be awarded if the work was part of a structural maintenance programme, such as resurfacing (resurfacing works were analysed in detail to obtain unit costs). The job would have its own cost code if funded from capital, but this job was funded from revenue.
15. The Council stated that it had in the past operated a more detailed system for coding the costs of works, but this had proved difficult to understand and expensive to maintain. It had since decided to simplify the collection of information within its financial system.
16. The Council explained that the member of staff who drafted the response to Mr James was the manager who authorised the work in question. This person, it submitted, would therefore know that the job did not have a specific cost code of its own. The Council stated that other than interrogating codes within the finance system (where these existed) there were no other records which could provide the information requested.
17. The Council also submitted that it had considered the possibility of retrieving information from staff job cards, but noted that these did not necessarily record job locations.

Submissions from Mr James

18. Mr James stated that, if the Council's submissions were accepted, any public body would be able to ignore Freedom of Information requests by claiming not to keep basic information. This might encourage such bodies not to record information in order to avoid responding to requests.
19. Mr James also referred to the time and resources employed on the job, and the effect of the work on his own property. He queried whether the work had been necessary. He believed the Council could, and should, provide him with a retrospective estimate of the cost of the work.



20. Mr James also asked the Commissioner to comment on what information the Council chose to keep, and on how it was kept.

The Commissioner's conclusion

21. In deciding whether a Scottish public authority holds requested information for the purposes of regulation 10(4)(a), the standard of proof is the civil standard of the balance of probabilities. In deciding where the balance lies, the Commissioner will consider the scope, quality, thoroughness and results of the steps taken by the public authority to identify and locate the information in question. She will consider whether these steps were proportionate, in the circumstances of that particular case. She will also consider, where appropriate, any other reason offered by the public authority to explain why the information is not held.
22. The Commissioner is of the view that the information requested in this instance would, if held by the Council, be readily identifiable. The Commissioner has considered the Council's explanations in this regard. While she has also considered Mr James's reasons for believing the information should be held, she accepts the Council's position as reasonable in the circumstances. Further enquiries on this matter would appear disproportionate.
23. The Commissioner is therefore satisfied, on the balance of probabilities, that the Council does not hold the requested information. She acknowledges that Mr James may believe more information *should* be held, but ultimately she can only consider whether it is.
24. The exception in regulation 10(4)(a) is subject to the public interest test in regulation 10(1)(b) of the EIRs and can only apply if, in all the circumstances, the public interest in maintaining the exception outweighs the public interest in making the information available.

The public interest

25. In this case, the Commissioner is satisfied that the Council did not (and does not) hold the information requested by Mr James. Consequently, she does not consider there to be any conceivable public interest in requiring that any information be made available. The Commissioner therefore concludes that the public interest in making the requested information available is outweighed by that in maintaining the exception in regulation 10(4)(a) of the EIRs.
26. The Commissioner is satisfied, therefore, that the Council was entitled to refuse Mr James's request under regulation 10(4)(a) of the EIRs, on the basis that it did not hold the requested information.
27. The Commissioner would reiterate that she has considered Mr James's points seriously. She acknowledges the importance of Scottish public authorities being transparent in relation to their expenditure from public funds. On the other hand, she must also acknowledge the authority's duty to achieve economy, efficiency and effectiveness in its use of resources. It is not the Commissioner's role to comment on the appropriate level of detail in an authority's financial records, and how it chooses to organise those records. So far as local government is concerned, these are matters for the Accounts Commission and those responsible for setting wider accounting standards.



28. The Commissioner has also considered Mr James's assertion that the Council should provide him with a retrospective estimate of the cost of the work. She notes that the Council does not consider this possible. In any event, it is not something she can require the Council to do. As indicated above, a Scottish public authority is only required to make available, in response to a request under the EIRs (or, for that matter, under the Freedom of Information (Scotland) Act 2002) that information it actually holds at the time the request is received. The Commissioner does not have the authority to compel an authority to create new information to satisfy a request. It is also outwith the jurisdiction of the Commissioner to provide any view on whether the work in question should, or should not, have been carried out.
29. Finally, the Commissioner's remit does not extend to whether the work in question was appropriate or its effects on Mr James. There are other routes (via internal complaints systems and ultimately the Scottish Public Services Ombudsman) for dealing with service-related complaints of this kind.

DECISION

The Commissioner finds that, Highland Council complied with the Environmental Information (Scotland) Regulations 2004 in responding to the information request made by Mr James.

Appeal

Should either Mr James or Highland 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
22 October 2013



Appendix

Relevant statutory provisions

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.

...



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;
- ...