

Decision Notice



Decision 261/2013 Mr Gordon Kelly and Glasgow City Council

Completion of Housing Development

Reference No: 201301820

Decision Date: 19 November 2013

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Scottish Information Commissioner

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Summary

On 21 April 2013, Mr Kelly asked Glasgow City Council (the Council) for information regarding a housing development. The Council provided responses to some parts of the request, and informed Mr Kelly that it did not hold information with respect to the remaining parts of the request.

During the investigation, the Council disclosed some additional information to Mr Kelly. The Commissioner found that the Council had disclosed all the information it held with respect to some parts of the request and did not hold any information covered by other parts of the request. However, by initially withholding some information which it later disclosed, the Council failed to comply with regulation 5(1) of the EIRs. The Commissioner also found that the Council had not responded to Mr Kelly's request in line with regulations 13(b) and (c) of the EIRs and had failed to respond within the statutory 20 working days.

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 (6) (General entitlement); 2(1)(b) (Effect of exemptions); 39(2) (Health, safety and the environment)

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (Interpretation) (definitions (a) and (c) of "environmental information"); 5(1) and (2) (Duty to make environmental information available on request); 10(1), (2) and (4)(a) (Exceptions from duty to make environmental information available); 13(a) - (c) (Refusal to make 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 21 April 2013, Mr Kelly asked the Council (amongst other matters, not the subject of this decision) for the following information about a housing development. (The numbering of the requests used here represents the original numbering in Mr Kelly's request.)



- (2) What assurances were made by Bellway Homes prior to permission for the development being granted?
 - (3) What plans or assurances that were part of the original agreement have been fulfilled or left unfilled?
 - (5) When did a handover inspection of the site take place to/from Bellway prior to and on completion of the works?
 - (6) What aspects were covered during these inspections and what inadequacies (if any) were noted?
 - (7) What action has/is being taken regarding the unauthorised blocking of Hugo Street by the erection of a concrete barrier, depredation of the road surface and removal of street lighting and pavements?
 - (8) Who is responsible for removal of the building rubble and other hazards that have been left on the site?
2. The Council responded on 23 May 2013. The Council provided short answers to each part of Mr Kelly's request, either informing him that it did not hold the information (parts 3, 5 and 6) or providing a brief explanation (parts 2, 7 and 8). The Council did not indicate whether it held any recorded information covered by parts 2, 7 and 8 of Mr Kelly's request.
 3. On 29 May 2013, Mr Kelly requested a review of the Council's decision. Mr Kelly expressed dissatisfaction with the Council's responses to each part of his request identified above. He considered that the Council should hold some information (where it had indicated that no information was held) or further information.
 4. The Council notified Mr Kelly of the outcome of its review on 5 July 2013. The Council expanded further upon its initial response, either providing further explanation, or confirming the initial response issued.
 5. On 3 August 2013, Mr Kelly 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 Kelly 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 on 15 August 2013, 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. The Council was asked to confirm whether it held any recorded information that would fall within the scope of Mr Kelly's request, and for details of the searches it had undertaken in order to locate and retrieve any relevant information.
8. The Council responded on 12 September 2013 with its submissions on Mr Kelly's application. It identified some information falling within scope of parts 2, 7 and 8 of Mr Kelly's request, and sent this information to him on 24 September 2013.
9. During the investigation, the Council was asked for, and provided, additional submissions about the searches it had conducted in order to establish whether it held any/further information covered by the various parts of Mr Kelly's request. The Council confirmed that the information requested by Mr Kelly was environmental information and should be considered under the EIRs.

Commissioner's analysis and findings

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

FOISA or EIRs?

11. Having considered the nature of the information sought by Mr Kelly, the Commissioner concluded that any information falling within the scope of the request would be environmental information, as defined in regulation 2(1) of the EIRs. The information in question concerns assurances provided by the builder, site inspections and the blocking of a road in a housing development. The Commissioner is satisfied that it would fall within either paragraph (a) of the definition of environmental information contained in regulation 2(1) of the EIRs (as information on the state of the elements of the environment) or paragraph (c) of that definition (as information on measures affecting or likely to affect those elements).
12. The Commissioner must therefore conclude that, by failing to consider this information and respond to Mr Kelly's request in terms of the EIRs, the Council failed to comply with regulation 5(1) and (2)(b) of the EIRs.
13. The Council confirmed during the investigation that it wished to apply the exemption in section 39(2) of FOISA to any information that the Commissioner found to be environmental information.



Section 39(2) of FOISA (Health, safety and the environment)

14. The exemption in section 39(2) of FOISA provides, in effect, that environmental information (as defined by regulation 2(1)) is exempt from disclosure under FOISA, thereby allowing any such information to be considered solely in terms of the EIRs. In this case, the Commissioner accepts that the Council was entitled to apply the exemption to the requested information, given her conclusion that it is properly classified as environmental information.
15. As there is a separate statutory right of access to environmental information available to the applicant in this case, the Commissioner also accepts that the public interest in maintaining this exemption and in dealing with the request in line with the requirements of the EIRs outweighs any public interest in disclosing the information under FOISA.

Regulation 5(1) – information held

16. 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.
17. As the Council has not sought to withhold any information covered by Mr Kelly's request, the key question for the Commissioner in this case is whether the Council has successfully identified all information covered by Mr Kelly's request.
18. During the investigation, the Council provided Mr Kelly with the following information and explanations.
19. In relation to part 2 of the request (assurances from the builder), the Council provided Mr Kelly with construction consent forms and associated correspondence relating to the road in question, and explained the process followed when a builder wishes to develop land for residential houses, in terms of planning permission and construction consent.
20. In relation to parts 7 and 8 of the request (blockage of Hugo Street), the Council explained that a formal stopping up process had not been completed. The process was commenced when the Council received a letter from Bellway Homes applying for Hugo Street to be stopped up, but was never completed. At the time of writing, Hugo Street was blocked up on an informal basis, albeit with the Council's consent. The Council explained that it could not provide a date upon which the concrete barrier will be removed and the footways repaired. It disclosed a copy of the referenced letter from Bellway Homes to Mr Kelly.

Searches

21. In its submissions, the Council confirmed that all of the relevant officers who were currently involved with the site had been consulted, and each had provided all the information they held in relation to Mr Kelly's request. Three officers who were originally involved with the site had left the Council's employment (the Council confirmed that, in all three cases, this had happened before Mr Kelly made his information request.)



22. The Council explained that some information relating to Mr Kelly's requests had been "lost", partly as the result of an office move and reorganisation, and following the departure of three of the officers involved in dealing with the development. The Council explained that, whilst the development was on-going, all inspection records were held by these officers. Until September 2013, each department operated their own record management practices; in relation to the department concerned, site diaries would normally have been kept until the road in question was adopted, when the diaries would be destroyed. It appeared that normal practice had not been followed in this case, and the site diaries no longer existed. The officers who had left had not been replaced, and it had not been possible to reallocate their previous workload to remaining staff members.
23. The Council stated that email accounts and electronic records for the officers who had left would have been deleted after their departure. During the investigation, the Council found it was possible to search the email archives for these individuals, but this revealed only one email which was potentially relevant, but which fell outside the scope of Mr Kelly's request, as worded. (The Commissioner understands that the Council has sent Mr Kelly a copy of the email, and she will not consider it further in this decision.)
24. In relation to other searches, the Council explained that, during an office move in June 2012, paper copies of files relating to new developments were scanned, registered and archived and were then held on a shared computer system. These records had been searched as well as the archived email accounts of the officers who had left the Council, and only the information disclosed to Mr Kelly during the investigation had been identified.

Commissioner's conclusion

25. The Commissioner notes Mr Kelly's view that the Council is likely to hold further information about the assurances provided by Bellway Homes and the blockage of Hugo Street, given that the development was considered a "landmark development" in a regeneration area and has been the subject of media attention¹. The Commissioner acknowledges Mr Kelly's concerns, and considers that it was reasonable for him to expect the Council to hold further information. However, after making enquiries on this point, she has found no evidence that the Council does hold any further information, or did so at the date of his request for review. She finds that the Council has provided a reasonable explanation of why it cannot provide any additional information, and she has concluded that the Council has now carried out proportionate searches and enquiries to establish what information it holds.
26. Consequently, the Commissioner accepts that, in relation to Mr Kelly's request, the Council does not hold any more information beyond that already provided to him.
27. The Commissioner notes that the Council did not disclose the relevant information that it held until after it had issued its review response and therefore failed to comply with regulation 5(1) of the EIRs.

¹ <http://www.easier.com/45488-bellway-triumphs-at-homes-for-scotland-awards.html>



Regulation 10(4)(a) – Information not held

28. In his application to the Commissioner, Mr Kelly expressed dissatisfaction that the Council did not hold information about the assurances complied with, and the inspections undertaken by, the Council (parts 3, 5 and 6 of his request).
29. The Commissioner considers that it was reasonable for Mr Kelly to expect that the Council would hold information covered by parts 3, 5 and 6 of his request, particularly in relation to site inspections. However, she is satisfied that the Council has now carried out searches which would be likely to have retrieved any relevant information (explained in detail in paragraphs 22 to 24 above) and has established that it does not hold any information.
30. Having already concluded that any information relating to parts 3, 5 and 6 of the request would, if held, have been environmental information, the Commissioner finds that the only appropriate response would have been to notify Mr Kelly that the requested information was excepted from disclosure under regulation 10(4)(a) of the EIRs, on the basis that the Council did not hold the information. By failing to give appropriate notice under the EIRs, the Commissioner finds that the Council breached regulation 13(b) and (c) of the EIRs.
31. However, given the Commissioner's conclusions in this case, she does not consider it necessary to require the Council to issue such a notice now.

Failure to comply with timescales

32. Regulation 5(2)(a) of the EIRs allows Scottish public authorities a maximum of 20 working days after receipt of a request to comply with a request for information, subject to certain exceptions which are not applicable in this case.
33. Regulation 13(a) of the EIRs allows Scottish public authorities a maximum of 20 working days after receipt of the requirement to comply with a requirement for review, again subject to exceptions which are not relevant in this case.
34. It will be evident from the timescales set out in the "Background" paragraphs above that these requirements were not met by the Council in this case, with the result that the Council failed to comply with regulations 5(2)(a) and 13(a) of the EIRs in these respects.
35. As Mr Kelly has received a response to his request and requirement for review, the Commissioner does not require the Council to take any action in relation to these breaches in respect of this application.



DECISION

The Commissioner finds that Glasgow City Council (the Council) partially complied with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by Mr Gordon Kelly.

The Commissioner finds that the Council should have dealt with Mr Kelly's information request under the EIRs and that, in initially failing to do so, the Council failed to comply with regulations 5(1) and 2(b) of the EIRs.

The Commissioner also finds that in failing to respond to Mr Kelly's request and requirement for review within 20 working days, the Council failed to comply with regulations 5(2)(a) and 13(a) of the EIRs.

The Commissioner finds that the Council was correct to inform Mr Kelly that it did not hold any information with respect to parts 3, 5 and 6 of his request. However, by failing to cite regulation 10(4)(a), the Council failed to comply with regulation 13(b) and (c) of the EIRs.

The Commissioner accepts that the Council has now identified and disclosed the information it holds with respect to parts 2, 7 and 8 of Mr Kelly's request. However, by failing to provide this information when Mr Kelly made his request for review, the Council failed to comply with regulation 5(1) of the EIRs.

The Commissioner does not require the Council to take any action in respect of these failures in relation to Mr Kelly's application.

Appeal

Should either Mr Gordon Kelly or Glasgow City 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
19 November 2013



Appendix

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.

...

- (6) This section is subject to sections 2, 9, 12 and 14.

2 Effect of exemptions

- (1) To information which is exempt information by virtue of any provision of Part 2, section 1 applies only to the extent that –

...

- (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

...

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.



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;

...

(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)-

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

(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;

...

13 Refusal to make information available

Subject to regulations 10(8) and 11(6), if a request to make environmental information available is refused by a Scottish public authority in accordance with regulation 10, the refusal shall-

- (a) be given in writing as soon as possible and in any event no later than 20 working days after the receipt of the request for information;
- (b) specify the reasons for the refusal including, as appropriate, any exception under regulation 10(4) or (5) or provision of regulation 11 and how the Scottish public authority has reached its decision with respect to the public interest under regulation 10(1)(b);
- (c) state the basis on which any exception relied on under regulation 10(4) or (5) or provision of regulation 11 applies if it would not otherwise be apparent

...