

Decision Notice

Decision 164/2015: Ms Laura Twaddell and South Ayrshire Council

SAWET grant to Putting Plus

Reference No: 201500884

Decision Date: 26 October 2015



Scottish Information
Commissioner

Summary

On 17 August 2014, Ms Twaddell asked South Ayrshire Council (the Council) for information about any grants or public money awarded to two companies operating a putting green. The Council disclosed the amounts awarded, including an award from the South Ayrshire Waste Environment Trust (SAWET). The Council told Ms Twaddell that it did not hold more information about the SAWET grant application because SAWET was an independent organisation. Following a review, Ms Twaddell remained dissatisfied and applied to the Commissioner for a decision.

The Commissioner found that, for the purposes of the EIRs, the Council did not hold information about the SAWET grant application. However, the Commissioner also found that the Council had failed to comply in full with the EIRs in responding to Ms Twaddell's information request.

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) (paragraphs (a) and (c) of definition of "environmental information") and 2(2) (Interpretation); 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); 13(b) (Refusal to make information available); 16(1), (3) and (4) (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.

Background

1. On 17 August 2014, Ms Twaddell made a request¹ for information to the Council. As part of her request, she asked for information about grants or public money awarded to Putting Plus and Putting Plus (2013), both Community Interest Companies (CICs).
2. The Council responded on 12 September 2014 under the EIRs. The Council stated that £1,000 was awarded in January 2013 in respect of fencing (materials and insurance) and £15,000 was awarded by SAWET (landfill tax money).
3. On 21 September 2014, Ms Twaddell wrote to the Council, complaining that she had not received any details of financial funding which the Council had given to Putting Plus (2013) CIC. On 2 October 2014, she wrote again, noting that (in relation to the funding from the Council and SAWET) she had been given only the amount of money awarded and asking for the documents relating to the awards. She considered that there must have been applications forms or other documents showing what the money would be used for. She asked who had approved the funding and why, and also asked whether Putting Plus had received money from the Council-run "AMBITION" programme.

¹ https://www.whatdotheyknow.com/request/regulatory_panel_minutes_and_fun#incoming-599227

4. The Council dealt with this email as a new request, rather than a request for a review of its response. On 3 October 2014, the Council wrote to Ms Twaddell and apologised that its initial response on funding was incomplete. The Council confirmed that Putting Plus (2013) CIC was supported by the Council's "AMBITION" project with an award of £11,560. In relation to the award from SAWET, the Council stated that SAWET was a separate organisation and enquiries about applications and awards should normally be made directly to SAWET. However, the Council told Ms Twaddell that it had forwarded her questions to SAWET and had asked it to respond directly to her.
5. Ms Twaddell wrote on 5 October 2014, asking again for information relating to the Council's grant of £1,000 and the "AMBITION" programme grant. She asked about applications forms stating what the grants would be used for, and about documentation from the approval process for these grants. On 7 October 2014, she reiterated that she wished to see all documentation relating to all funding given to the two putting companies, including application forms submitted by the companies and documentation about the process that led to the decision to make the awards.
6. The Council responded on 10 October 2014 under the EIRs. The Council provided information in respect of the AMBITION Programme funding to Putting Plus 2013 (CIC). It explained that Ms Twaddell's request about SAWET funding had been issued directly to SAWET, who would contact her directly.
7. The Council wrote to Ms Twaddell again on 29 October 2014 and provided grant information in respect of the £1,000 awarded by the Council.
8. On 16 December 2014, Ms Twaddell wrote to the Council requesting a review of its response to her request on the basis that the information about the award from SAWET had not been provided within the Council's response of 29 October 2014. She asked the Council to confirm that it held no information in respect of the SAWET grant.
9. The Council responded on 23 December 2014. The Council explained that SAWET was not a company wholly owned by the Council (if it was, it would be a public authority for the purposes of FOISA and the EIRs in its own right) and that the Council was employed by SAWET solely to provide an administration support service. The Council gave notice that it did not hold the information which Ms Twaddell had requested. The Council explained how it had established that it did not hold any relevant information.
10. On 11 May 2015, Ms Twaddell wrote to the Commissioner. Ms Twaddell 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. Ms Twaddell stated she was dissatisfied with the outcome of the Council's review because she wished to obtain the information held by the Council in respect of the SAWET grant.

Investigation

11. The application was accepted as valid. The Commissioner confirmed that Ms Twaddell 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.
12. 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 answer specific questions including justifying its reliance on any provisions of FOISA or the EIRs it considered applicable to the information requested.

Commissioner's analysis and findings

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

Application of the EIRs

14. "Environmental information" is defined in regulation 2(1) of the EIRs (the relevant parts of the definition are reproduced in Appendix 1). Where information falls within the scope of this definition, a person has a right to access it under regulation 5(1) the EIRs, subject to various restrictions and exceptions contained in the EIRs.
15. Ms Twaddell asked for information on any grants or public money awarded to Putting Plus (2013) CIC or Putting Plus CIC. The first question to consider is whether this is a request for environmental information in terms of the EIRs.
16. The Council explained that it had responded to Ms Twaddell's information request under the EIRs on the basis that she sought information in respect of grant monies awarded to a business that had been funded to utilise and develop an area of land. The Council submitted that the information requested fell within definition (c) of "environmental information" in regulation 2(1) of the EIRs, being measures (including administrative measures), such as policies, legislation, plans and programmes, environmental agreements and activities affecting or likely to affect the elements (in this instance, the landscape) as well as measures designed to protect those elements.
17. The Council submitted that it did not legally hold information about the grant awarded by SAWET (this point is discussed later in this decision notice).
18. Having considered the terms of the request, the Commissioner is satisfied that the information requested comprises environmental information as defined in regulation 2(1) of the EIRs. The information concerns a project application made to a waste and environment trust regarding the development of a piece of land. The Commissioner is satisfied that the information would fall within paragraph (c) of the definition of environmental information contained in regulation 2(1) of the EIRs, being information on measures and activities affecting or likely to affect the state of those elements of the environment referred to in paragraph (a) of the definition.

Is information relating to SAWET's award held by the Council?

19. The Commissioner must decide whether the environmental information requested by Ms Twaddell is held by the Council.
20. 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. Regulation 2(2) of the EIRs states that environmental information will be "held" by a Scottish public authority if it is:
 - (i) in its possession and it has been produced or received by that authority; or
 - (ii) held by another person on that authority's behalf,

and, in either case, it has not been supplied by a Minister of the Crown or department of the Government of the United Kingdom and held in confidence.

21. In this case, it is clear that the information was not supplied to the Council by a Minister of the Crown or by the UK Government.
22. This provision differs from the equivalent provision in section 3(2)(a)(i) of FOISA, which defines information as “held” if it is held by the authority *otherwise* than on behalf of another person. However, the absence of such a specific exclusion in regulation 2(2) does not necessarily mean that any environmental information held by the authority on behalf of others or simply to be found on its premises means that the authority holds the information for the purposes of the EIRs.
23. The EIRs require that, for the information to be “held” by the authority, it must be “in its possession” having been “produced or received by that authority”. Information stored on the authority’s premises solely on behalf of another body, and of which the authority makes no use, may not be in its possession. Similarly, information which is found on the authority’s premises only in the personal belongings of staff (e.g. personal diaries or mobile phones) may not be said to be in its possession or received by it.
24. The Council argued that SAWET is an independent organisation, an Environmental Trust created for the purpose of section 53 of the Finance Act 1996 and regulations 30 - 36 of the Landfill Tax Regulations 1996. SAWET was created primarily to ensure the proper management of any credits from landfill tax payments. Its trustees were appointed initially under a Minute of Agreement incorporating a Deed of Trust, dated 9 September 1999, between:
 - The Council
 - Barr Environmental (a company)
 - Forward Scotland (a company)
 - Enterprise Ayrshire (a company) and
 - The Council for Voluntary Organisations
25. The Minute of Agreement stipulated the original trustees, which included one elected member from the Council. The Council explained that the Trustees were thereafter amended and varied under a Deed of Assumption dated 25 June 2002 and 20 February, 22 May, 16 April, and 2 June 2003. The Council supplied the Commissioner with a copy of the Minute of Agreement and Deed of Assumption dated 2002 and 2003. The Deed of Assumption assumed the Scottish Agricultural College and Ayrshire and Arran NHS Board as trustees, and Scottish Enterprise Ayrshire resigned office as trustee.
26. The Council explained that, within the Minute of Agreement creating SAWET and the Deed of Assumption, the Council is designated solely to provide an administration function for the Trustees of SAWET. The financial responsibilities and decisions undertaken by SAWET are not the responsibility of the Council. The Council referred to clause 9(3) (this is understood to be a reference to clause NINE (e)) of the Minute of Agreement of 9 September 1999, which states that one of the powers of SAWET is to appoint administrative staff and to pay them suitable remuneration. The Council said SAWET approved the decision that this administration service would be provided by the Council.

27. The Council explained that records held on behalf of SAWET were in paper, electronic and email form. Paper records were in a locked four drawer filing cabinet reserved solely for SAWET. The administrative support officer saved electronic records in a folder named "SAWET", and a separate individual email account for "SAWET" was used for all email correspondence on behalf of SAWET. All the records held by the Council for SAWET are accessed solely by the administrator appointed to undertake the SAWET administration function, and cannot be accessed by other Council employees. All information held by the Council on behalf of SAWET is stored separately from Council information.
28. The Council has a separate insurance policy which allows it to provide administration service for SAWET; this Certificate is displayed upon the filing cabinet containing SAWET records within the Council. SAWET has its own separate logo, which is used on all SAWET correspondence.
29. The Commissioner accepts that SAWET is a separate legal entity from the Council and has separate legal personality. Similarly, she accepts that there is evidence to show that the Council only provides SAWET with an administrative function i.e. "administrative, secretarial and technical support, accountancy services; and accommodation and hospitality for meetings". SAWET has approved discretionary annual payments to the Council for these services. The Commissioner has considered each of the tests required by regulation 2(2) of the EIRs, to establish whether the Council holds the information about the money awarded to Putting Plus by SAWET.
30. The first question is whether the information is in the Council's possession. There is no dispute that the information relating to SAWET is stored on Council premises and IT systems. However, SAWET is an independent organisation, and storage and administrative facilities are provided by the Council on behalf of SAWET under a formal agreement. The information does not appear to relate closely to the Council's own functions, or to be required by the Council for any purpose of its own.
31. The ordinary meaning of "produced" would not seem to apply to information (such as an application form for funding) received from a third party. Similarly, any information created or used by a person who acts on behalf of SAWET would not have been "produced" by the Council. The Commissioner accepts that information to which a single member of the Council staff has access for administrative duties agreed with SAWET could not be said to be "produced" by the Council.
32. The next part of the test is whether information has been "received" by the Council. The ordinary meaning of "received" is that the Council has obtained or been given the information from a third party.
33. The Commissioner notes that the Council has in place procedures so that any information sent to SAWET is "received" by the single member of Council staff who provides the administrative function for SAWET, as contracted between SAWET and the Council. The Commissioner accepts that, in these circumstances, it is SAWET rather than the Council which received any information from Putting Plus in relation to a grant from SAWET.
34. The last test is whether, in relation to regulation 2(2)(b), the information is held on behalf of the Council by any other person. For the reasons outlined in paragraph 30, the Commissioner accepts that SAWET does not hold the information on behalf of the Council.
35. Having considered all of the above, the Commissioner accepts that, for the purpose of the EIRs, the environmental information requested by Ms Twaddell in relation to the award from

SAWET is not held by the Council, in terms of regulation 2(2). The information is not in the Council's possession, was not produced or received by the Council, and is not held by another person on the Council's behalf.

36. The Commissioner also investigated whether the Council might hold the information Ms Twaddell wanted in any of its other systems. The member of Council staff responsible for secretarial support to the Councillor who is a SAWET Trustee carried out a full email search and record search to ascertain if any such information was held on Council systems. Electronic records, paper records and email records were reviewed and it was ascertained that the Council held no records for SAWET from the time of the grant application.
37. The standard of proof to determine whether a Scottish public authority holds information is the civil standard of the balance of probabilities. In determining this, the Commissioner will consider the scope, quality, thoroughness and results of the searches carried out by the public authority. She will also consider, where appropriate, any reason offered by the public authority to explain why it does not hold the information.
38. Firstly, it should be noted that the information requested was "recent". This would suggest the information would be more accessible in terms of the Council's records management and that Council officials might also be aware of the existence of the information. The information relates to a specific subject, which might make it easier to locate or identify. The Council has consulted the staff who would be best placed to know what information was held on SAWET, and where it would be located.
39. Having considered all the relevant submissions, the Commissioner accepts that the Council has taken adequate and proportionate steps to establish whether it held information which fell within the scope of Ms Twaddell's request. The Commissioner is satisfied, on the balance of probabilities, that the Council does not hold any such information.

Compliance with technical requirements

40. Where a public authority does not hold information, it is required to notify the requester that that is the case. The Council accepted that that it failed to give Ms Twaddell formal notification that it did not hold information in respect of the SAWET grant award, or fully explain why this information was not enclosed with its response to her request. The Council acknowledged that it should have issued a refusal notice under regulation 10(4)(a) of the EIRs. In failing to do so, the Council failed to comply with regulation 13(b) of the EIRs, which provides that a Scottish public authority must specify the reasons for refusing a request including any exception which it has relied upon.
41. In her application to the Commissioner, Ms Twaddell commented that her request for review appeared to have been treated as a new request by the Council.
42. The Council acknowledged and accepted that it failed to act upon Ms Twaddell's request for an internal review, dated 16 December 2014.
43. The Commissioner notes that, even before writing on 16 December 2014, Ms Twaddell had expressed dissatisfaction with the Council's response to her request of 17 August 2014, in emails sent on 21 September 2014, and 2, 5 and 7 October 2014. The Commissioner takes the view that Ms Twaddell's email of 2 October 2014 should have been treated as a request for the Council to review its response of 12 September 2014. In this email, Ms Twaddell drew the Council's attention to the fact that she had not received all the information requested. She expressed dissatisfaction with the Council's response and said she expected the Council to review what it had provided. If there was any doubt of Ms Twaddell's

dissatisfaction, her email of 7 October 2014 made clear her concern that her request on 17 August 2014 had resulted in not all the information being provided to her.

44. Regulation 16(4) of the EIRs 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, subject to certain exceptions which are not relevant in this case. Regulation 16(1) of the EIRs provides that, 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 the EIRs in relation to the applicant's request.
45. The Commissioner acknowledges that the Council responded to Ms Twaddell's dissatisfaction by telling her it would forward her request to SAWET for a response (3 October 2014). However, the Commissioner does not consider that the Council provided a response to Ms Twaddell's requirement for review as required by regulation 16 of the EIRs, within the respective timescales required by regulation 16(4) of the EIRs.
46. The Commissioner therefore finds that the Council failed to comply with regulation 16(3) and (4) of the EIRs.

Decision

The Commissioner finds that South Ayrshire Council (the Council) partially complied with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by Ms Twaddell.

The Commissioner finds that the Council did not hold the information requested by Ms Twaddell for the purposes of regulation 2(2) of the EIRs. However, the Council failed to give notice that it did not hold the requested information in its own right, as required by regulation 13(3) of the EIRs.

The Commissioner also found that the Council failed to comply with regulation 16 of the EIRs in responding to Ms Twaddell's request for review.

The Commissioner does not require the Council to take any action in respect of these failures in response to Ms Twaddell's application.

Appeal

Should either Ms Twaddell 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

26 October 2015

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.

...

- (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;

...

(2) For the purpose of these Regulations, environmental information is held by a Scottish public authority if it is-

(a) in its possession and it has been produced or received by that authority; or

(b) held by another person on that authority's behalf,

and, in either case, it has not been supplied by a Minister of the Crown or department of the Government of the United Kingdom and held in confidence.

...

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

(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-

- ...
- (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);
- ...

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.
- ...

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