

Decision Notice

Decision 145/2016: Mr Ian Baxter and Aberdeen City Council

Blue badges

Reference No: 201600441
Decision Date: 30 June 2016



Scottish Information
Commissioner

Summary

On 6 November 2015, Mr Baxter asked Aberdeen City Council (the Council) about the misuse of blue badges. The Council disclosed some information. Following an investigation, the Commissioner found that the Council had complied with both FOISA and the EIRs in responding to Mr Baxter's information request.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and 1(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), (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 Appendix 1 to this decision. The Appendix forms part of this decision.

Background

1. On 6 November 2015, Mr Baxter made a request for information to the Council. He asked for the following information, between 1 April and 30 September 2015.
 - (i) The total recorded number of persons, being Blue Badge holders or others, who were either prosecuted or warned or cautioned or fined or advised or otherwise admonished or dealt with regarding presumed or actual or improper use or misuse of a Blue Badge by the Council. (He noted that he had not included the description "formal", was interested only in recorded statistics and had phrased the question to allow the largest possible figure to be given.)
 - (ii) If any fines were imposed as at paragraph (i) above, the number of such fines imposed at the increased rate enabled by the Disabled Persons' Parking Badges (Scotland) Act 2014 (the 2014 Act).
 - (iii) The total recorded number of Blue Badge holders who had their Badges withdrawn or cancelled or confiscated regarding presumed or actual or improper or inappropriate use or misuse of their Badges by the Council.
 - (iv) If any such badges were cancelled or confiscated, the number cancelled or confiscated in the terms of the 2014 Act.
 - (v) The total recorded number of reports received by the Council alleging presumed or suspected or actual or improper use or misuse of a Blue Badge.
2. The Council responded on 3 December 2016, as follows:
 - (i) The Enforcement Officer within the Council started in post on 2 June 2015. Between 2 June and 30 September 2015, nine persons were either prosecuted or warned or

cautioned or fined or advised or otherwise remonstrated or dealt with regarding presumed or actual or improper use or misuse of a blue badge by the Council.

- (ii) No fines were administered during the set period. The Council claimed it was unable to administer any fines for improper use of the Blue Badge scheme: any fines must be administered by the Court.
 - (iii) Between 2 June 2015 and 30 September 2015, and due to improper use of the Blue Badge scheme, 15 Blue Badge holders had their badges withdrawn or cancelled or confiscated.
 - (iv) All action is carried out in accordance with the 2014 Act.
 - (v) Between 1 April 2015 and 30 September 2015, 66 complaints were received by the Council with regard to the improper use of a Blue Badge.
3. On 4 December 2015, Mr Baxter wrote to the Council requesting a review of its decision. He reiterated that he had asked for information for the period 1 April and 30 September 2015 and submitted that the Council had “arbitrarily” changed the period to 2 June to 30 September. He also queried whether the responses given to parts (i) and (ii) of the request were consistent.
4. The Council notified Mr Baxter of the outcome of its review on 12 January 2016. The Council cited section 10(4)(a) of the EIRs in respect of figures for the period 1 April to 1 June 2015, explaining that it did not hold information for the period before the Enforcement Officer started in post. In relation to the claimed inconsistency between the figures for parts (i) and (ii), the Council explained that Blue Badges could be withdrawn, cancelled or confiscated without a warning or prosecution, for example, when information was provided that an expired Blue Badge had not been returned. If there was no evidence of misuse, a warning might not be suitable in such a case.
5. On 8 March 2016, Mr Baxter wrote to the Commissioner. He 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. Mr Baxter stated he was dissatisfied with the outcome of the Council’s review, disputing the relevance of the Enforcement Officer’s commencement of employment and inferring from what the Council had told him that there must be some recorded information for the preceding two months. He emphasised that he was not interested in action which was not recorded. He remained of the opinion that the figures for parts (i) and (ii) of the request were inconsistent: he made it clear that he was only interested in cases of actual or presumed misuse.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that Mr Baxter 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.
7. On 22 March 2016, the Council was notified in writing that Mr Baxter had made a valid application 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 Council was invited to provide any

comments it wished to make in response to the application, and specifically to provide details of the searches it carried out to ascertain that it did not hold information for the period 1 April to 1 June 2015.

Commissioner's analysis and findings

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

FOISA or EIRs

10. "Environmental information" is defined in regulation 2(1) of the EIRs (paragraphs (a), (b) and (c) of the definition are reproduced in full in Appendix 1). Where information falls within the scope of this definition, a person has a right to access it under the EIRs, subject to various qualifications and exceptions contained in the EIRs.
11. The Council responded to Mr Baxter's request under the EIRs, citing paragraphs (a), (b) and (c) of the definition and noting the impact on the environment of any decisions and policies it made in relation to transport infrastructure and parking. Section 39(2) of FOISA provides, in effect, that environmental information (as defined by regulation 2(1) of the EIRs) is exempt from disclosure under FOISA, thereby allowing any such information to be considered solely in terms of the EIRs.
12. The Commissioner has considered the subject matter of this request. She is satisfied that the information falls within paragraph (c) of the definition in regulation 2(1), as information on measures affecting, or likely to affect, the elements of the environment. She accepts that the information is exempt under section 39(2) of FOISA.
13. The exemption in section 39(2) is subject to the public interest test in section 2(1)(b) of FOISA. As there is a separate statutory right of access to environmental information available to Mr Baxter in this case, the Commissioner has also concluded that the public interest in maintaining this exemption, and responding to the request in line with the EIRs, outweighs the public interest in disclosure under FOISA.

Does the Council hold any further information?

14. The Council reiterated that its Blue Badge enforcement activity was governed by the 2014 Act and that it had no power to administer fines: that was a matter for the Court.
15. The Council explained that the request had been allocated to its Communities, Housing and Infrastructure service, as the one most directly relevant to the request and thus most likely to hold the information. Within that service, the Enforcement Officer involved in administering Blue Badge policy was identified as the appropriate person to answer the request.
16. The Council reiterated that no Blue Badge enforcement was undertaken prior to 2 June 2015. It provided details of its consultation with the Road Safety and Traffic Management Team in relation to that period. This confirmed that, in the absence of an Enforcement Officer in post, no enforcement was undertaken and thus no information was held.
17. City Wardens checked for all forms of illegal or inappropriate parking (not exclusively Blue Badge misuse) as part of their daily duties, and passed information on to the Road Safety and Traffic Management Team. This would cover the initial identification of instances of illegal or inappropriate parking, but City Wardens were not authorised to enforce Blue Badge

misuse and therefore would not hold any information in relation to prosecutions, warnings, cautions, fines or advice provided in relation to such misuse. They had used what was described as a “pragmatic and sensitive approach of educating Badge Holders (and non-badge holders) on appropriate and correct parking”, without specific reference to Blue Badge enforcement. No records of this advice were held, or were required, and the Council confirmed its understanding that Mr Baxter was not interested in information from the recollections of officers.

18. The Council also confirmed that it had undertaken searches, for the full period of the request, on a local spreadsheet/database held by the Enforcement Officer. This spreadsheet held details of all complaints and outcomes of any complaints undertaken by the Enforcement Officer with regard to Blue Badge fraud. This was in addition to the consultation described in the previous paragraph. Information was found to be held for the period 2 June to 30 September 2015 only.
19. The Council confirmed that the Enforcement Officer was solely responsible for enforcing fraudulent activity in the Blue Badge Scheme and managed and maintained all relevant records. He would hold all relevant records. No officer was undertaking this activity prior to his taking up appointment.
20. In relation to the claimed inconsistency between the answers to part (i) and (ii) of the request, the Council also explained that badges could be withdrawn without warning. It confirmed that all of the figures provided in this case did relate to misuse

Submissions from Mr Baxter

21. Mr Baxter continued to question the credibility of the Council's figures.

The Commissioner's findings

22. In deciding upon compliance with regulation 10(4)(a) of the EIRs, the standard of proof to apply in determining whether a public authority holds the requested information 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 also consider, where appropriate, any other reason offered by the public authority to explain why the information is not held.
23. The Commissioner would emphasise that it is not for her to judge whether the Council is implementing the 2014 Act, or performing any other element of its duties not related to FOISA or the EIRs, properly. Equally, it is not for her to judge what information the Council should hold, only what information it does (or did, on receiving the request) hold. In considering what information the Council holds, it is appropriate for her to consider the processes actually applied by the Council, not (if different) the processes it should be applying. Having determined what information is, or was, held, it is not for her to determine whether it is accurate.
24. Having carefully considered all of the above, the Commissioner is satisfied that the information requested in this case should be readily identifiable by the Council, if held. The Council has explained the searches and enquiries it undertook to establish whether it held the information, and the context within which any information would have been created and recorded. The Commissioner accepts that the searches and enquiries undertaken were reasonable and proportionate in the circumstances. The Council has identified some information for part of the timeframe of Mr Baxter's request and has provided this, explaining

(on review, at least) why information is not held for the full period. It has explained that Blue Badges may be withdrawn, cancelled or confiscated without warning, although it might have explained better that all of the withdrawals, cancellations and confiscations covered by this request related to misuse in some form.

25. In all the circumstances of this case, the Commissioner is satisfied (on the balance of probabilities) that the Council does not (and did not, on receipt of Mr Baxter's request) hold any further information.

Public interest test

26. The exception in regulation 10(4)(a) is subject to the public interest test in regulation 10(1)(b) of the EIRs.
27. The Council was of the opinion that there was no public interest in requiring that information not held should be made available.
28. The Commissioner accepts that no information is (or was) held, in addition to that provided to Mr Baxter. She agrees that there is no public interest in making available information not held. For the period 1 April to 1 June 2015, therefore, the Commissioner concludes, in all the circumstances, 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.

Decision

The Commissioner finds that Aberdeen City Council complied with Part 1 of the Freedom of Information (Scotland) Act 2002 and with the Environmental Information (Scotland) Regulations 2004 in responding to the information request made by Mr Baxter.

Appeal

Should either Mr Baxter or Aberdeen 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

30 June 2016

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;
- (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;

...

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