

Decision Notice



Decision 112/2012 Mr Gordon McFarlane and Fife Council

Pothole

Reference No: 201200080
Decision Date: 5 July 2012

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Rosemary Agnew
Scottish Information Commissioner

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Summary

Mr McFarlane requested from Fife Council (the Council) information relating to a specified pothole. The Council responded to each of Mr McFarlane's four requests, supplying information in respect of two of them and advised him that no information was held in respect of the remaining two. Following a review, as a result of which the Council provided further explanation, Mr McFarlane remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the Council had partially failed to deal with Mr McFarlane's request for information in accordance with the EIRs, by failing to respond to his request for review within the required timescales. The Commissioner did not require any action to be taken as a result of this failure.

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) (definition (a) of "environmental information"); 5(1) (Duty to make available environmental information on request); 16(4) (Review by Scottish public authority)

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 March 2011, Mr McFarlane wrote to the Council, requesting the following information relating to a specific pothole:
 - a. When the pothole was first reported
 - b. How many complaints were received relating to the pothole
 - c. Length, width and depth of the pothole
 - d. When it was filled.



2. The Council responded on 14 April 2011, as follows:
 - a. The defect was not reported, but noted by a technical Inspector during an ad-hoc inspection on 8 February 2011
 - b. No complaints were received regarding the pothole in question
 - c. It was unable to provide him with the dimensions of the pothole
 - d. The pothole was repaired on 9 February 2011.
3. On 3 and 25 May 2011, Mr McFarlane wrote to the Council requesting a review of its decision. Mr McFarlane was not satisfied that he had received all of the information he had requested. With specific reference to part b. of his request, Mr McFarlane stated that when he had reported the pothole on 9 February 2011, he had been advised that it had already been logged and the indications were that at least one other motorist had reported the matter.
4. Following further correspondence, the Council responded to Mr McFarlane's request for review on 19 October 2011, attempting to provide clarification in respect of the information provided. The letter also confirmed that the request was being dealt with under the EIRs.
5. On 3 January 2012, Mr McFarlane 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 McFarlane had made a request for information to a Scottish public authority and had 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. On 13 January 2012, the Council was notified in writing that an application had been received from Mr McFarlane.
8. 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 explain the steps it had taken to establish what relevant information it held. The investigating officer also sought clarification in respect of certain aspects of the Council's response.



9. Within his application, Mr McFarlane expressed dissatisfaction that he had not been provided with a response to his request within the required timescale. In addition, he did not believe he had been provided with a full response to his request. Therefore, the investigation will focus on these points.
10. The relevant submissions received from both the Council and Mr McFarlane will be considered fully in the Commissioner's analysis and findings below.

Commissioner's analysis and findings

11. In coming to a decision on this matter, the Commissioner has considered all of the submissions made to her by both Mr McFarlane and the Council and is satisfied that no matter of relevance has been overlooked.

Section 39(2) of FOISA

12. In its review response to Mr McFarlane, the Council advised that the request was considered under the EIRs as the requested information fell within the definition of environmental information in regulation 2(1) of the EIRs. The Council therefore relied upon the exemption in section 39(2) of FOISA.
13. The Commissioner, in line with other decisions considering information of this type (see, for example *Decision 019/2012 Mr Paul McGowan and Fife Council*¹), accepts that the Council was entitled to apply the exemption in section 39(2) of FOISA to Mr McFarlane's request. She is satisfied that the requested information falls within paragraph (a) of the definition of environmental information contained in regulation 2(1) of the EIRs, being information relating to the state of the elements of the environment.
14. Section 39(2) of FOISA is subject to the public interest test. As there is a separate statutory right of access to environmental information available to the applicant in this case, the Commissioner accepts that the public interest in maintaining this exemption and dealing with the request in line with the requirements of the EIRs outweighs any public interest in disclosure of the information under FOISA. She has consequently proceeded to consider this case in what follows solely in terms of the EIRs.

Handling of Mr McFarlane's request

15. Regulation 16(4) of the EIRs gives authorities a maximum of 20 working days after the date of receipt of the applicant's representations to comply with a requirement for review, subject to exceptions which are not relevant in this case.

¹ <http://www.itspublicknowledge.info/applicationsanddecisions/Decisions/2012/201101247.asp>



16. Within its letter of to Mr McFarlane of 19 October 2011, the Council acknowledged that it had failed to comply with the above timescale, accepting that Mr McFarlane's letters of 3 and 25 May 2011 should have been processed as requirements for review rather than fresh requests for information. The Council apologised for any inconvenience caused and stated that it had reminded relevant members of staff of the legal requirement to respond to requests timeously. A review was carried out at this point and the outcome communicated to Mr McFarlane.
17. As the Council did not conduct a review in respect of Mr McFarlane's request within the required timescale, the Commissioner finds that it failed to comply with regulation 16(4) of the EIRs.

Whether all the information has been provided

18. In his application, Mr McFarlane stated that he believed he had not been provided with the full facts surrounding his request for information, referring to inconsistencies in the Council's responses to him.
19. The Council explained to the investigating officer that potholes could be reported by members of the public, by phoning the complaint in to its contact centre, or by them providing information through the defects box on Fife Direct, its on-line reporting facility on Council website. However, it advised that potholes were mostly identified during routine inspections carried out by its Transportation staff.
20. The Council stated that Mr McFarlane's request was received by Risk Management, which directed Transportation to search their information database, called Confirm. Transportation staff then searched Confirm against the road name and provided information relating to the pothole Mr McFarlane had identified. The Council explained that it had confirmed the recording of a report in other correspondence with Mr McFarlane, but this related to a different pothole (i.e. not the one to which his request of 21 March 2011 related). It believed it had explained this inaccuracy to Mr McFarlane adequately in its review response dated 19 October 2011.
21. Having explained the position in its review response, the Council believed it had provided Mr McFarlane with all the information it held which he requested, with a clear explanation of its earlier error.
22. The Commissioner has considered carefully the terms of Mr McFarlane's request, together with the Council's responses and its submissions to the investigating officer. While acknowledging that inconsistencies in the Council's responses caused Mr McFarlane some confusion, the Commissioner is satisfied that the Council took adequate steps to clarify the situation. In all the circumstances, she accepts that the Council took adequate steps to identify, locate and make available all the information it held and which fell within the scope of Mr McFarlane's request.



DECISION

The Commissioner finds that Fife Council (the Council) partially complied with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by Mr McFarlane. She is satisfied that the Council dealt with the request in accordance with regulation 5(2) of the EIRs, by making available all the information it held and which fell within the scope of the request.

However, the Commissioner finds that the Council failed to comply with regulation 16(4) of the EIRs, by failing to identify a letter from Mr McFarlane as a requirement for review and respond to it within the requisite 20 working day period.

Given that the requirement for review was complied with, albeit outwith the 20 working day period, the Commissioner does not require the Council to take any action in respect of this failure in response to Mr McFarlane's application.

Appeal

Should either Mr McFarlane or Fife Council wish to appeal against this decision, there is an 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 notice.

Margaret Keyse
Head of Enforcement
5 July 2012



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;

...

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.

...

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.

...