

Decision Notice



Decision 079/2014 Mr Gordon C Ford and East Renfrewshire Council

Land at Eastwood High School campus

Reference No: 201400081
Decision Date: 7 April 2014

www.itspublicknowledge.info

Rosemary Agnew
Scottish Information Commissioner

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Summary

On 4 November 2013, Mr Ford asked East Renfrewshire Council (the Council) for information relating to land at the Eastwood High School campus. The Council responded by providing information for parts of Mr Ford's request, notifying him that it did not hold any information which would fulfil the other parts. Following an investigation, the Commissioner accepted that the Council held no further 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 4 November 2013, Mr Ford wrote to the Council to ask for the following information;
 - a) When was the land within the Eastwood High School campus and formally designated in the LDP (Local Development Plan) as a recreational/outdoor learning and social area with woodland walk, redefined as community land?
 - b) Why was the land within the Eastwood High School campus redefined as community land?
 - c) Why and when was the school car park redefined for use as a community car park?
 - d) Was any political pressure brought to bear on any Council officer by any politician, be they Councillor, MSP or MP with regard to the re-designation?
 - e) Or by any political party?
 - f) If the answer to the above is yes, who was the politician and which political party?
 - g) When was the small religious group ERMEC and Professor Hussain made aware of the changes to the school campus?



- h) Who informed them of the changes?
 - i) What date was the mosque proposal submitted?
 - j) Why was the general population, including the Rector of Eastwood High School, kept in the dark and not made aware of the re-designation and proposed changes, until it was announced at a Council meeting in September?
 - k) Why were the staff, pupils, parents and residents of East Renfrewshire led to believe by the Council, and in particular by its Planning Department, by way of planning seminars, maps, public meetings, a scale model of the school and uttering by both politicians and Council officials, that the school, its playing fields and landscaped area IN TOTAL was complete and would become the “Jewel in the Crown” of East Renfrewshire?
 - l) Why did the Planning Officer in charge of the LDP delay the start of the consultation period until one day before the start of the 10 day October holidays (which began on the 11th October), when she was aware that many parents and residents would be on holiday?
2. The Council responded on 19 November 2013, explaining to Mr Ford that it had processed his information request under the EIRs. It provided explanations in response to some parts of the request, but in relation parts d), e), f), g) and k) gave Mr Ford notice that it did not hold any information.
 3. On 27 November 2013, Mr Ford wrote to the Council requesting a review of its decision. He challenged the Council’s decision to process his request under the EIRs. Mr Ford also submitted that part l) of his request had been answered properly and that parts d), e), f), g) and h) had not been answered at all.
 4. The Council notified Mr Ford of the outcome of its review on 20 December 2013. It explained why it had processed Mr Ford’s request under the EIRs. The Council acknowledged that it had not informed Mr Ford of the exception it was relying on in stating that it did not hold information, confirming that this was the exception in regulation 10(4). It explained why it considered it had responded to all parts of the request.
 5. On 9 January 2014, Mr Ford 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 specified modifications.
 6. The application was validated by establishing that Mr Ford 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 contacted the Council on 28 January 2014, 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. Mr Ford challenged the Council's assertion that it did not hold information covered by parts d), e), f) and k) of his request and questions focused on the steps taken by the Council to establish this.
8. A response was received from the Council on 18 February 2014. Further submissions were sought and obtained from the Council during the course of the investigation.

Commissioner's analysis and findings

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

FOISA v EIRs

10. The Commissioner's thinking on the relationship between FOISA and the EIRs is set out in some detail in *Decision 218/2007 Professor AD Hawkins and Transport Scotland*¹ and need not be repeated in full here. The central point is that when a person requests information which would fall within the definition of environmental information in regulation 2(1) of the EIRs, that request should be considered and responded to in line with the EIRs.
11. Where the information falls within the definition of environmental information, it is exempt from disclosure under section 39(2) of FOISA, allowing its consideration solely in terms of the EIRs.
12. In this case, the Council processed both Mr Ford's request and requirement for review in line with the EIRs, applying section 39(2).
13. Given the subject matter of Mr Ford's request (allocations in the Local Development Plan) the Commissioner is satisfied that any information covered by the request meets the definition of environmental information in paragraph (c) of regulation 2(1) of the EIRs. The relevant provisions of regulation 2(1) are set out in the Appendix.
14. Given the Commissioner's conclusion that the requested information is properly classified as environmental information, she accepts that the Council was entitled to apply the exemption in section 39(2) of FOISA to the withheld information. The exemption is a qualified one, so the Commissioner must also consider the public interest test in section 2(1)(b) of FOISA.

¹ <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2007/200600654.aspx>



15. As there is a separate statutory right of access to environmental information available to Mr Ford in this case, the Commissioner finds that the public interest in maintaining the exemption (and dealing with the request in line with the requirements of the EIRs) outweighs any public interest in disclosing the information under FOISA. The Commissioner therefore finds that the Council was correct to process Mr Ford's request and requirement for review in line with the EIRs.

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

16. Regulation 10(4)(a) of the EIRs states that a Scottish public authority may refuse to make environmental information available to the extent that it does not hold the information when an applicant's request is received.
17. The Council responded to parts d), e), f) and k) of Mr Ford's request by notifying him that it held no information.
18. The Council described the searches it carried out on receipt of Mr Ford's request. These included all officers involved in the proposed modification of the Local Development Plan being asked to provide any information held by them which would fulfil Mr Ford's request. The Council informed the Commissioner of who these officers were and why they were the most relevant personnel to carry out searches for information which would fulfil Mr Ford's request.
19. The Council described the paper and electronic media searched and the search terms used.
20. The Council confirmed that it repeated these searches at the review stage. Additional searches in relation to political parties were carried out during the investigation. At no point, it confirmed, was any relevant, recorded information identified.
21. In deciding whether a Scottish public authority holds the requested information for the purposes of regulation 10(4)(a), the standard proof is the civil law 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 the 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. Having considered all of the submissions received from the Council, the Commissioner accepts that the Council carried out adequate, proportionate searches for the requested information by the conclusion of the investigation. She is satisfied that they would have been likely to identify any information held by the Council and covered by parts d), e), f) and k) of Mr Ford's request.
23. As a consequence, the Commissioner is satisfied, on the balance of probabilities, that the Council did not (and does not) hold any relevant, recorded information falling within scope of parts d), e), f) and k) of Mr Ford's request.



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 that 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 covered by parts d), e), f) and k) of Mr Ford's request. Consequently she does not consider there to be any conceivable public interest in requiring that information be made available in response to these parts of the request. 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. In all the circumstances, therefore, the Commissioner finds that the Council was entitled to refuse parts d), e), f) and k) of Mr Ford's request under regulation 10(4)(a) of the EIRs.

DECISION

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

Appeal

Should either Mr Ford or East Renfrewshire 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
7 April 2014



Appendix

Relevant statutory provisions

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;

- ...