

Decision Notice

Decision 156/2015: Company Y and The Highland Council

Heating upgrade contracts

Reference No: 201500078

Decision Date: 7 October 2015



Scottish Information
Commissioner

Summary

On 18 August 2015, Company Y asked Highland Council (the Council) for information in connection with Company Y's involvement with a heating upgrade contract.

The Council provided Company Y with some information. Company Y did not believe it had been provided with all the information requested and applied to the Commissioner for a decision.

The Commissioner investigated and found that the Council had partially failed to respond to Company Y's request for information in accordance with the EIRs, as it had not provided Company Y with all the relevant information it held. Although, by the close of the investigation, the Commissioner was satisfied that the Council had provided all further information held, she identified deficiencies in the Council's handling of Company Y's request.

Relevant statutory provisions

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (Interpretation) (paragraphs (a), (b), (c) and (f) of definition of "environmental information"), 5(1) and (2) (Duty to make available environmental information on request); 9(1) and (3) (Duty to provide advice and assistance)

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. It may be helpful to explain the context of Company Y's request. Company Y was engaged as the contractor to undertake gas installations on behalf of the Council in respect of a heating upgrade contract for retirement/sheltered housing in Inverness (the Queen Mother House project). Subsequently, Company Y was a potential sub-contractor for similar works on council housing (the Hilton project).
2. On 18 August 2014, Company Y made a request for information to the Council [Request 1]. Essentially, the request sought all information covering the period 4 March 2013 to 18 August 2014 referencing or relating to Company Y (including any of its employees or directors), with particular reference to the appointment of plumbing, electrical and/or heating sub-contractors for the Hilton Project.
3. On 17 September 2014, Company Y made a separate request [Request 2] seeking similar information, with particular reference to the Queen Mother House project. This time, the specified time frame was from 12 November 2012 to 17 September 2014.
4. The Council did not respond to Request 1. On 8 October 2014, Company Y wrote to the Council, requiring a review on the basis that the Council had not provided a response.
5. The Council notified Company Y of the outcome of its review on 15 October 2014. It apologised for the delay in responding and provided information it considered to fall within the scope of the request.

6. At the same time, the Council provided a response to Request 2, informing Company Y that its response to Request 1 included all information it held falling within the scope of the later request. It considered Request 1 to embrace the scope of Request 2 in its entirety.
7. On 8 January 2015, Company Y wrote to the Commissioner, applying 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. Company Y stated it was dissatisfied with the outcome of the Council's review, because it believed the information provided was incomplete, there was no distinction or separation between the two requests in the information provided, and the response to Request 1 was outwith the requisite statutory timescale. Company Y also raised specific issues in relation to particular documents disclosed by the Council.

Investigation

8. The application was accepted as valid. The Commissioner confirmed that Company Y made a request for information to a Scottish public authority and asked the authority to review its response to that request [Request 1] before applying to her for a decision.
9. The Commissioner cannot investigate the Council's response to Request 2 under this application. At the time of Company Y's application, the Council had not carried out a review. However, Request 2 is taken into account in this decision, given its relevance to Company Y's dissatisfaction with the Council's response to Request 1.
10. On 5 March 2015, the Council was notified in writing that Company Y had made a valid application. The Council was asked to send the Commissioner the information withheld from Company Y. The Council provided the information and the case was allocated to an investigating officer.
11. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Council was informed of the scope of Company Y's application and was invited to comment. In particular, the Council was asked to provide detailed submissions as to whether it held any further information falling within the scope of Request 1, with reference to the steps taken to establish this. The Council was also asked to clarify what information it considered fell within the scope of this request, as opposed to Request 2, and to explain why it had not provided a response to Company Y's request within the statutory timescale.

Commissioner's analysis and findings

12. 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 Company Y and the Council. She is satisfied that no matter of relevance has been overlooked.

Application of the EIRs

13. The Commissioner is satisfied that the information covered by this request is environmental information, as defined in regulation 2(1) of the EIRs. The information relates substantially to the safety and suitability of gas supplies and installations, in the context of significant building works. In reaching this conclusion, the Commissioner has considered the information in question, along with paragraphs (a), (b), (c) and (f) of the definition. Company Y has not

disputed the Council's decision to handle the request under the EIRs and the Commissioner will consider the information in what follows solely in terms of the EIRs.

Information held

14. 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. This obligation relates to information that is held by the authority when it receives a request.
15. On receipt of a request for environmental information, therefore, the authority must ascertain what information it holds falling within the scope of the request. Having done so, regulation 5(1) requires the authority to provide that information to the requester, unless a qualification in regulations 6 to 12 applies.

Why the Council considered all the information pertained to both requests

16. In its application to the Commissioner, Company Y was dissatisfied that, having submitted two separate information requests to the Council, the Council's response provided no distinction or separation as to which of the disclosed information pertained to which request.
17. In its submissions to the Commissioner, the Council acknowledged that although the two projects were separate, the matters that arose in relation to Company Y in the Queen Mother House project had an impact on the Hilton project: this resulted in both projects becoming linked in relation to the company. The Council submitted that the information for both projects, in relation to Company Y, was therefore inherently linked, and to try to separate it would be unhelpful.
18. The Council gave examples showing how some documents pertained solely to one project, or the other. The Council considered it helpful, however, to broaden its interpretation of the scope of Company Y's Request 1 to include information pertaining to the Queen Mother House project. The Council considered it necessary, to provide all information concerning Company Y and the Hilton project, to include all relevant information concerning Company Y and the Queen Mother House project, effectively rendering Company Y's second request unnecessary.

Issues with specific documents raised by Company Y

19. The Council was also asked to comment on specific concerns raised by Company Y in its application to the Commissioner, where it believed (from the documentation already provided by the Council) that further information was held. The Council provided explanations in response.

Information outwith scope of request

20. The Council was asked to comment on why it had provided Company Y with information which appeared to fall outwith the scope of Request 1, having been created after the request was received. The Council responded that it believed this information (in Document 7) provided background information on the issue and there seemed to be no harm in providing it. It noted that it often provided information outwith the scope of a request, if it thought this would assist with the issues giving rise to the request.

Searches

21. In order to ascertain whether all relevant information had been identified by the Council, it was asked to provide an explanation of the searches that it had undertaken in order to identify, locate and retrieve that information.

22. The Council explained that Company Y was a potential sub-contractor in relation to the Hilton project, not the main contractor. The Council's contract for that project was with the main contractor and generally in such circumstances it would hold little information on sub-contractors. The information held on Company Y in relation to the Hilton project was created as a result of its involvement in the Queen Mother House project.
23. The Council explained that the information would be held within its Property Section. At the time of Company Y's request, the team had been affected by recent re-organisation of the Council's services: it was adapting to these changes and was experiencing some staffing issues.
24. The Council understood its initial response to the request to have been adequate, but conceded that it had not retained any records of the relevant searches. During the investigation, the Council conducted fresh searches: these included electronic and physical searches. The Council identified the search terms it had used and the locations searched, and provided evidence of email exchanges relating to these searches. It explained that although Company Y's requests related to two separate projects, these were interrelated (as explained above) and searches were focussed on the company name as this was considered the most suitable term to locate all relevant information.

Further response provided to Company Y

25. In the searches carried out during the Commissioner's investigation, the Council identified seven further items relevant to Company Y's request. It confirmed that, in its view, all of the information falling within the scope of this request had now been identified.
26. The Council wrote to Company Y on 11 June 2015, disclosing this additional information, explaining the searches that had been undertaken and informing Company Y that no further information was held. The Council apologised that the further information had not been identified at the time of its review outcome.
27. The Council provided Company Y with an explanation of which information related to which request, and why it considered the information for both projects was inherently linked in relation to Company Y. The Council also included a detailed explanation of the reasons for the delay in providing its initial response.
28. In response to this further disclosure, Company Y wrote to the Commissioner on 7 July 2015. It raised some matters of dissatisfaction which are outwith the Commissioner's remit, and therefore cannot be considered here. Company Y still maintained that the Council held further information that had not been disclosed, citing specific references which (it believed) suggested further information was held.
29. On 7 July 2015, the Council was asked to provide further submissions on these matters which it provided on 30 July 2015. Highlighting the searches conducted earlier in the investigation, it reiterated that no further relevant information was held. It explained that some of the information identified by Company Y would not be relevant to Request 1 in any event. It provided Company Y with a copy of one letter referred to in Company Y's submissions, although it did not consider this to fall within the scope of Request 1.

Commissioner's findings – Information held

30. Having considered all of the relevant submissions, the Commissioner is satisfied that the Council had, by the end of her investigation, taken adequate and proportionate steps to establish what information it held and which fell within the scope of the request. She

accepts, on balance, that any information relevant to the request was capable of being identified using the searches described by the Council.

31. The Commissioner has no locus to comment on whether more information should have been held by the Council. The question she must consider in this case is: was all the relevant information held by the Council located and considered appropriately under the EIRs? She is satisfied that it was.
32. The Commissioner is concerned to note that the Council was required to carry out additional searches. It was only after the need for these additional searches was identified during her investigation that further documents were identified, located and disclosed to Company Y.
33. The Commissioner recognises and welcomes the fact that, following discovery of the additional information, the Council, of its own volition, took steps to ensure that it was supplied to Company Y. She also acknowledges that the Council accepted it had not carried out adequate searches earlier.
34. It is clear, therefore, that there were deficiencies in the Council's searches. The Commissioner recommends that the Council considers what might be learned from its experience and shortcomings in this case, and whether steps could be taken to avoid similar occurrences in future. She notes the actions referred to below, under the heading "Advice and Assistance".
35. The Commissioner finds that the Council failed to comply with regulation 5(1) of the EIRs in responding to Company Y's Request 1, as the Council failed to provide all the relevant information covered by the request. This information was later found and provided to Company Y.
36. In the circumstances, given she is now satisfied that the Council has provided Company Y with all relevant information held, the Commissioner does not require the Council to take any further action in this case, in response to the failures identified above.

Advice and assistance

37. Regulation 9(1) of the EIRs provides that a Scottish public authority must, so far as it would be reasonable to expect it to do so, provide advice and assistance to applicants and potential applicants. Regulation 9(3) provides that a Scottish public authority which conforms with the relevant Code of Practice (in relation to the provision of advice or assistance) is to be taken to have complied with this duty.
38. The Scottish Ministers' Code of Practice on the discharge of functions by Scottish public authorities under FOISA and the EIRs (the Section 60 Code¹) states (at paragraph 5.1 in Part 2):

Authorities should offer advice and assistance at all stages of a request

Authorities have a duty to provide advice and assistance at all stages of a request. It can be given either before a request is made, or to clarify what information an applicant wants after a request has been made, whilst the authority is handling the request, or after it has responded.

The full text of Section 5 gives more detailed guidance on good practice in offering advice and assistance in relation to various stages and aspects of a request.

¹ <http://www.gov.scot/Resource/0046/00465757.pdf>

39. The Council was asked to comment on what advice and assistance was given to Company Y, to help it understand the Council's responses.
40. The Council conceded that, other than providing additional information falling outwith the scope of the request (but considered helpful), it had not provided much advice and assistance. It recognised that the failure to provide an initial response resulted in the review outcome being rushed, with insufficient time taken to assure the quality of the response.
41. The Council also recognised it had missed an opportunity to clarify, with Company Y, the information it required, and the best way to proceed. There had been a meeting in September 2014, at which this could have been (but was not) done.
42. The Council acknowledged and apologised for the poor handling of Company Y's request. It conceded that the ongoing contact with Company Y, together with the staffing issues referred to above, had contributed to the request not being handled well.
43. The Council explained that it would be reviewing how the Property Section handled information requests, with a view to agreeing improvements which recognise the specialist nature of the information held and the way in which it was held. The Council hoped this would lead to better handling of future requests.

Commissioner's findings – advice and assistance

44. While Request 2 is not within the scope of this application, the Commissioner understands Company Y's dissatisfaction in being supplied with information, without adequate explanation of which request it related to, so has considered it insofar as it relates to advice and assistance given in relation to Request 1. She can see that the Council's overall actions were an effort to provide helpful information but on this occasion she is of the view these actions fell short of providing effective, reasonable advice and assistance, despite the underlying intentions.
45. The Commissioner notes the Council considered all of the information concerning both projects, in relation to Company Y, fell within the scope of the request. In the context of advice and assistance, the point is not what the Council considered in relation to this information, but the adequacy of the advice and assistance it gave Company Y to aid understanding of the information and the implications of how the Council held it. At the very least, the Council should have explained the relevance of the additional information and provided a breakdown of which information related to which request. In the absence of these, Company Y's confusion (and consequent dissatisfaction) was understandable.
46. In the circumstances narrated above, the Commissioner finds that the Council failed to meet its obligations to advise and assist Company Y, by providing it with the necessary information to allow it to fully understand the scope and relevance of the information provided. As the Council failed to afford Company Y the necessary explanations, which it later provided, the Commissioner finds that it failed to comply with regulation 9(1) of the EIRs in responding to Request 1.
47. The Commissioner recognises that, by the end of the investigation, the Council had taken steps to address these shortcomings, and is encouraged by the Council's aims and approach to prevent a recurrence. In the circumstances she does not require the Council to take any additional action.

Late response?

48. In its application to the Commissioner, Company Y raised concern that the Council had failed to provide a response to Request 1 within the statutory timescale.
49. Where a requester has received notice of the outcome of a review in relation to their information request, the role of an application to the Commissioner (under section 47(1) of FOISA and regulation 17 of the EIRs) is to address their dissatisfaction with that review outcome. The matter raised by Company Y, in relation to failure to comply with timescales, relates to dissatisfaction with the handling of its original request, and not that of the review. This matter was addressed by the Council in its review outcome and the Commissioner does not, in the circumstances, consider it to be within her remit to revisit it now as a potential breach of the EIRs (she has, however, commented on it in the next section).

Commissioner's observations

50. The following observations are not part of the Commissioner's findings on compliance with the EIRs, but cover practice issues the Commissioner has identified during this investigation and about which she has concerns. She hopes these comments are helpful to all Scottish public authorities and requesters.

Searching for, locating and retrieving information

51. The Council failed to locate all the relevant information it held when it conducted its initial searches. It also failed to retain records of its initial searches, resulting in these having to be repeated during this investigation.
52. Section 6 of Part 2 of the Section 60 Code provides good practice advice on searching for information, advising on factors to be considered in relation to the scope and focus of searches, and on maintaining records of searches carried out.
53. Conducting thorough and focussed searches, identifying and retrieving all relevant information at an early stage, and retaining records of searches carried out, can save a lot of time and work in the longer run. An unnecessary application to the Commissioner may be avoided in this way. If there is an application, adequate records of earlier searches will provide evidence and reduce the amount of work required during the Commissioner's investigation.
54. The Commissioner would draw the Council's attention (and that of all Scottish public authorities) to Module 2 of the Self-Assessment Toolkit "Searching for, Locating and Retrieving Information"². This resource is intended to assist authorities by giving them a tool which they can use to evaluate and, where necessary, improve practice in searching for, locating, identifying and retrieving information.

Failure to respond within statutory timescales

55. The Council's failure to respond to Company Y's request within the statutory timescale was not good practice. Any failure to meet timescales unnecessarily frustrates the legislation's primary purpose of facilitating access to information.

² <http://www.itspublicknowledge.info/ScottishPublicAuthorities/Self-AssessmentToolkit/Self-AssessmentToolkit.aspx>

56. At review stage, the Council recognised its failure to respond to Company Y's initial request, so apologised and provided a review outcome. This was in accordance with good practice (see paragraph 10.4 of Part 2 of the Section 60 Code).
57. The Commissioner would again draw the Council's attention to the Self-Assessment Toolkit, this time Module 1 "Responding on Time". She would ask the Council to consider whether there are steps it can take to monitor compliance with timescales and adjust practice, to minimise the likelihood of failing to respond on time in the future.

Contingency arrangements

58. From the Council's submissions to the Commissioner, it is apparent that staffing issues contributed to the areas of concern identified in this decision.
59. While an authority may decide to have recognised staff whose specific remit is responding to information requests, the responsibility for responding to requests under FOISA or the EIRs lies with the public authority itself, and not with individuals or departments within the authority.
60. Paragraph 1.4.1 of Part 2 of the Section 60 Code of Practice states:

Staff contingency and cover

Authorities should have in place robust arrangements to ensure that staff absence (whether planned or un-planned), does not affect the authority's ability to respond to requests for information, and requests for review, within statutory timescales.

61. The Commissioner cannot stress enough the importance of having adequate contingency arrangements in place to enable a public authority to meet its statutory responsibilities under FOISA and the EIRs at all times, including when regular staff and other resources are not available.

Decision

The Commissioner finds that The Highland Council (the Council) partially complied with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by Company Y.

The Commissioner finds that the Council complied with the EIRs by providing Company Y with some of the information requested.

However, the Commissioner finds that the Council did not provide all of the information requested and therefore failed to comply with regulation 5(1) of the EIRs.

She also finds that the Council did not meet its obligations to provide advice and assistance to Company Y when responding to its request, and so failed to comply with regulation 9(1) of the EIRs.

Given that, by the end of the investigation, the Council had provided the information requested in full, and had taken steps to provide a further explanation of its response, the Commissioner does not require the Council to take any action in respect of these failures.

Appeal

Should either Company Y or The Highland 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.

Rosemary Agnew
Scottish Information Commissioner

7 October 2015

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;

...

(f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in paragraph (a) or, through those elements, by any of the matters referred to in paragraphs (b) and (c);

...

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.

...

9 Duty to provide advice and assistance

(1) A Scottish public authority shall provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to applicants and prospective applicants.

...

- (3) To the extent that a Scottish public authority conforms to a code of practice under regulation 18 in relation to the provision of advice and assistance in a particular case, it shall be taken to have complied with the duty imposed by paragraph (1) in relation to that case.

...

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