



Scottish Information
Commissioner

**Decision 074/2007 - Mr L and the City of Edinburgh
Council**

Information relating to a planning application

**Applicant: Mr L
Authority: The City of Edinburgh Council
Case No: 200600881
Decision Date: 28 May 2007**

**Kevin Dunion
Scottish Information Commissioner**

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Decision 074/2007 - Mr L and the City of Edinburgh Council

Request for information held in relation to a planning application – dispute over whether information was, or should have been, held – Commissioner concluded that information was not held

Relevant Statutory Provisions and other Sources

The Environmental Information (Scotland) Regulations 2004 – Regulation 6(1)(b) (Form and format of information) – Regulation 10(4)(a) (Exceptions from duty to make environmental information available)

Facts

Mr L requested information from the City of Edinburgh Council (the Council) relating to a planning application submitted in the Fountainbridge area of Edinburgh. Mr L stated that he was particularly interested in receiving details of correspondence and meetings between the Council and the developers relating to the development.

The Council's response to Mr L informed him that regulation 6(1)(b) of the Environmental Information (Scotland) Regulations 2004 (the EIRs) applied in relation to his request, in that the full information sought was available from its publicly-accessible resources.

Mr L applied to the Commissioner on the basis that he considered additional information was held which was not made publicly available by the Council.

The Commissioner concluded that one item of information should have been provided in response to Mr L's request, which otherwise could be excepted on the grounds that the disputed information was not held by the Council.



Background

1. On 10 October 2005 Mr L contacted the Council to request information relating to a planning application in the Fountainbridge area of Edinburgh. In this request, Mr L sought full details of “*all meetings, transcriptions of what was said and all correspondence*” regarding the application.
2. Mr L’s request went on to clarify the nature of the specific information sought. In this, he stated that he was interested in receiving details of all meetings, discussions and correspondence between council officials and the developers, both prior to and during the application process, along with minutes of all planning sub-committee meetings. Mr L also indicated that he wished to receive details of the names and roles of council officers involved in meetings with the developer.
3. The Council responded to Mr L’s request on 13 October 2005. In this response, the Council informed Mr L that, as his request sought information on plans and policies relating to the built environment, it was considered within the terms of the EIRs. The Council went on to suggest to Mr L that all available information held which might be provided in response was (or would shortly be) accessible through the Council’s publicly available files. The Council stated that these files were accessible either through its website, or by viewing paper copies of the files on Council premises.
4. The Council therefore indicated that regulation 6(1)(b) of the EIRs applied in relation to his request. Regulation 6(1)(b) provides that Scottish public authorities are not obliged to comply with requests in circumstances where the information is already publicly available and easily accessible to the applicant in a form or format other than that requested.
5. Mr L contacted the Council to request that it review its handling of his initial request. In this correspondence, Mr L argued that the documentation available through the route proposed by the Council only represented a proportion of the information he requested. Mr L went on to indicate that he was aware that meetings had taken place between the Council and the developers, details of which were not available through the route proposed by the Council.



6. The Council responded to Mr L's review request on 16 November 2005. In this response, the Council confirmed that, following investigation, it found that it held no further information which could be provided in response to Mr L's request, beyond that available through the publicly available files. The Council's response also informed Mr L that, while at the time of his initial request not all of information available through the publicly accessible paper file was available through its website, this situation had since been amended. The Council therefore asserted that the full content of the paper file, and all the information held in relation to the application in question, was now also available through the Council's website.
7. Additional correspondence passed between Mr L and the Council following receipt of the Council's response to Mr L's request for review. Following the failure of this correspondence to resolve the matter, Mr L subsequently submitted an application for decision to me. This application was received by my Office on 16 May 2006.
8. Mr L's application was allocated to an investigating officer and validated by establishing that he had made a written request for information to a Scottish public authority and had applied to me for a decision only after requesting a review from the authority.

The Investigation

9. During the course of the investigation various submissions were received from both the Council and the Mr L. Key aspects of these submissions are summarised in the paragraphs below. All relevant submissions received in relation to this case were fully considered during the course of the investigation.

Submissions from the applicant

10. In his application, Mr L stated that his appeal was made in an attempt to seek access to communications between the developer (and its agents) and the Council. Mr L asserted that the information sought included any pre-application advice given to the developer by the Council.
11. Mr L stated that his application stemmed from wider concerns he held relating to suspected breaches of existing guidance and civil law with regard to the Fountainbridge development. Mr L asserted that he sought access to the information in order to determine whether the Council's planning officers were aware of the alleged breaches.



12. Mr L submitted an extensive dossier which addressed various issues and concerns which, he suggested, supported his view that additional information should have been created by the Council, and should, therefore be held. Issues raised in Mr L's correspondence with my Office included the following:
- a) Mr L argued that notes of any advice provided by the Council to the developer should have been recorded by the Council. In support of this, Mr L referred to the January 2002 version of Council's own "*Development Control - City Development Planning Charter*" which was in effect at the time any relevant communications would have occurred. The City Development Planning Charter sets out how the Council deals with planning applications and monitors development within the city. Mr L argued that the January 2002 version (the 2002 Charter) described the provision of written confirmation of any advice by the Council as a "*Service Standard*".
 - b) Mr L also referred to the Council's position on pre-application advice in relation to complex planning proposals, as set out in the 2002 Charter. This advice set out the following:

"Depending on the complexity of the proposals a reply will be given in writing or a meeting arranged...

...In the case of proposals particularly raising issues such as transportation, retail or environmental impact assessments or matters affecting large sites or listed buildings, it will nearly always be beneficial to have a meeting.

If a meeting is held, a note will be taken of the advice given and the recommendation for action. A copy will be sent to the potential applicant or their agent."

Mr L stated that the Council had informed him that the development in question was not complex enough to merit written advice being given. However, Mr L argued that the development in question contained large retail units and related to a five story office block that required the partial demolition of a listed building and the construction of a large basement for car parking and storage. Mr L also stated that two planning applications were required for the development – one for the plans and one for the listed building status. In this respect, Mr L asserted that the development in question would appear to fulfil the criteria required to be defined as a "complex" proposal, and any advice provided by the Council should therefore, in line with the policy set out in the 2002 Charter, have been recorded.



- c) Mr L stated that he was aware that several pre-application meetings took place between the Council and the developers, and pointed out that meetings were confirmed in the developer's planning submissions (copies of which were supplied to my Office). In this submission the developers described the process of pre-application consultation as "*comprehensive*", and set out that "[named Council officers] *have been consulted several times regarding the development proposals and integration of the listed building element*".
- d) In his application Mr L also questioned the Council's assertion that all the documents relating to this application are contained within the Council's online planning file. In doing so, Mr L provided a copy of a document which was available in the paper planning file, but was not included on the online portal. Mr L suggested that this document demonstrated that certain information was withheld from the Council's online portal (in contrast with the Council's response to his request for review which set out that all information was now accessible from the portal). Mr L went on to suggest that additional information, such as that information to which he sought access, may also be withheld from the publicly available files.

Mr L concluded his application by reiterating his view that there should be some form of recorded record of the meetings held. Mr L went on to argue that the only reasonable conclusion would therefore be that the relevant documents had either been destroyed, or were being concealed from him.

Information sought from the Council

- 13. The Council was notified to inform it of the receipt of Mr L's application and its comments sought, in terms of section 49(3)(a) of the Freedom of Information (Scotland) Act 2002 (FOISA)(which applies to enforcement of the EIRs). My investigating officer also sought a range of information from the Council throughout the course of the investigation. This information included (but was not limited to):
 - a) A response from the Council in relation to the various issues raised in Mr L's application.
 - b) A full and detailed description of all work undertaken by the Council to identify information falling within the scope of Mr L's request, including confirmation of whether specific locations and routes were pursued in order to identify relevant information.
 - c) Confirmation of whether any documentation sought by Mr L had been deleted or destroyed from Council files at any point.
 - d) Confirmation of the status of the 2002 Charter, and the Council's interpretation of it within the context of Mr L's appeal.



- e) Details of criteria used by the Council to assess the complexity (or otherwise) of planning applications.
- f) Confirmation of whether requests for pre-application advice were received from the developer.
- g) Confirmation of the number of meetings or discussions which took place between the Council and the developer prior to the application being received. Confirmation of the date, length and attendees in relation to any such meetings, along with all recorded documentation generated or received as a result.

Submissions from the Council

- 14. The Council's initial response to my Office stated that relevant records had been thoroughly checked, and that it held no additional information which could be released. The Council asserted that all relevant information was available to Mr L through the publicly accessible paper file.
- 15. The Council stated, however, that its previous assertion to Mr L that all relevant information was available on the online planning portal was, in fact, incorrect. The Council informed my Office that it had discovered two documents following its review of the paper file which were not accessible through the Council's online portal (one of which was the document identified by Mr L). The Council advised my investigating officer that it was not departmental policy for all information from the publicly-accessible paper file to be placed on the online portal. The Council suggested that an internal communication error between staff within different Council departments led to Mr L being incorrectly informed of the availability of the full information in this manner.
- 16. The Council stated, however, that this did not mean that it had acted to conceal information from Mr L. It stated that full information was not made available on the planning portal for administrative reasons, and that Mr L had nevertheless clearly accessed the publicly accessible paper file, and had therefore viewed all the relevant information held by the Council.
- 17. The Council stated that it was confident that no documentation had been deleted or destroyed in relation to Mr L's application.



18. With regard to the issue of whether any pre-application meetings were minuted or recorded by the Council, the Council stated that responses to requests for pre-application advice varied depending on the nature of the specific proposals received. The Council pointed out that the 2002 Charter (and its successor) reflected an internal protocol, "*Procedure Note 15A: Pre-application enquiries*". The Council stated out that following an internal review of the 2002 Charter and related stakeholder surveys, it discovered that various stakeholders took different views of what constituted a "pre-application meeting." As a result, the Council stated that this definition was clarified in a revised Charter (the 2005 Charter). The Council informed my Office that the 2005 Charter was revised in such a way as to clarify and emphasise that "pre-application meetings" should only be considered to refer to those meetings arranged by a Principal Planner. The Council stated that the term "pre-application meeting" should not, therefore, be considered to refer to "*any other type of discussion or informal communication between Council officers and potential applicants or their agents.*"
19. The Council went on to state that the "Service Standard" referred to by Mr L (and discussed in **paragraph 12a above**) was intended only to refer to those meetings falling within the above definition of a "pre-application meeting".
20. With regard to the complexity of the application in question, the Council asserted that it had reviewed the proposed development against its own criteria for complex proposals. Complex proposals were described by the Council as those "*which raise significant land use, design, or listed building issues.*" The Council stated that the proposals in question were not considered to be "complex" and, as such, did not lead to a formal pre-application meeting with a written record.
21. In response to later questioning, however, the Council subsequently identified additional information held which had not previously been made available in either the publicly accessible paper file or the online planning portal. Relevant information was identified following direction by my investigation officer to review, amongst other sources, any diaries, notebooks and email accounts of relevant Council staff.
22. The Council stated that such information had not been searched previously, for the reason that the department in question took the view that such sources did not constitute part of the Council's official record.
23. The additional information identified included diary entries from two officers' diaries, which revealed that two meetings took place prior to the formal submission of an application by the developer, both of which were attended by a Principal Planner within the Council. The Council stated however, that no agenda or pre-meeting correspondence could be located.



24. The Council did, however, state that a subsequent review of a personal electronic file of email correspondence maintained by the Planning Officer revealed that a note of a meeting held on 9 June 2004, which was received by the Council from the developer's agent, was held. On review of this note, the Council stated that it suggested that the pre-application meeting was "*more detailed than...previously suggested.*" A copy of the note was supplied to Mr L.
25. The Council stated that it was the normal practice of the Principal Planner involved to transfer such notes to the relevant planning files. The Council stated that this did not happen in this case, and suggested that the omission may be due to human error on the part of the of the member of staff in question.
26. The Council also stated that the relevant Department had revised its procedures to ensure that all such pre-application notes would, in future, be appended to the relevant planning files.
27. The Council maintained, however, that it was not required by its procedures to issue a written response in relation to the meeting which took place, and that its failure to hold this information therefore did not represent a breach of those procedures. The Council indicated that this was because the meetings, while taking place prior to the developer's submission of its application, did not fulfil the Council's definition of a full and formal "pre-application meeting". The Council suggested that this was because:
 - a) The application was not considered by the Council to be complex;
 - b) The meeting was arranged following receipt of an "exploratory enquiry", as opposed to a formal request;
 - c) The purpose of the meeting was not to bring together different interests, such as relevant consultees;
 - d) The meetings held were arranged on an informal basis;
 - e) While a Principal Planner was in attendance, the meetings were neither arranged or chaired by that Principal Planner.

The Commissioner's Analysis and Findings

28. As is clear from the submissions made by the relevant parties to my Office, a substantial factor in the dispute between Mr L and the Council relates to the issue of whether the Council is required, by its own procedures, to record and hold the information requested.



29. It should be noted, however, that it is not my role in considering this case to assess whether or not an authority *should* hold information which might be provided in response to Mr L's information request. Rather, the EIRs govern access only to that environmental information which is held by an authority, with regulation 2(2)(a) setting out that information is held by a Scottish public authority if it is "*in its possession and it has been produced or received by that authority*".
30. While I acknowledge that Mr L has supplied me with an extensive submission which expresses in some detail his concerns regarding a perceived disparity between Council procedures and Council practices in the recording of such information, it must be stressed that the consideration of this issue will not fall within my remit with regard to this investigation. The main issue which I must consider in relation to this case is simply that of whether the Council holds additional information which falls within the scope of Mr L's information request and, if so, whether that information should be released to him.
31. The Council has stated, in its submissions to this Office, that it holds no additional information which might be provided in response to Mr L. The EIRs set out that, where information is not held by an authority, the authority is entitled to refuse that request. Regulation 10(4) of the EIRs states:
- "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;"*
32. In the course of searches carried out during my investigation, the Council located the minute of a meeting which, while it might not have fallen within the seemingly restrictive definition of a "pre-application meeting" used by the Council for its own purposes, clearly fell within the scope of Mr L's request on any reasonable interpretation of its terms. This minute should therefore have been located and provided to Mr L in response to his initial request or his request for review, and the Council's failure to do so meant that it misapplied regulation 10(4) when it informed Mr L, in response to his request for review, that no further information was held. Regarding the Council's handling of its initial searches more generally, I would refer to my comments at paragraphs 36-40 below.



33. Having fully considered the submissions made by both parties in relation to this case, and having subsequently assessed the search routes and methodology used by the Council both prior to and following communications with my Office, I am satisfied that (with the exception of the note located and supplied to Mr L in the course of my investigation) the additional information sought by Mr L is not held by the Council and was not so held at the time it dealt with his request. I am also satisfied that there is no evidence to suggest that this information was destroyed following the receipt of Mr L's information request.
34. I therefore find that (with the exception of that note which was located in the course of the investigation) the additional information sought by Mr L is excepted from release under regulation 10(4)(a) of the EIRs.
35. I wish to conclude by commenting briefly on the initial searches undertaken by the Council, in order to identify relevant information falling within the scope of Mr L's request.
36. It is clear from the Council's submissions that the publicly accessible planning file was initially considered as the only appropriate location where relevant information may be located. As a result, the Council informed Mr L that all relevant information would be accessible from that file. It is also clear however, that following correspondence with my Office, additional information of relevance was identified from elsewhere within the Council's resources - specifically from the diaries and email accounts of relevant Council staff.
37. Where an authority receives a request under the EIRs (or, indeed, under the Freedom of Information (Scotland) Act 2002 (FOISA)) for all the information it holds in relation to a particular subject, it should take appropriate steps to ensure that all resources likely to hold that information are adequately searched. In this case, it is apparent that the Council's initial searches, both in response to Mr L's correspondence and in response to correspondence from my Office, were inappropriate, in that they failed to identify all relevant information falling within the scope of Mr L's request.
38. It should be noted by the Council that it will only be appropriate to rely on the planning file as the definitive source of information in relation to an application in circumstances where the Council is entirely confident that all information received and recorded by its officers relating to that application is copied to the relevant file.



39. The Council has also stated, in its submissions to my Office, that certain sources were not searched by the Council, for the reason that such sources “did not constitute part of the Council’s official record”. The Council should note, however, that the EIRs (and FOISA) do not govern access only to information which forms part of an authority’s “official record”, but to all recorded information held by an authority and falling within the scope of the applicant’s request, regardless of its format, source, or precise location within the authority.

Decision

I find that the City of Edinburgh Council (the Council) failed to deal with Mr L’s request for information in accordance with the requirements of The Environmental Information (Scotland) Regulations 2004 (the EIRs) in that it failed to locate and provide to Mr L certain information falling within the scope of his request. That information has, however, now been provided to Mr L and therefore I do not require the Council to take any action in respect this breach.

In all other respects, I find that the Council dealt with Mr L’s request in accordance with the requirements of the EIRs. In particular, I find that no further information falling within the scope of the request was held by the Council.

Appeal

Should either Mr L or the Council wish to appeal 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 of receipt of this notice.

Kevin Dunion
Scottish Information Commissioner
28 May 2007



Appendix

Relevant Statutory Provisions

The Environmental Information (Scotland) Regulations 2004

Form and format of information

6. – (1) Where an applicant requests that environmental information be made available in a particular form or format, a Scottish public authority shall comply with that request unless –

(a) it is reasonable for it to make the information available in another form or format; or

(b) the information is already publicly available and easily accessible to the applicant in another form or format.

Exceptions from duty to make environmental information available

10. – (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;