

Decision Notice



Decision 094/2013 Ms Maxine Campbell and East Dunbartonshire Council

Risk assessments and policy documents: cold weather conditions

Reference No: 201201543
Decision Date: 16 May 2013

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Rosemary Agnew
Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews KY16 9DS
Tel: 01334 464610



Summary

On 30 May 2012, Ms Maxine Campbell asked East Dunbartonshire Council (the Council) for copies of risk assessments, policy documents and maintenance schedules relative to cold weather conditions and the spreading of salt/grit. The Council told Ms Campbell that it did not hold the information, as it contracted this work out.

Following an investigation, the Commissioner found that the Council did hold the information.

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) (definitions (a) and (c) of “environmental information”) and (2) (Interpretation); 5(1) and (2)(b) (Duty to make environmental information available 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 30 May 2012, solicitors for Ms Campbell (referred to in the remainder of the decision as “Ms Campbell”) wrote to the Council requesting, with reference to Douglas Academy, Milngavie:
 - risk assessment(s) and/or method statements relative to cold weather conditions;
 - risk assessments and/or method statements relative to the spreading of grit/salt on school premises;
 - policy documents or other documentation relative to cold weather conditions, including details of how the school checks or is given notification of forthcoming cold weather conditions;



- copies of maintenance schedules or other documentation showing when grit/salt was deployed proactively on school premises.

The request was for information since 1 October 2010.

2. The Council responded on 18 June 2012. It informed Ms Campbell that it did not hold the information she had requested and suggested that she contact InspireED (the private party responsible for this particular school through a Public Private Partnership (PPP) contract) to obtain the information.
3. Later the same day, Ms Campbell wrote to the Council requesting a review of its decision. Ms Campbell believed it was the Council's responsibility, and not InspireED's, to provide the information.
4. The Council notified Ms Campbell of the outcome of its review on 13 July 2012. The Council informed Ms Campbell that her requests were for environmental information and that, consequently, her request had now been considered in terms of the EIRs. However, it considered that its original response had been correct and advised Ms Campbell, in terms of regulation 10(4)(a) of the EIRs, that it did not hold the information she had requested. The Council maintained that the information requested "is not dealt with by" the Council, but externally by InspireED.
5. On 13 August 2012, Ms Campbell wrote to the Commissioner, stating that she 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 Ms Campbell had made requests 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 those requests. The case was then allocated to an investigating officer.

Investigation

7. On 3 September 2012, the investigating officer 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 justify its reliance on any provisions of FOISA/the EIRs it considered applicable to the information requested.
8. The Council confirmed that it wished to rely on regulation 10(4)(a) of the EIRs in responding to these requests. The Council stated that the information in question is held by an external contractor of the Council (InspireED) and their respective sub-contractors (Spie FM).



9. The Council also stated that, as well as requesting the information under FOISA/the EIRs, Ms Campbell had raised a Summary Application against the Council and InspirED jointly, seeking a court order, for the same information, under the Administration of Justice (Scotland) Act 1972. The Council informed the Commissioner that, as a result, it might be required to release the information to Ms Campbell.
10. When asked how it could disclose information which it had told the Commissioner it did not hold, the Council stated that it did not have the information in its possession, but if it was required to release the information to comply with the court order, it would have to physically obtain that information from InspirED.
11. During the investigation, a court order was granted and the Council released the information to Ms Campbell. The Council informed the Commissioner that the information it had released was exactly the same information Ms Campbell had requested under FOISA/the EIRs.
12. However, Ms Campbell was not satisfied with the information released as a result of the court order and continued to seek a decision from the Commissioner. As the disclosure was done outwith FOISA/the EIRs, the Commissioner cannot take this disclosure into consideration in reaching a conclusion on Ms Campbell's application. The Commissioner's investigation is limited to determining whether the Council holds the information Ms Campbell has requested for the purposes of the EIRs. Accordingly, no comment can be made on the information that was released to Ms Campbell by way of the above court order during the course of this investigation.

Commissioner's analysis and findings

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

FOISA or EIRs?

14. It is clear from the Council's correspondence with Ms Campbell and the Commissioner that it dealt with Ms Campbell on the basis that the information requested was environmental information, as defined in regulation 2(1) of the EIRs. In this case, the Commissioner accepts that the information requested, which concerns the conditions of grounds around the school in cold weather, is environmental information. It relates to the state of the elements of the environment (paragraph (a) of the definition), or measures (the policy and documentation relative to cold weather) and activities affecting or likely to affect those elements (paragraph (c) of the definition).



Section 39(2) of FOISA

15. The exemption in section 39(2) of FOISA provides, in effect, that environmental information (as defined by regulation 2(1)) is exempt from disclosure under FOISA, thereby allowing any such information to be considered solely in terms of the EIRs. As she is satisfied that the information is environmental, the Commissioner accepts that this exemption is applicable to the information requested by Ms Campbell.
16. As there is a separate right of access to environmental information available to the applicant in this case, the Commissioner also accepts that the public interest in maintaining this exemption and in dealing with request in line with the requirements of the EIRs outweighs any public interest in disclosing the information under FOISA. Consequently, she finds that the Council was entitled to withhold the information under this exemption.

Regulation 10(4)(a)

17. 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 that information when an applicant's request is received. In terms of regulation 10(2) of the EIRs, public authorities must interpret the exceptions in a restrictive way and apply a presumption in favour of disclosure.
18. As noted above, the Council applied this exception because the information Ms Campbell had requested was not dealt with by it, but by an external contractor – InspirED.
19. In terms of regulation 2(2) of the EIRs, and for the purposes of this decision, information is "held" by a Scottish public authority if it is:
 - a. in its possession and has been produced or received by that authority; or
 - b. held by another person on that authority's behalf.
20. The Council stated that the school to which this request relates is under a PPP contract, i.e. a contract between a public sector authority and a private party, in which the private party provides a public service or project and assumes financial, technical and operational risk in the project. In this instance, InspirED is the private party to whom the Council has transferred all associated risk.
21. The Council explained that InspirED provides a ground and building maintenance service at this school. InspirED is contractually liable for carrying out all the risk assessments and consequently no such documents are held by the Council. The Council also stated that the risk documents are not provided to the Council by InspirED in their own right.
22. In its submissions, the Council confirmed that part of its contract with InspirED includes the provision of snow clearing and gritting services to roads, car parks and footpaths at the school in question. The Council stated that InspirED has subsequently sub-contracted these services to other parties.



23. When questioned, the Council confirmed that it still has duties in respect of certain groups of people under health and safety legislation and common law, which require it to maintain safe premises. It also confirmed that it is obliged to make suitable and sufficient assessment of the risks to the health and safety of its employees to which they are exposed whilst at work (under the Management of Health and Safety at Work Regulations 1999).
24. The Council's position is that such assessments as are required under Health and Safety legislation are undertaken by the Council in its role as employer; however, specific risk, such as those under consideration in this case, is a risk that is assessed and undertaken to be dealt with by a sub-contractor under the PPP contract. It is not, the Council stated, its position that the risk is therefore contracted out of but the control and maintenance of it is, and these documents are a part of that control and maintenance.
28. The Commissioner acknowledges that InspireED and/or its sub-contractor may bear contractual responsibility for the tasks in question and may be required by the contract to carry out the relevant risk assessments and maintain other related records. The Commissioner also acknowledges that the contractor may bear the risk in relation to these tasks, in the sense of being required to indemnify the Council should anything go wrong.
29. However, the Council still owes duties to certain groups of people (principally, its employees and school pupils), under which it is required to maintain safe premises. The Commissioner understands that these duties cannot be contracted out of. Consequently, the documentation relating to these tasks would be held by the contractor on behalf of the Council.
30. Given the above, for the purposes of the EIRs, the Commissioner is satisfied that the tasks to which these requests relate are carried out on behalf of the Council and, consequently, relative documentation will be maintained (and therefore held) on the Council's behalf.
31. The Commissioner therefore concludes that the Council was not entitled to rely on regulation 10(4)(a) of the EIRs in responding to Ms Campbell's request.



DECISION

The Commissioner finds that East Dunbartonshire Council (the Council) breached the Environmental Information (Scotland) Regulations 2004 (the EIRs) (and in particular regulation 5(1)) by notifying Ms Campbell, in line with regulation 10(4)(a), that it did not hold the information she had asked for.

The Commissioner therefore requires the Council to respond to Ms Campbell's requests, otherwise than under regulation 10(4)(a) of the EIRs, by Monday 1 July 2013.

Appeal

Should either Ms Campbell or East Dunbartonshire 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
16 May 2013



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;

...

(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;

...

(2) For the purpose of these Regulations, environmental information is held by a Scottish public authority if it is-

(a) in its possession and it has been produced or received by that authority; or

(b) held by another person on that authority's behalf,

and, in either case, it has not been supplied by a Minister of the Crown or department of the Government of the United Kingdom and held in confidence.

...

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;

...