

Decision Notice

Decision 143/2014 RJ Soutar and Dundee City Council

Aggregation of requests/environmental information

Reference No: 201302703

Decision Date: 1 July 2014



Scottish Information
Commissioner

Summary

On 9 September 2013, Mr Soutar asked Dundee City Council (the Council) for information on several topics, which he grouped into six sets of questions. The Council refused to respond, on the basis that it would cost in excess of the £600 cost limit to do so.

The Commissioner found that the Council was wrong to aggregate all of Mr Soutar's requests for the purposes of applying the cost limit, and also that it should have identified some of Mr Soutar's requests as seeking environmental information. She found that the Council should have provided advice and assistance to help Mr Soutar narrow his requests, and required the Council to issue further (compliant) responses to Mr Soutar.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 12(1) (Excessive cost of compliance); 15 (Duty to provide advice and assistance); 21(4)(b) (Review by Scottish public authority)

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (Interpretation) (paragraphs (a) and (c) of the definition of environmental information); 5(1) and (2)(b) (Duty to make environmental information available on request); 9(1) Duty to provide advice and assistance; 16(4) (Review by Scottish public authority)

The full text of each of the statutory provisions cited above is reproduced in Appendix 1 to this decision. The Appendices form part of this decision.

Background

1. On 9 September 2013, Mr Soutar wrote to the Council requesting information on several topics. The requests are set out in full in Appendix 2 at the end of this decision. It will be apparent that there are 21 questions, grouped and numbered 1 to 6 inclusive.
2. The Council responded on 22 October 2013, applying section 12(1) of FOISA. It stated it was not obliged to comply with Mr Soutar's "request", as it estimated the cost of doing so would exceed the £600 limit prescribed for the purposes of section 12.
3. On 24 October 2013, Mr Soutar wrote to the Council requesting a review of its decision. He highlighted that he had asked a number of individual questions and submitted that the Council should address these individually.
4. The Council notified Mr Soutar of the outcome of its review on 12 November 2013. It confirmed its decision to apply section 12(1), making some reference to Mr Soutar's individual questions, but still appearing to deal with all of them together as a single request.
5. On 14 November 2013, Mr Soutar wrote to the Commissioner's office, 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 Soutar made requests 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 those requests. The case was then allocated to an investigating officer.

Investigation

7. On 18 December 2013, the Council was notified in writing that an application had been received from Mr Soutar and given an opportunity to provide comments, all as required by section 49(3)(a) of FOISA.
8. The Council was asked to comment on whether some of Mr Soutar's questions were likely to be for environmental information, and to consider the implications of any of the information being subject to the EIRs. It was also asked to justify its application of section 12(1) of FOISA, on the basis that there appeared to be more than one request involved, and to explain any advice or assistance it gave Mr Soutar with a view to narrowing any of his requests.
9. The Council responded to the investigating officer, acknowledging that elements of the requested information were likely to be environmental (with comments on the implications of this). It continued to apply section 12(1) of FOISA.

Commissioner's analysis and findings

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

Excessive costs

11. The Council originally applied section 12(1) of FOISA to all of Mr Soutar's questions, which it treated as one request. At review stage and when responding to the investigating officer, it provided more detailed comments on some of the individual questions. However, there is nothing in these responses to suggest comprehensive scrutiny of each question and it is apparent throughout that they have been addressed collectively as a single request. The Council's conclusion is that it is "inconceivable" that the cost of responding would fall within the £600 limit, but there is no evidence that has applied this conclusion consistently across all of the individual questions.
12. There are very different charging regimes under FOISA and the EIRs. While FOISA allows public authorities to refuse to comply with a request costing more than £600, there is no such limit in the EIRs (subject to a public authority being entitled not to comply with a request if it is manifestly unreasonable). The question of whether Mr Soutar made requests for environmental information will be considered further below.
13. FOISA does not permit authorities to aggregate the costs for two or more requests made by one person. The Commissioner's briefing on section 12 (at paragraph 2.6) explains this point in detail¹. The power to make regulations in section 12 allows for regulations which would permit such aggregation, but no such regulations have been made.

1. See ¹ <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/Fees/FeesOverview.aspx>

14. The Council has not provided clear reasons why Mr Soutar's various questions should be treated as a single request. In fact, it appears to acknowledge that he has made more than one distinct request, but there is nothing to suggest that it has given full consideration to the extent to which there are separate requests within his email of 9 September 2013. From the submissions and other communications she has seen from the Council, the Commissioner is unable to conclude that the 9 September 2013 email has been dealt with (at any point, up to the close of this investigation) other than as a single request.
15. Having considered the email of 9 September 2013, the Commissioner is of the view that it contains more than one distinct request. These cover a number of different topics, for example, findings against the Council by various decision-making bodies, the Council's Standing Orders and construction works at Anton Drive. They are not, as a whole, so interrelated that they can only be dealt with as a single request. Being separate requests, they cannot (as indicated above) be aggregated for the purposes of section 12(1) of FOISA.
16. In all the circumstances of this case, considering its responses to Mr Soutar and to the investigating officer, the Commissioner cannot accept that the Council has justified its application of section 12(1) of FOISA to Mr Soutar's email of 9 September 2013, given that it can only reasonably be approached as a number of requests for information. Ultimately, it is for the Council to determine how many individual requests it is required to deal with here, but it is clear that there are several. The Council must justify its application of section 12(1) to each of these, where appropriate and assuming that it what it wishes to do, with reference to calculations supporting its cost estimates.
17. The Commissioner therefore requires the Council to address each of Mr Soutar's requests individually, i.e. not as one single request, in accordance with the requirements of Part 1 of FOISA. This means providing a fresh response (or responses) to his requirement for review, substituting a different decision (or decisions) in terms of section 21(4)(b) of FOISA. In relation to those requests which are seeking environmental information, it may wish to consider applying the exemption in section 39(2) of FOISA before going on to consider these (as it must – see below) under the EIRs.

The Environmental Information (Scotland) Regulations 2004

18. As indicated above, the Council dealt with Mr Soutar's case wholly under FOISA.
19. During the investigation, the Council was asked to comment on whether it considered any of Mr Soutar's requests to be for environmental information, as defined in regulation 2(1) of the EIRs. It was asked to consider the implications of applying the EIRs to the information.
20. The Council considered it "extremely difficult" to determine, in the absence of the information requested, whether or not a request was for environmental information. However, it acknowledged that some of the requests would be for environmental information and suggested that it would be entitled to deal with these as manifestly unreasonable, under regulation 10(4)(b) of the EIRs. It did not provide full reasons to support the application of this exception.
21. The Commissioner set out her thinking on the relationship between FOISA and the EIRs in some detail in Decision 218/2007 Professor A D Hawkins and Transport Scotland and need not repeat it in full here. Here, it will suffice to summarise some of the key points:
 - (a) The definition of what constitutes environmental information should not be viewed narrowly, but in line with the definition of environmental information in the EIRs;

- (b) There are two separate statutory frameworks for access to environmental information, and an authority is required to consider any request for environmental information under both FOISA and the EIRs;
 - (c) Any request for environmental information therefore must be dealt with under the EIRs;
 - (d) In responding to a request for environmental information under FOISA, an authority may claim the exemption in section 39(2).
22. The Commissioner has considered the terms of Mr Soutar's requests. She acknowledges that it may not always be apparent simply from the terms of a request whether or not the applicant is seeking environmental information, but in this case it appears clear that those requests seeking information on construction works (i.e. those grouped under numbers 3, 4 and 5) are for information on measures affecting or likely to affect the elements of the environment. In other words, they will fall within part (c) of the definition of environmental information in regulation 2(1) (see Appendix 1 below). Clearly, the application of the EIRs to these requests is a matter which should have been considered by the Council.
23. In not considering the application of the EIRs to Mr Soutar's requests, the Commissioner finds that the Council failed to comply with regulation 5(1) of the EIRs. She now requires the Council to identify which of these requests are for environmental information and to deal with them accordingly under the EIRs (by issuing a fresh response to his requirement for review in terms of regulation 16(4)). The Council should note that there is nothing in the EIRs which would permit the aggregation of requests for the purposes of responding to them under the EIRs.

Advice and assistance

24. In Mr Soutar's requirement for review of 24 October 2013, he stated that he had asked several questions of the Council, each of which should have been considered separately. He offered to break down his requests further if that would help.
25. Section 15(1) of FOISA and regulation 9(1) of the EIRs provide that a Scottish public authority must, so far as it is reasonable to expect it to do so, provide advice and assistance to a person who proposes to make, or has made, a request for information to it. Section 15(2) and regulation 9(3) provide that a Scottish public authority which conforms with the Section 60 Code (in relation to the provision of advice or assistance) is to be taken to comply with this duty.
26. The Scottish Ministers' Code of Practice on the discharge of functions by Scottish public authorities under FOISA and the EIRs (the Section 60 Code²) states (at paragraph 1.9 in Part 2):

Providing advice and assistance when the upper cost limit applies

Where the cost of responding to a request made under FOISA will exceed the upper cost limit of £600 or the burden of responding to a request under the EIRs would be manifestly unreasonable (and so the authority is not obliged to comply), the authority may again consider what information could be provided below the cost limit, and suggest how the applicant may wish to narrow the scope of their request accordingly.

The Commissioner will generally consider the provision of such advice and assistance to be good practice.

27. In its review outcome, the Council gave some explanation to Mr Soutar in relation to the cost of responding to those questions about findings of the Ombudsman, Tribunals and Courts, but this did not include advice on how to narrow his requests to bring the cost of responding within the £600 limit. The investigating officer asked the Council to clarify what advice it gave to Mr Soutar to help him narrow his requests, but the Council did not explicitly address this

² <http://www.scotland.gov.uk/Resource/Doc/933/0109425.pdf>

point. The Council did, however, comment on the background to Mr Soutar's requests, noting that it had provided relevant information in response to other requests and complaints. It also provided some information to Mr Soutar during the investigation. All of this suggests that the Council was in a position to identify, locate and provide reduced sets of information falling within the general scope of these requests.

28. In the circumstances narrated above, the Commissioner finds that the Council has not met its obligations to advise and assist Mr Soutar to help him narrow his requests. To comply with section 15 of FOISA and regulation 9(1) of the EIRs, it is required to do so now.

Decision

The Commissioner finds that Dundee City Council (the Council) failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) and with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information requests made by Mr Soutar. She finds that the Council was not entitled to aggregate the costs of Mr Soutar's requests and thereby apply section 12(1) of FOISA.

The Commissioner also finds that by failing to identify some of Mr Soutar's requests as being for environmental information and respond as required under the EIRs, the Council failed to comply with regulation 5(1) of the EIRs.

Finally, the Commissioner finds that the Council did not meet its obligations to provide advice and assistance to Mr Soutar when responding to his requests, and so failed to comply with section 15 of FOISA and regulation 9(1) of the EIRs.

The Commissioner therefore requires the Council to respond to Mr Soutar's requirement for review, in accordance with both FOISA and the EIRs (including the provision of such advice and assistance as it would be reasonable to expect in the circumstances). She requires the Council to comply with this decision notice by 18 August 2014.

Appeal

Should either Mr Soutar or Dundee City 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
1 July 2014

Appendix 1

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.

...

12 Excessive cost of compliance

- (1) Section 1(1) does not oblige a Scottish public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed such amount as may be prescribed in regulations made by the Scottish Ministers; and different amounts may be so prescribed in relation to different cases.

...

15 Duty to provide advice and assistance

- (1) A Scottish public authority must, so far as it is reasonable to expect it to do so, provide advice and assistance to a person who proposes to make, or has made, a request for information to it.
- (2) A Scottish public authority which, in relation to the provision of advice or assistance in any case, conforms with the code of practice issued under section 60 is, as respects that case, to be taken to comply with the duty imposed by subsection (1).

21 Review by Scottish public authority

...

- (4) The authority may, as respects the request for information to which the requirement relates-

...

- (b) substitute for any such decision a different decision; or

...

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;

...

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.

...

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.

...

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.

...

Appendix 2

Mr Soutar's Information Requests

1)

How many times in the last five years has the Ombudsman found the Council has acted wrongly?

Following these decisions, how many employees have been officially reprimanded?

How many times in the last five years has a Tribunal found that the Council acted wrongly?

Following those decisions, how many employees have been officially reprimanded?

How many times in the last five years has a Court found against the Council?

Following those decisions, how many employees have been officially reprimanded?

2)

You say the Standing Order that lists of contractors should be drawn up after advertising, is out of date.

Is it legal to ignore standing orders due to that reason or any other reason?

Have any other standing orders been regularly ignored?

3)

What was the final cost of the work at Anton Drive?

What were the total charges for sub contract work?

What was the cost attributed to supervision and other overheads by the Environmental Department?

What was the amount in the final cost to cover physical (manual) work on site by Environmental Department employees?

4)

What was the total value of construction work carried out in house by departments of the Council in the last 5 years?

What is the total value of work subcontracted during these "in house" "contracts"?

5)

Does the work at Anton Drive occupy land owned by the Council and doesn't the occupation of that land by the retaining material change its use?

If so, does that not mean planning permission should have been sought due to the exception about "change of use" mentioned in the GPDO?

Does the work at Anton Drive involve more than 200 cubic metres?

If so, does that not mean planning permission should have been sought in accordance with the GPDO?

6)

Where and when was the "open afternoon" advertised?

What "feedback" do you refer to?

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