

Decision Notice

Decision 109/2019: Mr Y and East Renfrewshire Council

Braidbar Quarry

Reference No: 201900241
Decision Date: 18 July 2019



Scottish Information
Commissioner

Summary

The Council was asked for information about Braidbar Quarry from March 2018. The Commissioner investigated and found that the Council did not hold any relevant information.

Relevant statutory provisions

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 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 Appendix 1 to this decision. The Appendix forms part of this decision.

Background

1. On 2 October 2018, Mr Y made a request for information to East Renfrewshire Council (the Council). He asked for all information regarding Braidbar Quarry from 15 March 2018.
2. The Council responded on 22 October 2018. The Council stated that it did not hold any information.
3. On 6 November 2018, Mr Y wrote to the Council requesting a review of its decision on the basis that he believed information was held. He referred to a “major” report that he was provided with, that was scheduled to be considered at next full Council meeting on 31 October 2018. On that basis, he believed that the Council had wrongly withheld information from him.
4. The Council notified Mr Y of the outcome of its review on 5 December 2018. The Council upheld its original response and advised no information was held under regulation 10(4)(a) of the EIRs. It explained that the report referred to was not based on any significant communication between the Council and Advance Construction (the third party involved in the project with the Council): any communications had taken place by telephone and had not been recorded.
5. On 6 February 2019, Mr Y wrote to the Commissioner. Mr Y applied to the Commissioner for a decision in terms of section 47(1) of the Freedom of Information (Scotland) Act 2002 (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. Mr Y stated he was dissatisfied with the outcome of the Council’s review. He considered that the timing of his request and overlap with the report to the Council meant the Council must have been in contact with the third party in order to prepare the report which was, as he argued, clearly the result of extensive work and external correspondence.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that Mr Y made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to him for a decision.
7. On 4 March 2019, the Council was notified in writing that Mr Y had made a valid application and the case was allocated to an investigating officer.
8. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Council was invited to comment on this application and to answer specific questions relating to whether the Council held any information at the time of the request.

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 him by both Mr Y and the Council. He is satisfied that no matter of relevance has been overlooked.

Application of the EIRs

10. It is clear that any information falling within the scope of this request would be environmental as defined in regulation 2(1) of the EIRs as it is in regard to the potential development of a former quarry. As such the Commissioner is satisfied that it would fall within paragraphs (a) and/or (c) of the definition in regulation 2(1) of the EIRs. In any event Mr Y has not expressed dissatisfaction with the Council's handling of this request under the EIRs and the Commissioner will consider that handling solely in terms of the EIRs.

Has all relevant information been identified, located and provided?

11. The Commissioner's remit is to investigate and reach a determination on recorded information, if held by a Scottish public authority. He cannot comment on what a public authority ought to hold, but he can consider whether the Council took adequate, proportionate steps to establish what information, if any it held falling within the scope of Mr Y's request at the time of that request.
12. The standard of proof in considering whether a Scottish public authority holds information is the civil standard of the balance of probabilities. In determining this, the Commissioner will consider the scope, quality, thoroughness and results of the searches carried out by the public authority. He will also consider, where appropriate, any reason offered by the public authority to explain why the information was not held.
13. 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 did not hold the information when the applicant's request is received. This exception is subject to the public interest test in regulation 10(1)(b) of the EIRs, so can only apply if, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in making the information available (although, logically, it is highly unlikely that there will ever be a public interest in disclosing information which is not, in fact, held).
14. Mr Y expressed concern that the response received on 22 October 2018 stated that no information was held, yet on 29 October 2018 he received a copy of what he described as a

major report, distributed by the Council on 25 October 2018, into the future of Braidbar Quarry. Mr Y argued that it was not feasible that such a report could be produced without extensive correspondence or produced in the three days.

Searches

15. The Council provided details of the processes followed to identify any relevant documentation. The Council submitted that searches were restricted to information between the dates outlined in Mr Y's request (15 March – 2 October 2018, the date the request was received). Searches were made on manual filing held on the matter and on electronic records held by individuals involved in the issue. The Council used a variety of search terms, including: Advance Construction, Advanced Construction Ltd, Braidbar and Braidbar Quarry. Individuals were also asked to identify notes (of any description, i.e. including telephone or meeting notes) which may have been held outwith the manual filing system or electronic storage.
16. The Council explained that Mr Y had made a number of requests over a number of years in relation to Braidbar Quarry and therefore the source of manual records and identity of relevant individuals were well established. Information provided as a result of previous requests was disregarded as already provided. The Council stated that the only extra necessary checks were for any new officers becoming involved in the issue and whether they held information separately since the previous disclosure of information or any new files created.
17. According to the Council, work on the report was undertaken *after* the receipt of Mr Y's request on 2 October 2018. The report was drafted by the Director of Environment, who was primarily involved in the subject matter of the request and took into account information ingathered from discussions with Advance Construction over a substantial period of time. The nature of the information generating the report, the Council argued, was all within the Director's historical knowledge and was not as detailed as required to be prompted by recorded communication during the period of the request. The Council provided evidence that the report in question was created on 25 October 2018, the day it was provided as part of the agenda to be tabled for the meeting on 31 October 2018.

Conclusions

18. As indicated above, the Commissioner's remit here extends only to the consideration of whether the Council actually held the information requested at the time of the request, and whether it complied with the EIRs in responding to Mr Y's request.
19. The Commissioner is of the view that, having considered the explanations by the Council and having reviewed the content of the report in question, that extensive correspondence or discussions were not required in the compilation of this report.
20. The Commissioner accepts that the Council took adequate and proportionate steps to establish what information it held and that it was only obliged to consider information held at the time of Mr Y's request on 2 October 2018. In this case, the Commissioner is satisfied that the information in question was not held at the time it received Mr Y's request.
21. Given that the Commissioner is satisfied that the information requested was not held by the Council at the time of the request,, he does not consider there to be any conceivable public interest in requiring that the information be made available. Given this conclusion, he is satisfied that the Council was entitled to refuse Mr Y'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 Y.

Appeal

Should either Mr Y or the 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

18 July 2019

The Environmental Information (Scotland) Regulations 2004

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;

...

Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews, Fife
KY16 9DS

t 01334 464610

f 01334 464611

enquiries@itspublicknowledge.info

www.itspublicknowledge.info