

Decision Notice

Decision 026/2016: Company X and the Scottish Ministers

Zero Waste Scotland funding - Sustaining Dunbar and business displacement

Reference No: 201501153

Decision Date: 5 February 2016



Scottish Information
Commissioner

Summary

On 21 August 2014, Company X asked the Ministers for information they held about Zero Waste Scotland (ZWS) funding, including information relating to business displacement and the community development trust, Sustaining Dunbar. The Ministers disclosed some information and stated that they did not hold any further information.

Following an investigation, the Commissioner accepted that the Ministers did not hold any further information falling within the scope of the request.

Relevant statutory provisions

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (Interpretation) (paragraphs (a) and (c) 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); 10(1) 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 21 August 2014, solicitors acting on behalf of Company X made a request for information to the Ministers. The request asked for all information contained within:
 - (i) documents or records regarding applications by Sustaining Dunbar to ZWS for funding for projects – particularly the application for the “Zero Waste Town” – including copies of such application or tender documents and all correspondence relating to such funding between ZWS and Sustaining Dunbar;
 - (ii) relevant documents or records setting out the terms on which funding has been made to Sustaining Dunbar by ZWS, whether in response to an application or tender;
 - (iii) documents or records considering displacement of private business as a result of ZWS funding of projects in Scotland generally, including how displacement was considered by ZWS prior to making funding for projects available and
 - (iv) documents or records considering displacement and potential displacement of private business by the proposed activities of Sustaining Dunbar.
2. Subsequent references to correspondence with Company X should be read as including correspondence with solicitors acting on their behalf.
3. By way of background, information on the activities of Sustaining Dunbar and of ZWS can be found here: <http://sustainingdunbar.org/> and here: <http://www.zerowastescotland.org.uk/content/who-we-are>.
4. The Ministers responded on 6 October 2014 and provided some information in response to part (i) of the request. They confirmed that they were responding under the EIRs and applied section 39(2) of the Freedom of Information (Scotland) Act 2002 (FOISA). With regard to the

remaining parts of the request, they applied regulation 10(4)(a) of the EIRs, stating that they did not hold any of the information and advising Company X to contact ZWS directly.

5. The Ministers also stated that they were relying on regulation 10(4)(e) (internal communications) of the EIRs to withhold information, but it was not clear in the circumstances what information this was referring to.
6. On 1 December 2014, Company X wrote to the Ministers, requiring a review of their decision. Company X was dissatisfied because:
 - It disagreed with the application of regulation 10(4)(e) and had not been made aware of which information this exception was being applied to;
 - It believed more information should be held by the Ministers. In particular, it referred to complaints it understood had been investigated: no documents had been provided which indicated that any such investigation had taken place.
 - The response to its request had been issued outwith the 20 working day deadline.
7. The Ministers notified Company X of the outcome of their review on 23 December 2014.
 - They confirmed that they held no further information (and therefore upheld their application of regulation 10(4)(a) and withdrew their reliance on regulation 10(4)(e)).
 - They had not interpreted the request as extending to the investigation of complaints made by Company X. They suggested making a separate request in relation to this information.
 - They apologised for the late response and stated that their procedures would be reviewed to ensure that this did not happen in future.
 - They acknowledged that they should have worded their response more clearly when referring to ZWS, to allow Company X to request the information directly from ZWS. They stated that ZWS was a separate organisation.
8. On 17 June 2015, Company X wrote to the Commissioner. Company X applied 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. In essence, Company X disagreed with the Ministers' position that they held no further information falling within the scope of the request of 21 August 2014.

Investigation

9. The application was accepted as valid. The Commissioner confirmed that Company X made a request for information to a Scottish public authority and asked the authority to review their response to that request before applying to her for a decision.
10. On 1 July 2015, the Ministers were notified in writing that Company X had made a valid application 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 Ministers were invited to comment on this application and answer specific questions, with particular reference to the steps taken to establish that they held no relevant information.

12. The Ministers responded on 30 July 2015. Further submissions were sought and obtained from both the Ministers and Company X.

Commissioner's analysis and findings

13. 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 X and the Ministers. She is satisfied that no matter of relevance has been overlooked.
14. In submissions of 22 December 2015, Company X referred to investigations conducted, and funding decisions made, by the Ministers, with the apparent expectation that these would be matters covered by the Commissioner's investigation. The Commissioner must emphasise that her remit in this case is confined to considering whether, in handling Company X' request for information, the Ministers complied with the relevant requirements of (as appropriate) FOISA and/or the EIRs.

Application of the EIRs

15. The Commissioner is satisfied that any information covered by this request would be environmental information, as defined in regulation 2(1) of the EIRs (paragraphs (a) and (c) of the definition of "environmental information" – see Appendix 1). The information relates substantially to the funding of an organisation promoting recycling and the reduction of carbon emissions into the environment. Company X has not disputed the Ministers' decision to handle the request under the EIRs and the Commissioner will consider the information in what follows solely in terms of the EIRs.

Was all relevant information identified, located and made available by the Ministers?

16. 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 the information held by an authority when it receives a request.
17. Company X considered that the Ministers held more information than they had identified and disclosed in their response. The Ministers submitted that they had provided all the information they held that fell within the scope of part (i) of Company X' request and did not hold the remaining requested information. In respect of the remaining information, they applied the exception in regulation 10(4)(a) of the EIRs.
18. The exception in regulation 10(4)(a) of the EIRs applies to information which is requested from, but which is not held by, a Scottish public authority. As with all exceptions in regulation 10(4), it is subject to the public interest test in regulation 10(1)(b), although it is unlikely that there will be a public interest in making available information which the public authority does not hold.

Interpretation of the request

19. Company X expressed concern that the Ministers' searches failed to capture information relating to the investigation of a complaint regarding Sustaining Dunbar. The Commissioner has considered the Ministers' explanations in this regard and is satisfied that the Ministers interpreted Company X' request reasonably. In any event, following further engagement with Company X during the investigation, this appeared no longer to be an issue.

Searches carried out by the Ministers

20. The Ministers stated that the Scottish Government's Electronic Record and Data Management (eRDM) system was searched for any documents that would fall within the scope of the request. Searches were also conducted of personal computers and email records, along with hard copy files/folders of policy officials with an interest in the relevant area of ZWS's work.
21. The Ministers explained that the following search terms were used:
 - Sustaining Dunbar
 - Sustaining Dunbar, Zero Waste Scotland
 - Sustaining Dunbar, business displacement
 - Zero Waste Scotland, business displacement
 - Business displacement
 - Business displacement, waste
 - Business displacement, environment
 - Zero Waste Town.
22. The Ministers considered the search terms/key words used to be comprehensive and stated they were satisfied that all or any relevant documents would have been stored in the places searched. Screen captures of the eRDM searches were also provided by the Ministers, to show the Commissioner the results of each search.
23. The Ministers confirmed that they had checked all documents identified by these searches, to confirm whether they were relevant to the request. They submitted that all the documents falling within the scope of the request had been provided to Company X.
24. ZWS is a company limited by guarantee. For a period of slightly less than a year (1 July 2014 to 27 May 2015, both dates inclusive), it was wholly owned by the Ministers. During that period, which happens to have coincided with the making of Company X' information request and requirement for review, it would appear to have been a Scottish public authority for the purposes of the EIRs (definition (b) of "Scottish public authority" in regulation 2(1) of the EIRs includes a publicly owned company as defined in section 6 of FOISA).
25. Company X did not ask ZWS for the information, so the Commissioner is not required to reach a conclusion on whether it was, at the relevant time, a Scottish public authority for the purposes of EIRs (but see her consideration of the Ministers' provision of advice and assistance in this connection, below). The only way in which information held by ZWS could be relevant to the present investigation would be if it were held on behalf of the Ministers.
26. Company X suggested that this should be considered a possibility, noting that ZWS was (at the time) both wholly owned and fully funded by the Ministers. Company X also suggested that information might have been held by the Ministers on behalf of ZWS, in which case this should still have been considered held by the Ministers. While it is not entirely clear how the latter possibility could have arisen in the circumstances (the Ministers' submissions at all stages appearing to relate to any relevant information in their possession), the Commissioner will consider both points below.

27. In response to the investigating officer's request for comments, the Ministers explained that ZWS was an independent delivery programme for Scottish Government waste policy. They acknowledged that it was funded by them and operated to objectives set by them, but maintained that it operated independently in the day-to-day administration of its projects and budgets, including all aspects of the handling of funding applications. Given this independent status, the Ministers submitted that they would not hold information on individual projects funded by ZWS, except to the extent that they had received such information from ZWS (in which case it had been given to Company X). They provided information relating to ZWS's funding and noted that they had advised Company X to request the information from ZWS.

The Commissioner's conclusions

28. In reaching a conclusion in this case, the Commissioner has considered all of the submissions she has received on the searches and other enquiries carried out by the Ministers, with the evidence provided to her showing the results of these searches.
29. The Commissioner considers the searches conducted by the Ministers to have been proportionate and reasonable in the circumstances. There is nothing to suggest that they covered anything less than all information the Ministers held and which fell within the scope of the request, whether held by the Ministers in their own right or on behalf of a third party. There is, in any event, no suggestion that anything was held on behalf of ZWS or any other third party. In the circumstances, there is no need to consider whether information held on behalf of ZWS should be deemed to have been held by the Ministers.
30. The Commissioner has also considered whether ZWS could be deemed to have held information on behalf of the Ministers. In the circumstances, having considered the terms of the request and all relevant submissions, she considers it reasonable to conclude that ZWS was more likely than the Ministers to hold information falling within the scope of the request. It does not follow that they held it on the Ministers' behalf.
31. The Commissioner accepts that ZWS is (and was, at the relevant time) a separate legal entity from the Ministers. In law, that was the case even if ZWS was wholly owned by the Ministers. Having considered the documentation she has received from the Ministers relative to ZWS's funding, she accepts that this sets out a framework for the award of project-related funding by ZWS. Within that framework, the award of such funding is a matter for ZWS. In the circumstances, the Commissioner cannot accept that information on the funding of projects by ZWS (broadly, the subject matter of the request) could be regarded as held by ZWS on behalf of the Ministers, or indeed on behalf of anyone else.
32. On the basis of the submissions received, therefore, the Commissioner accepts that the Ministers held no relevant information falling within the scope of Company X' request, in addition to that disclosed already. She is therefore satisfied that the exception in regulation 10(4)(a) of the EIRs was correctly applied in this case.
33. As indicated above, the exception in regulation 10(4)(a) is subject to the public interest test and can only be upheld if, in all the circumstances, the public interest in maintaining the exception outweighs the public interest in making the information available.
34. The Commissioner is satisfied that the Ministers did not hold the information in question. Consequently, she does not consider there to be any conceivable public interest in requiring that such information be made available. The Commissioner therefore concludes that the public interest in making the requested information available is outweighed by that in maintaining the exception in regulation 10(4)(a) of the EIRs.

35. As a result, the Commissioner is satisfied that the Ministers were entitled to rely on the exception in regulation 10(4)(a), on the basis that they did not hold any information in addition to that provided in response to part (i) of Company X' request.

Regulation 9(1) – Duty to provide advice and assistance

36. Company X suggested that the Ministers should have advised them that the information could be requested from ZWS, during the time they were the sole member of ZWS. The Commissioner will consider this in the context of regulation 9 of the EIRs.
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 EIRs¹ 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.

39. The Commissioner notes that the Ministers did, both in their initial response of 6 October 2014 and in their review outcome of 23 December 2014, suggest that Company X might wish to contact ZWS to request the information. In the initial response, the Ministers also provided a link for contact details.
40. The Commissioner also notes that during the course of the investigation, on 28 September 2015, the investigating officer picked up on this point and asked Company X if it had actually made any such request to ZWS. Company X, in their response of 22 December 2015, advised that they had made no such request.
41. In the circumstances, the Commissioner is satisfied that the Ministers made a reasonable effort to provide Company X with advice and assistance, in compliance with regulation 9(1) of the EIRs.
42. In reaching this conclusion the Commissioner has taken account of paragraphs [64] and [65] of the Court of Session Opinion delivered by Lord Reed [2009] in the case of *Glasgow City Council and Dundee City Council v The Scottish Information Commissioner CSIH 73*². (The Opinion focusses on the equivalent duty to provide advice and assistance under section 15 of FOISA.)

43. These paragraphs of the Opinion state that,

¹

<http://www.itspublicknowledge.info/nmsruntime/logLink.aspx?linkURL=http%3a%2f%2fwww.gov.scot%2fAbout%2fInformation%2fFOI%2fSection60Code%2fs60codeofpractice>

² <https://www.scotcourts.gov.uk/search-judgments/judgment?id=cc8f86a6-8980-69d2-b500-ff0000d74aa7>

“... there may be cases where a judgment has to be made as to whether, as a matter of fact, the information can reasonably be obtained by “the applicant”. In that regard, section 25(1) can be considered along with section 15, which places public authorities under a duty to provide advice and assistance to a person who proposes to make, or has made, a request for information. An applicant who has an alternative means of obtaining the information should not therefore be left in doubt as to how to go about it.

44. The Opinion goes on to state that,

“It can sometimes be necessary to take account of the nature and characteristics of the particular applicant: for example, if the applicant is disabled or does not understand English, then it may be that information which could reasonably be obtained by most persons cannot be so obtained by the applicant in question. We do not doubt that such factors as these may be relevant: there are indeed many forms of disadvantage that may prevent information from being reasonably obtainable in an individual case. If that is so, however, then we are at a loss to understand why account should not equally be taken of circumstances which render information more accessible to the applicant than it is to the general public.”

45. The Commissioner has borne in mind that, as in the case referred to above, Company X was represented by a large firm of corporate solicitors. If it were accepted by the Ministers that information could be pursued from ZWS as of right under the EIRs (and it is not entirely clear that it was, at the relevant time), it might have been advisable, with a view to complying with regulation 9(1), to highlight that to the applicant. In Company X' circumstances, the Commissioner considers it to have been something the applicant (appropriately advised by its solicitors) could reasonably have worked out for itself and taken the necessary action.

Delay in responding

46. Company X expressed concern at the time taken by the Ministers to respond to the request.

47. Regulation 5(2) of the EIRs gives Scottish public authorities a maximum of 20 working days following the date of receipt of the request to comply with a request for information. This is subject to qualifications which are not relevant in this case.

48. The Commissioner notes that the Ministers failed to provide Company X with a response within this timescale and therefore failed to comply with regulation 5(2) of the EIRs in this regard. She also notes that the Ministers acknowledged this failure and apologised to Company X in their review outcome of 23 December 2014. The matter was therefore addressed on review and is not something the Commissioner can make a finding on, or require any action in relation to, now.

Decision

The Commissioner finds that the Scottish Ministers (the Ministers) did not hold any further

information falling within scope of part (i) of the request and therefore their response to this part of the request complied with regulation 5(1) of the EIRs.

The Commissioner finds that the Ministers held no information falling within the remaining parts of the request and correctly applied the exception in regulation 10(4)(a) of the EIRs.

Appeal

Should either Company X or the Ministers 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

5 February 2016

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

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(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)-

(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.

...

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.

...

- (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;

...

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