

Decision Notice

Decision 231/2016: Company X and Dumfries and Galloway Council

Waste: contracts, invoices and data

Reference No: 201601178

Decision Date: 27 October 2016



Scottish Information
Commissioner

Summary

On 6 April 2016, Company X asked Dumfries and Galloway Council (the Council) for a range of information about waste management, including contracts, invoices and data.

The Council informed Company X that its request was manifestly unreasonable.

The Commissioner investigated and found that the Council had not provided sufficient evidence to show that the request was manifestly unreasonable. She found that the Council's response did not comply with technical requirements of the EIRs, and that the Council did not provide reasonable advice and assistance to Company X. She required the Council to respond afresh to Company X's request for review.

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), (b) and (c) of "environmental information"); 5(1) and (2)(b) (Duty to make available environmental information on request); 9(1) and (3) (Duty to provide advice and assistance); 10(1), (2) and (4)(b) (Exceptions from duty to make environmental information available); 13(b) and (c) (Refusal to make 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 6 April 2016, Company X made a request for information to the Council. The information requested was:
 1. A copy of the contract referred to in specified correspondence dated 24 January 2014.
 2. Copies of:
 - i) all invoices and/or conveyance notes relating to deliveries made by Oakbank Services to the Locharmoss RDF plant during the month of May 2014; and
 - ii) any contracts that exist between Oakbank Services and the Council's Economy, Environmental & Infrastructure Department and DG First for this period.
 3. Copies of contracts for each waste stream identified [in an attached table] in respect of the 2013-14 Financial Year.
 4. Information as to Council Waste received during Financial Year 2014-15.
 5. Copies of the contract or contracts between the Council and Oakbank Services ("Oakbank") for 2012 and 2013 relating to or governing:
 - i) the provision or delivery of waste by or on behalf of Oakbank to the Council; and/or

- ii) the collection of waste by Oakbank from the Council; and/or
 - iii) the delivery of waste to Locharmoss MBT plant, which is operated by Company X.
2. On 4 May 2016, the Council contacted Company X to seek clarification of part 2(i) of the request. It had identified a number of invoices which might fall within scope, but because it was not sure, it asked for a discussion with Company X. The Council indicated that it might not hold the information in a way that would confirm whether each job involved a delivery to the Locharmoss RDF plant.
3. Without waiting for a response to its request for a discussion with Company X, the Council responded to the request on 5 May 2016. The Council refused the request on the grounds that it was manifestly unreasonable, in line with regulation 10(4)(b) of the EIRs. It stated that it would not offer a detailed explanation at this time why the request was considered to be manifestly unreasonable, but stated “it is not solely due to the cost of complying with the request”.
4. On 5 May 2016, Company X responded to the Council’s query about part 2(i) of the request. It confirmed it would like to see all of the relevant information “even if the delivery location can be overtly identified, as long as this does not push the request over the cost threshold”.
5. On 12 May 2016, Company X wrote to the Council requesting a review of its decision. Company X stated that it was surprised to have its request refused on the grounds that it was manifestly unreasonable, as it had followed the Council’s advice on narrowing the terms of a previous request which had also been refused on these grounds. The Council’s guidance was that the request should be “accurately phrased, unable to be misinterpreted and one that would not be likely to be considered manifestly unreasonable”. Company X also complained that the Council had contacted it to seek clarification of the request, but then had issued its review response without waiting for clarification.
6. The Council notified Company X of the outcome of its review on 9 June 2016. It upheld its previous decision without modification. It referred to the Commissioner’s guidance and the factors relevant to consider in reaching a decision that a request is manifestly unreasonable.
7. On 27 June 2016, 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. Company X was dissatisfied with the outcome of the Council’s review because the Council had failed to explain its reasons for considering the request manifestly unreasonable.

Investigation

8. 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 its response to that request before applying to her for a decision.
9. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. On 11 July 2016, the Council was notified in writing that Company X had made a valid application. The Council was also invited to comment on this application and answer specific questions including justifying its reliance on any provisions of the EIRs it considered applicable to the information requested.

10. The Council provided submissions to the investigating officer on 10 August 2016.
11. Company X was invited to provide its comments as to why the information should be disclosed, and did so.

Commissioner's analysis and findings

12. In coming to a decision on this matter, the Commissioner considered the relevant submissions, or parts of submissions, made to her by both Company X and the Council. She is satisfied that no matter of relevance has been overlooked.

EIRs or FOISA?

13. The relationship between FOISA and EIRs was considered at length in *Decision 218/2007 Professor A D Hawkins and Transport Scotland*¹. Broadly, in the light of that decision, the Commissioner's general position is as follows:
 - (i) The definition of what constitutes environmental information should not be viewed narrowly.
 - (ii) 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.
 - (iii) Any request for environmental information therefore **must** be dealt with under the EIRs.
 - (iv) In responding to a request for environmental information under FOISA, an authority may claim the exemption in section 39(2).
 - (v) If the authority does not choose to claim the section 39(2) exemption, it must respond to the request fully under FOISA, by providing the information, withholding it under another exemption in Part 2, or claiming that it is not obliged to comply with the request by virtue of another provision in Part 1 (or a combination of these).
 - (vi) Where the Commissioner considers a request for environmental information has not been dealt with under the EIRs she is entitled (and indeed obliged) to consider how it should have been dealt with under that regime.
14. As the Commissioner has not seen the withheld information in this case, she asked the Council whether all of the information requested by Company X is environmental information. In response, the Council stated that all information within the scope of Company X's request falls within the definition of environmental information in regulation 2(1) of the EIRs.
15. The Commissioner accepts, from the wording of Company X's request, that any information caught by the request will be environmental information, as defined in regulation 2(1) of the EIRs (the relevant parts of which are set out in Appendix 1). The information relates to waste collection activities which affect or are likely to affect the elements of the environment described in paragraph (a) and the factors detailed in paragraph (b) of the definition of environmental information.

¹ <http://www.itspublicknowledge.info/applicationsanddecisions/Decisions/2007/200600654.aspx>

16. During the investigation, the Council confirmed that it wished to rely upon section 39(2) of FOISA.

Section 39(2) of FOISA - environmental information

17. The exemption in section 39(2) of FOISA provides, in effect, that environmental information (as defined by regulation 2(1) of the EIRs) is exempt from disclosure under FOISA, thereby allowing any such information to be considered solely in terms of the EIRs. During the investigation, the Council confirmed that it wanted to apply the exemption in section 39(2) to the information requested by Company X. In this case, the Commissioner accepts that the Council was entitled to apply the exemption to the requested information, given her conclusion that the requested information is environmental information.
18. As there is a separate statutory 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 the request (insofar as it concerns environmental information) in line with the requirements of the EIRs outweighs any public interest in disclosing the information under FOISA.
19. Taking all of the above into account, for the purposes of reaching a decision in this case, the Commissioner will consider the request in terms of the EIRs in what follows.

Was the request manifestly unreasonable?

20. Under the exception in regulation 10(4)(b) of the EIRs, a Scottish public authority may refuse to make environmental information available to the extent that the request for information is manifestly unreasonable. If it finds that the request is manifestly unreasonable, it is still required to make the information available unless, in all the circumstances, the public interest in making it available is outweighed by that in maintaining the exception. In considering whether the exception applies, it must interpret it in a restrictive way and apply a presumption in favour of disclosure.
21. The Commissioner's general approach is that the following factors are relevant when considering whether a request is vexatious or manifestly unreasonable. These are that the request:
- (i) would impose a significant burden on the public body
 - (ii) does not have a serious purpose or value
 - (iii) is designed to cause disruption or annoyance to the public authority
 - (iv) has the effect of harassing the public authority
 - (v) would otherwise, in the opinion of a reasonable person, be considered to be manifestly unreasonable or disproportionate.
22. This is not an exhaustive list. Depending on the circumstances, other factors may be relevant, provided the impact on the authority can be supported by evidence. The Commissioner recognises that each case must be considered on its merits, taking all the circumstances into account. The term "vexatious" or "manifestly unreasonable" must be applied to the request and not the requester, but an applicant's identity, and the history of their dealings with a public authority, may be relevant in considering the nature and effect of the request and surrounding circumstances.

The Council's submissions

23. The Council provided its submissions as to why it considered Company X's request manifestly unreasonable. The Council requested that the detail of its submissions should not be included within the Commissioner's decision, stating that do so would put it at a disadvantage in its discussions with Company X.
24. The Commissioner accepts that disclosing the finer detail of the Council's submissions would put it at a disadvantage with Company X. However, the Commissioner has not accepted that this applies to everything from the Council's submissions.
25. The Commissioner has taken a measured approach, ensuring that nothing relating to the Council's contractual relationship with Company X has been included in this decision, but including some parts of the submission which explain (in a broad sense) the Council's reliance on regulation 10(4)(b) of the EIRs.
26. The Council stated that it considered the following factors supported its reasoning as to why it considered the request manifestly unreasonable:
 - (i) it would impose a significant burden on the Council
 - (ii) it was designed to cause disruption or annoyance to the Council
 - (iii) it has had the effect of harassing the Council.
27. In relation to the significant burden which the request would impose, the Council took into consideration the following factors:
 - staff time involved in analysing information and accessing the amount of information from software systems
 - cost implication resulting from any related disputes
 - staff not being able to progress with their current workload
 - a small team of five staff deals with all waste matters.
28. The Council submitted the following reasons why it believed the request was designed to cause disruption or annoyance to the Council:
 - it is trying to negotiate outstanding issues with Company X
 - the request has the effect of disrupting and frustrating attempts to implement a contract.
29. The Council submitted the following reasons why the request has the effect of harassing the Council:
 - the Council is being distracted from the task at hand (this relates to the Council's attempts to progress a contract variation to address new legislation)
 - the Council has previously found that when it was close to agreeing a matter, Company X would look for something else to increase the cost to the Council.
30. The Council did not provide an estimate of the costs it was likely to incur in responding to the request. It explained that it had identified a number of invoices falling in scope of part 2(i) of the request. Having considered some of these invoices, the Council submitted that it would

have to contact each department to find out if the relevant information was held: it considered such work would impose a significant burden.

The Commissioner's findings

31. There is no definition of "manifestly unreasonable" in the EIRs, or in Directive 2003/4/EC² from which they are derived. The Commissioner's view is that "manifestly" implies that a request should be obviously or clearly unreasonable and she notes the opinion of the Information Tribunal in *Dr Kaye Little v Information Commissioner and Welsh Assembly Government (EA/2010/0072)*³, which considers the equivalent regulation to 10(4)(b) of the Environmental Information Regulations 2004, and states:
- "From the ordinary meaning of the words "manifestly unreasonable", it is clear that the expression means something more than just "unreasonable". The word "manifestly" imports a quality of obviousness. What is in issue, therefore, is a request that is plainly or clearly unreasonable. It is a more stringent test than simply "unreasonable".
32. This view was confirmed in the (English and Welsh) Appeal Court decision *Dransfield & Anor v The Information Commissioner & Anor* [2015] EWCA Civ 454⁴ (Dransfield) which comments:
- "The word "manifestly...means of course the unreasonableness must be clearly shown. This saves the authority from having to make any detailed investigation into matters which it does not know or are not in the public domain."
33. Whether a request is manifestly unreasonable will depend on the facts of each case. It may apply where it can be demonstrated that a request is vexatious, or where compliance would incur unreasonable costs for the public authority or an unreasonable diversion of public resources.
34. *Decision 024/2010 Mr N and the Scottish Ministers*⁵ established that the Commissioner was likely to take into account the same kinds of considerations in deciding whether a request was manifestly unreasonable under the EIRs as in reaching a decision as to whether a request was vexatious in terms of section 14(1) of FOISA. In *Dransfield*, Lady Justice Arden commented that while "manifestly unreasonable" differs on its face from "vexatious" (section 14(1) of FOISA), the difference between the two phrases is "vanishingly small", if the approach to section 14 is objective and takes as its starting point the approach that "vexatious" means without any reasonable foundation for thinking that the information sought would be of value to the requester or the public.
35. In this case, the Commissioner considers that the Council's submissions are generally poor and unsubstantiated, even taking account of the additional information in the submission which is not discussed in this decision notice. The Council has been given ample opportunity to justify its position that it considers Company X's request is manifestly unreasonable.
36. The Commissioner has considered each part of the argument put forward by the Council to support its view that the request made by Company X was manifestly unreasonable.

² <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32003L0004:EN:HTML>

³

[http://www.informationtribunal.gov.uk/DBFiles/Decision/i475/%5b2010%5dUKFTT_EA20100072_\(GRC\)_20101230.pdf](http://www.informationtribunal.gov.uk/DBFiles/Decision/i475/%5b2010%5dUKFTT_EA20100072_(GRC)_20101230.pdf)

⁴ <http://www.bailii.org/ew/cases/EWCA/Civ/2015/454.html>

⁵ <http://www.itspublicknowledge.info/applicationsanddecisions/Decisions/2010/200900461.asp>

Significant burden

37. The Council has not provided any factual evidence to explain how responding to the request would impact upon the Council and its staff. It has not attempted to quantify the burden which would be placed on the team of staff dealing with waste management, simply stating that there are only five members of that team. The Commissioner has not been provided with sufficient evidence to accept that disclosure would place a significant burden on the Council.
38. As an aside, the Commissioner notes that the Council's Information Guide⁶ (which specifies the information which the Council routinely publishes) includes a list of contracts which have gone through formal tendering, including name of supplier, period of contract and value. Given that this information is routinely available, the Commissioner does not accept that it should have been included in the Council's consideration of whether responding to the request would create a significant burden.

Disruption or annoyance

39. The Council submitted that the request was designed to cause disruption and annoyance. The Commissioner is aware that the Council has been involved in a legal dispute with Company X, but, again, the Council provided nothing of real substance to substantiate its assertion. The Council did not explain how the performance of its functions would be impeded by providing the information, or provide evidence to show a history of disruptive action by Company X.

Harassment

40. The Council asserted that the request was designed to cause harassment, but, again, did not provide anything of real substance to substantiate the claim. The Council asserted that it was being distracted from "the task at hand" (understood to be implementation of a contract variation to address new legislation), but it did not provide any evidence or detailed argument to support this point.

Conclusions

41. For the reasons set out above, the Commissioner finds that the Council was not entitled to refuse to comply with Company X's request under regulation 10(4)(b) of the EIRs.
42. Having reached this finding, the Commissioner is not required to consider the public interest test in regulation 10(1)(b) of the EIRs.
43. The Commissioner requires the Council to respond to Company X's request in accordance with the requirements of the EIRs (other than in terms of regulation 10(4)(b)). In other words, the Commissioner requires the Council to carry out a fresh review of its response to Company X's request, in accordance with regulation 16 of the EIRs.

Regulation 13 – Refusal to make information available

44. The Council's responses to Company X's request did not give any specific reason why it considered the request to be manifestly unreasonable. Regulation 13(b) of the EIRs requires a Scottish public authority to specify the reasons for refusing a request. Regulation 13(c) requires the authority to state the basis on which any exception relied upon applies.

⁶ <http://www.dumgal.gov.uk/CHttpHandler.ashx?id=17253&p=0>

45. The Council was asked for its submissions. It stated that it was satisfied that based on the information provided within the submission to the Commissioner, it had “appropriately specified the reasons for the refusal, both with the application of an exception and evidence to support this”. The Council added that, in terms of its decision to progress in this way, it felt this was covered by the information provided and the circumstances the Council finds itself in with Company X (i.e. the legal dispute).
46. Under the EIRs, an authority is required to provide **an applicant** with an explanation in line with regulation 13(b) and (c) if the request is being refused. Accordingly, the Commissioner has concluded that the Council failed to comply with the requirements of regulation 13(b) and (c) of the EIRs in responding to Company X’s request.

Duty to provide advice and assistance

47. The Commissioner has considered whether the Council provided sufficient advice and assistance to Company X in relation to its request of 6 April 2016.
48. Regulation 9 of the EIRs requires a public authority, so far as it reasonable to do so, to provide advice and assistance to a person who proposes to make, or has made, a request for information to it. The Scottish Ministers' Code of Practice on the discharge of Functions by Scottish Public Authorities under FOISA and the EIRs⁷ ("the Section 60 Code") gives guidance to authorities on providing such advice and assistance.
49. The Section 60 Code states, at paragraph 5.1.1:

"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."
50. The Section 60 Code cautions:

"Applicants should not be expected to always have the technical knowledge or terminology to identify the information they seek".
51. At paragraph 1.10 (Providing additional information), the Code says:

"The duty to provide advice and assistance does not extend to providing additional information which falls outside the scope of the information request, or locating information held by other public authorities. However, in some situations it may be helpful to provide some form of clarification or context to their response to avoid the information disclosed being misunderstood or misinterpreted."
52. As noted, the Council had previously provided Company X with advice on narrowing the scope of a similar request, also refused on the grounds that it was manifestly unreasonable. Company X was therefore surprised to learn that the Council had refused its narrowed request on the same grounds. The Commissioner asked the Council why it considered the revised request, based on its own advice, to be manifestly unreasonable.
53. The Council submitted that it did its best to respond to Company X’s requests individually in the way it would respond to any request, and had applied the ‘applicant blind’ principle (i.e. treating requests from Company X in the way it would treat the same request if made by any

⁷ <http://www.gov.scot/About/Information/FOI/Section60Code>

other person). It stated that “the Council takes its duties under FOISA seriously and believes in treating every requester with respect and in a consistent way”. The advice and assistance it had given in relation to the earlier request was provided as a result of this. However, when the latest request was received and the wider context was considered, the Council decided that “due to the circumstances, the request was manifestly unreasonable”.

54. The Council was asked why it contacted Company X to discuss its request on 4 May 2016 but sent its response to the request on 5 May, before Company X had a reasonable chance to respond. The Council accepted that in principle this would not be considered good practice but hoped the Commissioner would “take into consideration the circumstances and the fact that many Officers were involved with this response and appropriate consultation and input was required which naturally led to new information coming to light and the proposal of different responses”.
55. In the circumstances, the Commissioner considers that if the Council found that the April 2016 request was still manifestly unreasonable, it should have revised its previous advice, and provided Company X with new guidance.
56. The Commissioner also notes that the Council contacted Company X on 4 May 2016 to discuss part 2(i) of the request and indicated that it might hold some information. This represents good practice on the part of the Council. However, the Council did not wait for an answer from Company X before it issued its response. The Council’s explanation for adopting this approach was that there were many officers working on the response; the Commissioner does not find this a satisfactory explanation.
57. The Commissioner finds that the Council failed to comply with regulation 9 of the EIRs, in failing to provide reasonable advice and assistance to Company X.

Decision

The Commissioner finds that Dumfries and Galloway Council (the Council) failed to comply with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by Company X.

The Council was not entitled to refuse to comply with the request as manifestly unreasonable under regulation 10(4)(b) of the EIRs, its response was not in line with regulation 13(b) and (c) of the EIRs and it did not provide advice and assistance to Company X in line with regulation 9 of the EIRs

The Commissioner requires the Council to respond afresh to Company X’s request for review, other than in terms of regulation 10(4)(b) of EIRs. The Council must provide Company X with the outcome of this review by **Monday, 12 December 2016**.

Appeal

Should either Company X 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.

Enforcement

If the Council fails to comply with this decision, the Commissioner has the right to certify to the Court of Session that the Council has failed to comply. The Court has the right to inquire into the matter and may deal with the Council as if it had committed a contempt of court.

Margaret Keyse
Head of Enforcement

27 October 2016

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.

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;
- (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in paragraph (a);
- (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.

...

(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.
- (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

...

- (b) the request for information is manifestly unreasonable;

...

13 Refusal to make information available

Subject to regulations 10(8) and 11(6), if a request to make environmental information available is refused by a Scottish public authority in accordance with regulation 10, the refusal shall-

...

- (b) specify the reasons for the refusal including, as appropriate, any exception under regulation 10(4) or (5) or provision of regulation 11 and how the Scottish public authority has reached its decision with respect to the public interest under regulation 10(1)(b);
- (c) state the basis on which any exception relied on under regulation 10(4) or (5) or provision of regulation 11 applies if it would not otherwise be apparent;

...

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