

Decision Notice 137/2019

Site of former Dalry gasworks

Applicant:

Public authority: North Ayrshire Council

Case Ref: 201900090



Scottish Information
Commissioner

Summary

The Council was asked about the site of the former Dalry gasworks.

The Commissioner investigated and found that the Council had failed to identify and disclose all the information falling within the scope of the request. The Council also failed to respond to the request and requirement for review within the required timescales.

By the end of the investigation, he was satisfied that the Council had carried out appropriate searches to identify the information falling within the scope of the request.

Relevant statutory provisions

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations (5)(1) and (2)(a) (Duty to make available environmental information on request); 16(3), (4) and (5) (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 Appendix forms part of this decision.

Background

1. On 21 October 2018, the Applicant made a request for information to North Ayrshire Council (the Council). The Applicant requested details of any communications between the Council and the owners/agents of a former gas works in Dalry. The Applicant also requested details of any communications in relation to the Vacant and Derelict Land Funding (VDLF) obtained for the site.
2. The Council responded on 28 November 2018. The Council provided descriptive responses to the request.
3. On the same date, the Applicant emailed the Council requesting a review of its decision on the basis that it had not provided him with the information requested. The Applicant said he wanted the Council to clarify the following:
 - whether the owners had provided a price at which they would be prepared to sell and, if so, what that price was.
 - whether the Council ever approached the Scottish Government to ask about changing what would be done on the site with VDLF funding already obtained, and for details of all enquiries about the repurposing the funding for the site.
4. On 13 December 2018, the Council advised the Applicant that it was handling his correspondence of 28 November 2018 as a new request for information. On the same date, the Applicant responded to the Council arguing that the information fell with the scope of his original request and should be handled as a review.
5. On 4 January 2019, the Council acknowledged the Applicant's correspondence, apologised for the delay and confirmed that it would handle his correspondence of 28 November 2018 as a review.

6. The Council notified the Applicant of the outcome of its review on 10 January 2019. It apologised for the delay in handling his request and requirement for review. The Council also stated that further information falling within the scope of his request had been identified. Some of the information would be provided to him (within 14 days) and some of the information was withheld on the basis that regulation 10(5)(e) of the EIRs applied.
7. On 15 January 2019, the Applicant 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. The Applicant was dissatisfied with the outcome of the Council's review because he:
 - had not been provided with any information in response to his request;
 - did not accept the Council's reliance on regulation 10(5)(e) of the EIRs; and
 - was dissatisfied with the handling of his request.
8. On 24 and 25 January 2019, the Council provided a further response to the Applicant, providing information it identified as falling within the scope of the request. The Council also provided the Applicant with the price quoted by the owners of the site, alongside the related documentation. It also explained that the original request for VDLF funding was to carry out site improvement works and the potential purchase of the site and that, in its view, the purpose had not changed.
9. On 29 January 2019, and in response to the provision of this information and explanation, the Applicant expressed dissatisfaction to the Commissioner that:
 - he was not provided with all attachments to the documents provided;
 - he was not provided with any documentation showing the sale price quoted;
 - environmental/topography reports were missing; and
 - correspondence relating to VDLF funding did not demonstrate that the Scottish Government had been consulted on the repurposing of the VDLF funding.

Investigation

10. The application was accepted as valid. The Commissioner confirmed that the Applicant 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.
11. On 30 January 2019, the Council was notified in writing that the Applicant had made a valid application. The Council was asked to send the Commissioner any information withheld from the Applicant. The Council provided the information and the case was allocated to an investigating officer.
12. 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 answer specific questions about the information it held, searches it had conducted and the way in which it had handled the request. The Council responded on 18 April 2019.

13. On 20 August 2019, the Council disclosed further information to the Applicant that it considered to fall within scope of his request.

Commissioner's analysis and findings

14. In coming to a decision on this matter, the Commissioner considered all of the information and the relevant submissions, or parts of submissions, made to him by both the Applicant and the Council. He is satisfied that no matter of relevance has been overlooked.
15. Having considered the terms of the Applicant's request for review on 28 November 2018, the Commissioner's investigation is limited to information held by the Council falling into the following categories:
 - the price of the land quoted;
 - VDLF funding and correspondence with the Scottish Government; and
 - correspondence relating to the change in repurposing of the funding of the site.
16. The Commissioner will consider the Council's submissions on each of these parts of the request and reach a conclusion as to whether the Council has identified and disclosed all relevant information falling within the scope of the request.
17. Information relating to environmental/topography site investigation reports (withheld under regulation 10(5)(e)) are excluded from this investigation as they do not form part of the categories of information listed in paragraph 15.

Information falling in scope

18. Regulation 5(1) of the EIRs (subject to the various qualification contained in regulations 6 to 12) requires a Scottish public authority which holds environmental information to make it available when requested to do so by any applicant.
19. The standard proof to determine whether a Scottish public authority holds information is the civil standard of the balance of probabilities. In determining this, the Commissioner considers the scope, quality, thoroughness and results of the searches carried out by the public authority. He also considers, where appropriate, any reason offered by a public authority to explain why it does not hold the information, and any reason offered by an applicant to explain why an authority is likely to hold information. While it may be relevant as part of this exercise to explore what information should be held, ultimately the Commissioner's role is to determine what relevant information is (or was, at the time the request was received) held by the public authority.

Searches

20. The Council provided details of the searches it had conducted. It explained that it had identified three individuals that had direct involvement with the regeneration of the former gas works site. The Council's email searches focussed on these individuals alongside a search of the shared drive. The Council used the criteria "Dalry gas works", "VDLF funding proposal" and "North Street Dalry" to search for information. The Council's searches included inboxes of former employees. The Council provided the Commissioner with screen shots of the search results.

21. During the course of the investigation, the Council, on the request of the investigating officer, conducted additional searches for a specified document. The document was located and provided to the Applicant on 20 August 2019.

Price of land quoted

22. The Council informed the Applicant on 24 January 2019 that it had been quoted a price for the site and provided him with the figure. This formed part of a draft Heads of Terms of sale, which the Council also supplied to the Applicant on 24 January 2019.
23. Additional correspondence was also identified and disclosed to the Applicant, including a range of correspondence with the agents of the site. One of the emails disclosed to the Applicant contains a discussion about the sale of the land, and reference to site reports.
24. Having considered the information provided to the Applicant, the Commissioner is satisfied that the Council has now provided the Applicant with the information he requested (i.e. the price of the land quoted).
25. The Commissioner notes that this information was provided to the Applicant after responding to both the request and request for review. Consequently, the Commissioner must find that, in failing to identify, locate and provide all relevant information at the time it dealt with the Applicant's request, the Council failed comply with regulation 5(1) of the EIRs.

VDLF Funding and correspondence with the Scottish Government

26. The Council explained that it submitted a project delivery plan to the Scottish Government outlining its proposals to carry out site investigations and subsequent improvements. The Council stated that its proposals had not changed and therefore there was no need to contact the Scottish Government about the changes to the original plan other than to seek authority to carry forward funds awarded for the financial year 2017/18. The Council explained that the Scottish Government agreed to the carry forward. The Council confirmed that the correspondence between it and the Scottish Government relating to the proposals and timing had been released to the Applicant.
27. The Applicant acknowledged that the Council provided him with some information that related to this part of his request. However, he argued that some information was missing from the response: he referred specifically to an attachment to an email which referred to version 1 of a delivery plan. He stated that he had been provided with version 2, but not version 1. The Applicant also made reference to communications between the Council and the owner of the site which suggested that the "alternate plan" would need the funding to be repurposed.
28. The Council was asked to conduct further searches and was able to able to identify version 1 of the document in question. This was supplied to the Applicant during the investigation.
29. The Council was asked to confirm whether it held any further correspondence with the Scottish Government about the site. The Council responded, and confirmed that it had now located and provided all of its correspondence about the VDLF funding with the Scottish Government to the Applicant.
30. The Commissioner is satisfied that the Council has now identified and provided all the information falling within scope of this part of the request. However, given the Council failed to take adequate steps to identify, locate and provide all information falling within scope of the Applicant's request when responding to his request and request for review, the Commissioner finds that the Council failed to comply fully with regulation 5(1) of the EIRs.

Change in repurposing of the funding of the site

31. The Applicant argued that the Council have “aspirations” to repurpose the VDLF funding and that these aspirations did not include part of the site, core paths (which he states are outside of the site and should be maintained by the Council). The Applicant argued that the original purpose was defined as a “greening project” which could be confirmed if the original delivery plan to the Scottish Government had been made available.
32. As explained above, the Council stated that its proposals had not changed and the Council has therefore had no need to contact the Scottish Government about changes to the original plan.
33. The Council argued that the proposed plans for the site do not require repurposing the VDLF funding obtained as the original request for the funding was to carry out site improvement works and the potential purchase of part of the site.
34. The Applicant considers that the Council has repurposed the VDLF funding. The Council has confirmed, with supporting arguments and evidence of searches, that it has not repurposed the VDLF funding.
35. The Commissioner has read the correspondence between the Council and the Scottish Government and the agents for the site, which has been disclosed to the Applicant.
36. The Commissioner cannot comment on whether the Council will use the VDLF funding in a way different to that envisaged by the Applicant: he can only consider whether the recorded information requested by the individual has been disclosed.
37. The Commissioner is satisfied that the Council has taken adequate, proportionate steps to establish whether it held any further information falling within the scope of the request.
38. Taking all of the above into consideration, the Commissioner is satisfied, on the balance of probabilities that the Council does not hold any information falling within the scope of this element of the Applicant’s request.

Handling of the request

39. The Applicant expressed dissatisfaction with the Council's failure to respond to his initial request and review response within the required timeframe.
40. Regulation 5(2)(a) of the EIRs gives Scottish public authorities a maximum of 20 working days after receipt of the request to comply with a request for information, subject to certain qualifications which are not relevant in this case.
41. Given that the Council did not respond to the Applicant’s request of 21 October 2018 within the required 20 working days, or issue a refusal notice meeting the requirements of regulation 13 within that time, it is apparent that the Council failed to comply with the requirements of regulations 5(2)(a) and 13 of the EIRs.
42. The Applicant’s email of 28 November 2018 clearly expresses dissatisfaction with the Council’s failure to provide a complete response, including the provision of the requested information in a response to the request of 21 October 2018.
43. Regulation 16 of the EIRs states that, on receipt of a requirement to conduct a review, the authority shall review the matter and decide whether it has complied with the regulations, within 20 working days (regulations 16(3) and (4)). It also states that where an authority has

not complied with its duty under the EIRs, it shall *immediately* take steps to remedy the breach of duty (regulation 16(5)).

44. The Commissioner notes that, in remedying the initial failure to respond to the Applicant's request by issuing a review response, the Council had a duty to provide the Applicant with any non-exempt information.

The Commissioner must find that in failing to respond to the requirement for review within the time allowed and by failing to remedy the earlier breach of duty, the Council failed to meet the requirements of section 16(4) and (5) of the EIRs.

Decision

The Commissioner finds that North Ayrshire Council (the Council) failed to comply with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by the Applicant.

The Commissioner finds that the Council failed to comply with regulation 5(1) the EIRs by not identifying and disclosing all (non-exempt) information when it responded to the request and requirement for review. The Commissioner also found that the Council did not respond to the request and review within the prescribed timescales.

The Commissioner does not require any action with respect of these failures as a further response and information was provided during the investigation.

Appeal

Should either the Applicant 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

19 September 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)-
 - (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

...
- (4) A Scottish public authority shall, in making environmental information compiled by it available in accordance with paragraph (1), ensure so far as practicable that that information is up to date, accurate and comparable.

...

16 Review by Scottish public authority

- ...
- (3) The Scottish public authority shall on receipt of such representations-
 - (a) consider them and any supporting evidence produced by the applicant; and
 - (b) review the matter and decide whether it has complied with these Regulations.
 - (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.
 - (5) Where the Scottish public authority decides that it has not complied with its duty under these Regulations, it shall immediately take steps to remedy the breach of duty.

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