

Decision Notice

Decision 183/2018: X and the University of Aberdeen

Information regarding a property in Old Aberdeen

Reference No: 201801100

Decision Date: 14 November 2018



Scottish Information
Commissioner

Summary

The University was asked about a property it owned at 15 High Street, Old Aberdeen.

The University stated that it did not hold any other information. After issuing its review response, the University identified and disclosed further information.

By the end of the investigation, the Commissioner was satisfied that the University had carried out appropriate searches and did not hold any other relevant information. However, he found that the University failed to respond to the request within the prescribed timescales and failed to provide the information it held when responding to the request.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), and (4) (General entitlement); 10(1) (Time for compliance)

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (paragraphs (a), and (c) of definition of “environmental information”); (5)(1) and (2)(a) (Duty to make available environmental information on request)

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 15 February 2018, X made a request for information to the University of Aberdeen (the University), asking for all information held by the University’s Estate Department in relation to 15 High Street, Old Aberdeen, from 1 January 1997 to 31 December 2001, and from 1 January 2010 to 31 December 2011.
2. The University wrote to X on 19 March 2018, explaining that its response would be delayed.
3. On 21 March 2018, X wrote to the University requesting a review of its failure to respond to the request.
4. The University notified X of the outcome of its review on 29 March 2018. The University stated that it held no information falling within scope of the request, except for some information about a survey that had taken place in November 2011. This had been provided to X in response to another request.
5. The University wrote to X on 30 April 2018 in relation to another request. It stated that it had found information falling within scope of the request under consideration (15 February 2018), which it enclosed. The University explained that this information had not been identified previously, as it was held in a file for another property on the High Street, Old Aberdeen.
6. On 27 June 2018, 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. X believed that the University held more information covered by its request, and provided three examples of the type of information it

considered should be held. It also complained that the response from the University was late, and that its request should have been considered under the EIRs only.

Investigation

7. The application was accepted as valid. The Commissioner confirmed that 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 him for a decision.
8. On 23 August 2018, the University was notified in writing that X had made a valid application.
9. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The University was invited to comment on this application and answer specific questions about the searches undertaken by the University and the information it held. The University responded on 10 September 2018.
10. On 1 October 2018, X provided the Commissioner with copies of documents to support its view that the University held more information than it had disclosed. On the basis of the information contained within these documents, the University was asked more questions about information falling within scope of the request.
11. The University's submissions are considered in detail below.

Commissioner's analysis and findings

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

FOISA or EIRs

13. The University responded to X's request in terms of the EIRs and FOISA.
14. Environmental information is defined in regulation 2(1) of the EIRs (the relevant parts of the definition are reproduced in the Appendix to this decision). Where information falls within the scope of this definition, a person has a right to access it under the EIRs, subject to various restrictions and exceptions contained in the EIRs.
15. The Commissioner's views on the relationship between FOISA and the EIRs are set out in detail in *Decision 218/2007 Professor A D Hawkins and Transport Scotland*¹ (*Decision 218/2007*), and need not be repeated in full here. However, he will reiterate some of the key points which are relevant in this case:
 - (i) The definition of what constitutes environmental information should not be viewed narrowly, but in line with the definition of environmental information in the EIRs.
 - (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.

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

- (iv) In responding to a request for environmental information under FOISA, an authority **may** claim the exemption in section 39(2).
16. *Decision 218/2007* means that the Commissioner must first determine whether any of the requested information is environmental information. If it is, he must go on to consider the authority's handling of the request in terms of both FOISA and the EIRs (in line with point ii above).
17. In its submissions, the University stated that the request had a wide scope. It argued that because the focus of the request is a physical building, part of an element of the environment, the majority of the information is likely to be covered by part (c) of the definition of environmental information in regulation 2(1) of the EIRs.
18. However, the University considered that the request would also encompass information that is not environmental in nature, such as leasing arrangements and information relating to internal decoration. In support of its position, the University referred to *Decision 095/2016 Mr Stephen Calder and Aberdeenshire Council*² and *Decision 174/2016: Wardell Armstrong LLP and Aberdeen City Council*³ to indicate that information relating to buildings is not always environmental. Therefore, the University considered both regimes (FOISA and the EIRs) were relevant to the request.
19. Having considered the nature and likely content of the information covered by the request, the Commissioner is satisfied that at least some of it is environmental information as defined within regulation 2(1) of the EIRs. It relates to measures affecting or likely to affect the elements of the environment, and therefore falls within paragraphs (a) and (c) of the definition in regulation 2(1) of the EIRs.
20. The Commissioner also accepts that the request could encompass non-environmental information, and in that respect requires to be considered under FOISA too.
21. In the circumstances, the Commissioner will consider the University's handling of X's request and set out his conclusions in terms of both FOISA and the EIRs.

Was all relevant information identified, located and provided by the University?

22. In terms of section 1(4) of FOISA, the information to be provided in response to a request under section 1(1) is that falling within the scope of the request and held by the authority at the time the request is received. 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.
23. 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 the public authority to explain why the information is not held, and any reason offered by the requester to explain why information is likely to be held. 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.

² <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2016/201600039.aspx>

³ <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2016/201601299.aspx>

24. X has explained to the Commissioner the importance of the information it requested, and why it believes the University should hold further information.

Information disclosed

25. The University stated that, between August 2017 and June 2018, X has submitted eight information requests relating to the property at 15 High Street, each of which has been separately considered. The University submitted that it is confident that any other information relating to this property would have been uncovered when handling these requests.
26. The University explained that it had identified and disclosed further information to X while responding to a separate request for information about the neighbouring property. The searches for information about the neighbouring property identified a paper file, titled "High Street Development," which relates to proposals to develop the site occupied by 15 - 23 High Street for commercial purposes. The contents of the file date from 1999 to 2009.
27. The University explained that this file had not been identified as relevant in earlier searches for information relating to 15 High Street partly because the file title is not specific about the properties covered, and partly because the majority of the file relates to the development of 17 – 23 High Street in the period after 2001, following the University's acquisition of the property at 17 – 19 High Street.
28. The University submitted that its records retention practices mean there are few extant classes of records dating to the period before 2012 that can be searched for information relating to buildings that have been unoccupied since 1999 (15 High Street has been unoccupied since 1999).

Searches

29. The University confirmed that its searches focussed on information held by the Estates Department, in accordance with the parameters laid down in X's request. It summarised the information already provided to X in response to other requests, and stated that the searches carried out previously had established that the main source of information would be the property file, and that three members of department staff had been involved with the property since it was deemed uninhabitable in 1999.
30. In support of its submissions, the University referred to its submissions in a previous case which resulted in *Decision 140/2018: X and the University of Aberdeen*⁴.
31. The University stated that the complete contents of the property file had been disclosed to X. The Estates Department confirmed that there were no other closed property files for 15 High Street that pre-dated the file from which information has been disclosed.
32. The University responded to each of the three points raised by X in its application:
- (i) Information relating to the installation of central heating. All available information on the property file for 15 High Street has been disclosed: the earliest information on the extant file dates to 2011, and there is no information relating to the installation of central heating. The University considered it was likely that information deemed unnecessary was destroyed when the Estates department moved from a paper filing system to an electronic filing site.

⁴ <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2018/201800686.aspx>

- (ii) Correspondence with Aberdeen City Council and Historic Scotland. Information of this type would be held on the property file, and may have subsequently been destroyed, as explained above.
 - (iii) Timber infestation report. Again, the University submitted that information of this type would be in the property file, if held, and would have been disclosed in response to previous requests.
33. During the investigation, the University was provided with copies of some of the information X had shown the Commissioner to substantiate its view that the University held further information falling within scope of the request. The University was asked whether it held any further information about the installation of central heating and / or correspondence with Aberdeen City Council.
34. The University stated that it held no further information relating to Council tax or central heating and referred to its previous submissions (described above). The University provided the following comments:
- (i) Information relating to the installation of central heating. Invoices that are authorised for payment by University departments are passed to the Finance department for action. An invoice for works on a property, such as installation of central heating, would therefore be held by the Finance department for the majority of its lifecycle. Such invoices are nevertheless routinely destroyed after six years in line with standard financial regulations.
 - (ii) Council tax. The University stated that, typically, correspondence about Council tax liability would be handled by the Estates Department, but confirmed that no records were held for the period in question. (Although the request was limited to information held by the Estates Department, the University has also confirmed that no records are held by the Finance Department.)

The Commissioner's conclusions

35. The Commissioner can only consider what information is actually held by the University, not what information it might be expected to hold.
36. X has provided evidence which, in its view, supports its assertion that further information is held by the University. The Commissioner's investigation has addressed these matters. The University has consistently confirmed, with supporting arguments and evidence of searches, that it does not hold any further information falling within scope of X's request.
37. The Commissioner notes X's belief that the University must hold the specific information it identified in its application. The Commissioner notes that the requested information was, at the earliest, seven years old at the date of X's request. The Commissioner accepts the University's explanation that it only keeps records for a few years (in line with its records management practices) and that not all records were transferred to a new electronic filing system a few years ago.
38. The Commissioner notes that the University has previously found information which it did not know it held, while responding to another request. However, the Commissioner accepts that, given the number of related requests which the University has now considered, it is likely to have a good understanding of the information it holds about properties on the High Street, Old Aberdeen, and has identified and disclosed all the information it holds about 15 High Street, in relation to the request under consideration.

39. The Commissioner is satisfied that the University has now taken adequate, proportionate steps to establish whether it held any further information falling within the scope of the request.
40. Taking all of the above into consideration, the Commissioner is satisfied, on the balance of probabilities, that the University does not hold any more information falling within the scope of X's request than it has already provided. The University has disclosed the information falling within scope of the request, but did so after responding to both the request and request for review. Consequently, the Commissioner finds that the University failed to comply with section 1(1) of FOISA and regulation 5(1) of the EIRs when responding to X's request.
41. Given that the University failed to respond to the request within 20 working days, the Commissioner finds that it also failed to comply with section 10(1) of FOISA and regulation 5(2)(a) of the EIRs.

Decision

The Commissioner finds that the University of Aberdeen (the University) partially complied with the Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) and the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by X.

By the end of the investigation, the Commissioner was satisfied that the University had carried out appropriate searches and did not hold any information beyond that already provided to X.

Because it failed to provide information which it held when responding to X's request, the Commissioner finds that the University failed to comply with section 1(1) of FOISA and regulation 5(1) of the EIRs when responding to the request. The University also failed to respond within the timescales in section 10(1) of FOISA and regulation 5(2)(a) of the EIRs.

Appeal

Should either X or the University 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

14 November 2018

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.

...

- (4) The information to be given by the authority is that held by it at the time the request is received, except that, subject to subsection (5), any amendment or deletion which would have been made, regardless of the receipt of the request, between that time and the time it gives the information may be made before the information is given.

...

10 Time for compliance

- (1) Subject to subsections (2) and (3), a Scottish public authority receiving a request which requires it to comply with section 1(1) must comply promptly; and in any event by not later than the twentieth working day after-

- (a) in a case other than that mentioned in paragraph (b), the receipt by the authority of the request; or
- (b) in a case where section 1(3) applies, the receipt by it of the further information.

...

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)-
 - (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

...

Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews, Fife
KY16 9DS

t 01334 464610

f 01334 464611

enquiries@itspublicknowledge.info

www.itspublicknowledge.info