

Decision Notice



Decision 056/2013 Mr Derek Headspeath and the City of Edinburgh Council

Information relating to an uncovered drain/utility box

Reference No: 201300063
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Rosemary Agnew
Scottish Information Commissioner

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Summary

On 12 November 2012, Mr Headspeath asked the City of Edinburgh Council (the Council) for information relating to an uncovered drain/utility box. The Council provided Mr Headspeath with one piece of information. The Commissioner carried out an investigation and accepted that the Council did not hold any further information falling within the scope of Mr Headspeath's request.

Relevant statutory provisions

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (definition (a) of "environmental information"); 5(1) and (2)(b) (Duty to make available environmental information on request); 9(1) (Duty to provide advice and assistance); 10(1), (2) and (4)(a) (Exceptions from duty to make environmental information available)

The full text of each of the statutory provisions cited above is reproduced in the Appendix to this decision. The Appendix forms part of this decision.

Background

1. On 12 November 2012, solicitors acting on behalf of Mr Headspeath wrote to the Council, asking for the following information relating to an uncovered drain/utility box [the equipment] located in the Meadows park in Edinburgh:
 - The Council's description of the locus, including identification of the type of street furniture shown in the photos and their ownership thereof [part 1]
 - Confirmation that the Council was responsible for the inspection and maintenance of the equipment at the locus [part 2]
 - The Council's statement of their system of inspection and maintenance for the area covering the accident locus [part 3]
 - Information from inspection and maintenance schedules, reports, memoranda and other similar documents kept by the Council for the period 1/1/11 to 21/10/12, to show the nature and extent of any inspections carried out by the council of the equipment at the locus and the condition thereof as revealed by such inspections [part 4]



- Information from written orders, work schedules, instructions, contracts, memoranda and other similar documents issued by the Council or anyone on their behalf during the period 1/1/11 to 21/10/11, to show the nature and extent of any repair, renewal or maintenance work carried out on the equipment at the locus during that period and all reports upon the equipment made in respect of that repair, renewal or maintenance work [part 5]
 - Information from letters, faxes, reports, memoranda, notes of telephone calls or personal visits and other similar documents relative to communications made to the Council or anyone on their behalf by their employees or members of the public for the period 1/1/11 to 21/10/12, to show the nature and extent of, and date of, any complaints made to the Council or anyone on their behalf in relation to the condition of the equipment at the locus during that period [part 6].
2. Subsequent references to correspondence with Mr Headspeath should be read as including correspondence with his solicitors acting on his behalf.
 3. The Council responded on 21 November 2012. It stated that the information was environmental and that it was responding in terms of the EIRs. The Council went on to state that it did not hold any information falling within the scope of Mr Headspeath's request and cited regulation 10(4)(a) of the EIRs – information not held.
 4. Having checked with the relevant service, the Council understood that it did not own the equipment and, therefore, was not responsible for its maintenance. It explained how it had become aware of the equipment, the steps it had taken to ascertain ownership and the temporary measures it had taken to make it safe. In pursuing ownership, it had placed a notice with Symology¹, the computer programme used to coordinate roadworks and record all plant in the road network.
 5. On 21 November 2011, Mr Headspeath wrote to the Council requesting a review of its decision. He pointed out that his request for information was wider than just a request for maintenance records of the utility box. It extended to information concerning the Council's inspection records for the wider locus [the Meadows] within which the box was situated.
 6. Mr Headspeath stated that he was unhappy with the Council's responses to parts 2, 3, 4 and 6 of his request and believed the Council must have information about inspection systems for its parkland property. He understood that utilities with equipment in Council-owned land would rely on its scheduled inspections.
 7. The Council notified Mr Headspeath of the outcome of its review on 19 December 2012. It confirmed that it was not the owner of the equipment and had no responsibility for its maintenance or inspection (part 2 of the request). In relation to part 3, it explained that the formal maintenance inspection regime within its parks extended to play equipment only. All other checks were carried out visually during daily patrols, with defects being reported to the appropriate department or utility.

¹ <http://www.roadworksscotland.org/ghelp.aspx>



8. The Council also provided Mr Headspeath with a copy of a “Clarence” (Road Services) report, showing that a member of the public had reported the equipment to the Council as unsafe on 5 November 2012. Although this report fell outwith the scope of Mr Headspeath’s request (the date parameters in his request being from 1 January 2011 to 21 October 2012), the Council provided it by way of assistance to Mr Headspeath, explaining that this was the only copy of any record it held relating to the equipment.
9. On 31 December 2012, Mr Headspeath wrote to the Commissioner, stating that he was dissatisfied with the outcome of the Council’s review and applying 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 certain specified modifications.
10. The application was validated by establishing that Mr Headspeath made a request for information to a Scottish public authority and applied to the Commissioner for a decision only after asking the authority to review its response to that request. The case was then allocated to an investigating officer.

Investigation

11. The investigating officer contacted the Council and notified it of Mr Headspeath’s application. The Council was given an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and was asked to respond to specific questions. Specifically, it was asked to describe the steps it had taken to identify and locate the information requested.
12. During the investigation, the Council confirmed that it had ascertained Scottish Water was responsible for the equipment, and provided the Commissioner with a copy of a Street Works Report received from Symology confirming this. This document was also provided to Mr Headspeath.
13. The relevant submissions received from both the Council and Mr Headspeath will be considered fully in the Commissioner’s analysis and findings below.

Commissioner’s analysis and findings

14. In coming to a decision on this matter, the Commissioner has considered all of the withheld information and the submissions made to her by both Mr Headspeath and the Council. She is satisfied that no matter of relevance has been overlooked.



Application of EIRs

15. The Council notified Mr Headspeath that it was dealing with his request under the EIRs.
16. In line with other decisions considering information of this type, the Commissioner accepts that the Council was correct in this approach. She is satisfied that any information falling within the scope of the request would be covered by paragraph (a) of the definition of environmental information contained in regulation 2(1) of the EIRs (that is, information relating to the state of the elements of the environment).

Regulation 5(1) of the EIRs

17. Subject to various qualifications, 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. It is important to bear in mind that this obligation relates to information actually held by an authority when it receives the request, as opposed to information an applicant believes the authority should hold, but which is not in fact held.
18. Under the EIRs, a public authority may refuse to make environmental information available if one or more of the exceptions in regulation 10 apply and, in all the circumstances of the case, the public interest in maintaining the exception or exceptions outweighs the public interest in making the information available (see regulations 10(1) and (2), as set out in the Appendix below).

Part 2 of the request

19. In part 2 of his request, Mr Headspeath asked the Council for confirmation that it was responsible for the inspection and maintenance of the equipment. In its review outcome of 19 December 2012, the Council confirmed that it was *not* responsible for the maintenance or inspection of the equipment. During the investigation, the Council provided evidence of its further research to confirm this.
20. The Commissioner is therefore satisfied that the Council complied with part 2 of Mr Headspeath's request and, in doing so, complied with section 5(1) of the EIRs.

Parts 3, 4 and 6 of the request

21. The Council submitted that it held no information falling within the scope of parts 3, 4 and 6 of Mr Headspeath's request.

Regulation 10(4)(a) of the EIRs

22. Regulation 10(4)(a) of the EIRs provides that a Scottish public authority may refuse to make environmental information available to the extent that it does not hold that information when an applicant's request is received. As indicated above, this exception is subject to the public interest test in regulation 10(1)(b) of the EIRs.



23. The Council explained the steps it had taken to ascertain ownership, both via Symology (a database maintained independently and accessible to all utilities) and also through additional searches it carried out itself on its own systems. As indicated above, it was able to produce evidence that Scottish Water was responsible for the equipment
24. Given that the Council did not own the equipment and was not responsible for inspecting or maintaining it, the Commissioner accepts that it would be unlikely to hold any inspection or maintenance records relating specifically to the equipment.
25. The Council might still have received complaints about the condition of equipment. It indicated that the searches referred to would have picked these up, referring to the "Clarence" report identified in paragraph 8 above. The documentation of this complaint was not created within the date parameters of Mr Headspeath's request, so the Commissioner accepts that the Council was not obliged to provide this information to him (although it did so to provide assistance). The Commissioner also notes that the Council discussed Mr Headspeath's request with the staff involved in regular patrols of the area, who confirmed that they had not identified any defects of this kind before 5 November 2012.
26. Mr Headspeath also asked the Council for its statement of system of inspection and maintenance for the area covering the accident locus (the Meadows park). The investigating officer asked the Council to provide a copy of any relevant policy or equivalent document it might hold. It was also asked to explain how it had ascertained that no such statement of system was held if this was the case.
27. The Council stated that it had checked with the relevant service, which confirmed that there was no formal park inspections policy or documentation for inspecting the area. It confirmed that it only carried out regular maintenance inspections on play equipment within parks. Any other checks were carried out visually during daily patrols, with any defects found being reported to the appropriate department or utility for repair. The staff most directly involved in these inspections had confirmed that there was no schedule or defined system of inspection for parks and parkland.
28. Having considered the Council's submissions, the Commissioner is satisfied that it took adequate steps with a view to identifying and locating the information requested by Mr Headspeath. In the circumstances, she is satisfied that the Council did not (at the time it received the request) hold the information requested by Mr Headspeath in parts 3, 4 and 6 of his request.
29. As the Commissioner is satisfied that the Council did not hold the information, she does not consider there to be any conceivable public interest in requiring that any information be made available. Therefore, in all the circumstances, the Commissioner concludes that the public interest in making the requested information available is outweighed by the public interest in maintaining the exception in regulation 10(4)(a).
30. The Commissioner is satisfied, therefore, that the Council correctly applied regulation 10(4)(a) of the EIRs in this case.



Regulation 9(1) of the EIRs

31. Regulation 9 provides that a Scottish public authority shall provide advice and assistance, so far as it is reasonable to expect it to do so, to applicants and prospective applicants. In this case, having considered the Council's actions in responding to Mr Headspeath's request, the Commissioner is satisfied that it gave him adequate advice and assistance.

DECISION

The Commissioner finds that the City of Edinburgh Council complied with the Environmental Information (Scotland) Regulations 2004 in responding to the information request made by Mr Headspeath.

Appeal

Should either Mr Headspeath or the City of Edinburgh Council wish to appeal against this decision, there is an 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
26 March 2013



Appendix

Relevant statutory provisions

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;

...

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.

...



10 Exceptions from duty to make environmental information available–

- (1) A Scottish public authority may refuse a request to make environmental information available if-
 - (a) there is an exception to disclosure under paragraphs (4) or (5); and
 - (b) in all the circumstances, the public interest in making the information available is outweighed by that in maintaining the exception.
- (2) In considering the application of the exceptions referred to in paragraphs (4) and (5), a Scottish public authority shall-
 - (a) interpret those paragraphs in a restrictive way; and
 - (b) apply a presumption in favour of disclosure.
- ...
- (4) A Scottish public authority may refuse to make environmental information available to the extent that
 - (a) it does not hold that information when an applicant's request is received;
- ...