

Decision Notice

Decision 037/2017: Dr Peter Geoghegan and City of Glasgow College

Contract information

Reference No: 201700100

Decision Date: 15 March 2017



Scottish Information
Commissioner

Summary

City of Glasgow College (the College) was asked for contract information relating to the development of the College's new campus. The College withheld some of the information requested on the basis that it was exempt in terms of section 33(1)(b) of FOISA (commercial interests).

The Commissioner found that the College had considered the request under the wrong legislation. The request was for environmental information and the College should have considered it under the EIRs.

The Commissioner required the College to respond to the request under the EIRs.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and 1(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) (paragraphs (a) and (c) of definition of "environmental information"); 5(1) and (2)(b) (Duty to make available environmental information on request); 16 (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 1 September 2016, Dr Geoghegan made a request for information to the College. He requested the following information about the development of the College campus:
 - (i) copies of the original contract, including the financial model and any related correspondence, appendices, annexes or other related information
 - (ii) any subsequent refinancing deals for the project, including any related correspondence, reports or other related information
 - (iii) details of the tender documentation and process, and the names of bidders.
2. The College responded on 13 September 2016. It provided Dr Geoghegan with some information, but indicated that the financial model was commercially sensitive and could not be disclosed until two years after the "First Phase Actual Completion Date" (which was given as 17 August 2015). The College explained that the new campus project had been a significant undertaking and that there was a considerable volume of information associated with it. The College asked Dr Geoghegan to provide a precise clarification of what "related correspondence" he was seeking, in order for it to determine whether it was reasonable and possible for the information to be disclosed.
3. On 23 September 2016, Dr Geoghegan made a new request for information to the College which clarified his original request. He requested:

- (i) The *initial* financial model for the College campus development project (not that at financial close). He commented that this should not be commercially sensitive and [disclosure] was clearly in the public interest.
4. Dr Geoghegan also narrowed his request seeking “related correspondence” to “any substantive discussions about the financial model within the last two years” (part (ii) of his request).
5. The College responded on 26 October 2016. It advised Dr Geoghegan that the initial financial model varied little from that at financial close, and it was withholding this information under section 33(1)(b) of FOISA. The College also stated that it did not hold any information in relation to part (ii) of his request.
6. On 22 November 2016, Dr Geoghegan wrote to the College requesting a review of its decision. He believed there was a clear public interest in disclosing the full financial model. Dr Geoghegan was dissatisfied that the College held no information falling within part (ii) of his request. He noted that he had narrowed the scope of his request because the College had told him the initial request was too broad, but now it seemed that nothing fell within the scope of his revised request. Dr Geoghegan queried whether the College’s interpretation of this part of his request had been unduly restrictive.
7. The College notified Dr Geoghegan of the outcome of its review on 20 December 2016. The College upheld its previous response, arguing that the information covered by part (i) of his request was exempt from disclosure under section 33(1)(b) of FOISA and that it did not hold any information falling within part (ii) of his request.
8. On 18 January 2017, Dr Geoghegan 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. Dr Geoghegan stated he was dissatisfied with the outcome of the College’s review because disclosure of the financial model was in the public interest.

Investigation

9. The application was accepted as valid. The Commissioner confirmed that Dr Geoghegan 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. On 9 February 2017, the College was notified in writing that an application had been received from Dr Geoghegan. The case was allocated to an investigating officer.
10. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. On 3 March 2017, the College was invited to comment on this application and answer specific questions.
11. In particular, the College was asked if it had considered whether Dr Geoghegan’s information request should have been treated as a request for environmental information, and responded to under the EIRs. The College was asked to comment on whether it considered its review outcome to have met the requirements of the EIRs. Attention was drawn to three decision notices recently issued by the Commissioner; *Decision 011/2017 Mr Rob Edwards and Lothian Health Board*¹; *Decision 013/2017 Mr Billy Briggs and Lothian Health Board*²; and

¹ <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2017/201602129.aspx>

*Decision 025/2017 Mr Billy Briggs and Inverness College*³. In these decisions, the Commissioner found that similar requests should have been considered under the EIRs.

12. The College responded on 8 March 2017. The College explained that it had considered whether the requested information was environmental, but it had concluded that it was not. The College noted that the Commissioner's guidance acknowledges that determining whether or not information is environmental is not always easy. It was grateful to the Commissioner for referring it to three decisions which considered similar information. The College now agreed that the information requested by Dr Geoghegan was environmental information and that it should have responded in terms of the EIRs. It confirmed that it now wanted to rely upon the exemption in section 39(2) of FOISA (which exempts information from disclosure under FOISA if it falls with the scope of the EIRs).
13. The College confirmed that it would take steps to deal with Dr Geoghegan's request in terms of the EIRs and issue him with an appropriate response. The College stated that it would be in a position to provide Dr Geoghegan with a compliant review outcome by 5 April 2017.

Commissioner's analysis and findings

14. In coming to a decision on this matter, the Commissioner considered all of the withheld information and the relevant submissions, or parts of submissions, made to her by both Dr Geoghegan and the College. She is satisfied that no matter of relevance has been overlooked.

FOISA or EIRs?

15. The relationship between FOISA and the EIRs was considered at length in *Decision 218/2007 Professor A D Hawkins and Transport Scotland*⁴. 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 handled 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).

² <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2017/201602131.aspx>

³ <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2017/201602132.aspx>

⁴ <http://www.itspublicknowledge.info/applicationsanddecisions/Decisions/2007/200600654.asp>

- (vi) Where the Commissioner considers a request for environmental information has not been handled under the EIRs, she is entitled (and indeed obliged) to consider how it should have been handled under that regime.
16. Given the subject matter of the request, the Commissioner asked the College to consider whether the request properly fell to be handled as a request for environmental information, and therefore responded to under the EIRs. As noted above, the College agreed that it should have responded under the EIRs and not solely under FOISA.
17. It is clear from the College's correspondence with the Commissioner that any information falling within the scope of the request would be environmental information, as defined in regulation 2(1) of the EIRs. The information in question concerns the construction of a new campus for the College, and the Commissioner is satisfied that it would fall within either paragraph (a) of the definition of environmental information contained in regulation 2(1) of the EIRs (as information on the state of the elements of the environment) or paragraph (c) of that definition (as information on measures affecting or likely to affect those elements).
18. Given that the information requested is environmental information, the College had a duty to consider it in terms of regulation 5(1) of the EIRs. In failing to do so, it failed to comply with regulation 5(1).

Section 39(2) of FOISA - environmental information

19. 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. In this case, the College informed the Commissioner that since it now accepted that the information was environmental, it wanted to rely upon section 39(2) of FOISA, and provide Dr Geoghegan with a response compliant with regulation 16 of the EIRs.
20. The Commissioner accepts that the College is entitled to apply this exemption to Dr Geoghegan's request, given her conclusion that the information requested is properly classified as environmental information. As there is a separate statutory right of access to environmental information available to the applicant, the Commissioner also accepts that, in this case, the public interest in maintaining this exemption and in handling the request in line with the requirements of the EIRs outweighs any public interest in disclosing the information under FOISA.

Regulation 16 of the EIRs

21. 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 EIRs, 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)).
22. Although the College responded to Dr Geoghegan's requirement for review on 20 December 2016, as explained above, this was a result of the College considering the request solely in terms of FOISA and not under the EIRs.
23. It is apparent that the College failed to respond to Dr Geoghegan's request of 23 September 2016 in terms of the EIRs, and therefore failed to comply with regulation 5(1) of the EIRs. It is also apparent that the College failed to carry out a review meeting the requirements of regulation 16 of the EIRs.

24. The Commissioner therefore requires the College to provide a response to Dr Geoghegan's requirement for review of 23 November 2016, in terms of regulation 16 of the EIRs. She would expect such a review outcome to include full reasons for its decision on review, including justification of any exception in the EIRs that the College may wish to apply.
25. The Commissioner's decision below states a compliance date of 2 May 2017, in line with the approach and statutory timescales she is required to follow. This is the latest day on which the College must issue a response: the deadline does not prevent the College from issuing one sooner. The Commissioner would encourage the College to provide Dr Geoghegan with a response as soon as possible, given that it has already indicated a willingness to do so by 5 April 2017.

Decision

The Commissioner finds that City of Glasgow College (the College) failed to comply with the requirements of regulations 5(1) and 16 of the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to Dr Geoghegan's information request and requirement for review.

The Commissioner requires the College to provide a response to Dr Geoghegan's requirement for review, in terms of regulation 16 of the EIRs, by 2 May 2017.

Appeal

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

Margaret Keyse
Head of Enforcement

15 March 2017

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;

...

(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.

...

16 Review by Scottish public authority

(1) Subject to paragraph (2), an applicant may make representations to a Scottish public authority if it appears to the applicant that the authority has not complied with any requirement of these Regulations in relation to the applicant's request.

(2) Representations under paragraph (1) shall be made in writing to the Scottish public authority no later than 40 working days after either the date that the applicant receives any decision or notification which the applicant believes does not comply with these Regulations or the date by which such a decision or notification should have been made, or any other action should have been taken, by the authority but was not made or taken.

(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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