

Decision Notice

Decision 067/2018: Ms Rebecca Hay and South Lanarkshire Council

“Roof Top Tax” payments: Shields Road development

Reference No: 201702107

Decision Date: 9 May 2018



Scottish Information
Commissioner

Summary

The Council was asked for the amount per house paid by Taylor Wimpey in “roof top tax” payments for the Shields Road Development in East Kilbride. The Council considered the request under the EIRs and responded by explaining that it did not hold the information.

The Commissioner accepted that the Council did not hold the information requested, but found that its review was deficient in terms of the advice and assistance given.

Relevant statutory provisions

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (Interpretation) (paragraphs (a), (c) and (e) of definition 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 Appendix 1 to this decision. The Appendix forms part of this decision.

Background

1. On 14 September 2017, Ms Hay made a request for information to South Lanarkshire Council (the Council) about payments made by Taylor Wimpey, in relation to the Shields Road Development in East Kilbride. Ms Hay asked the Council to confirm:
 - (i) the amount per house and where the money from the payments would be spent; and
 - (ii) that Auldhouse Road would be re-opening at the beginning of November as promised.
2. The Council responded on 17 October 2017 under section 14(2) of the Freedom of Information (Scotland) Act 2002 (FOISA), explaining that it believed her request was a repeat of an earlier one. The Council also referred Ms Hay to information in the Land Register at the Registers of Scotland.
3. On 24 October 2017, Ms Hay wrote to the Council, requesting a review of its decision. She did not accept that her request repeated the earlier one. She stated she did not ask about “roof top tax” previously. She did not believe the Section 75 Agreement (the document in the Land Register referred to in the Council’s original response) addressed her concerns.
4. The Council notified Ms Hay of the outcome of its review on 21 November 2017, substituting a new decision whereby it applied section 39(2) of FOISA and handled the entire request under the EIRs. The Council issued a refusal notice under regulation 10(4)(a) of the EIRs, stating that Taylor Wimpey had not yet made any such payments and that there were no records held as to how specific monies received by the Council would be used.
5. On 21 November 2017, Ms Hay wrote to the Commissioner. Ms Hay 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. Ms Hay stated she was

dissatisfied with the outcome of the Council's review, because she remained convinced that a figure per house must have been agreed before final planning permission was granted. She did not believe the question on the "roof top tax" had been answered. She noted a payment of £5 million, which she understood Taylor Wimpey to have made to the Council already in relation to this development.

6. As Ms Hay has not raised any dissatisfaction with the part of her request which referred to the reopening of Auldhouse road, the Commissioner need not consider this element of her request further here.

Investigation

7. The application was accepted as valid. The Commissioner confirmed that Ms Hay 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 12 December 2017, the Council was notified in writing that Ms Hay had made a valid application. The case was allocated to an investigating officer.
9. 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, focusing on the searches carried out in response to the request and seeking to clarify some aspects of the background.

Commissioner's analysis and findings

10. 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 him by both Ms Hay and the Council. He is satisfied that no matter of relevance has been overlooked.

Application of the EIRs

11. It is clear from the Council's correspondence with both Ms Hay and the Commissioner that any information falling within the scope of this request would be environmental information, as defined in regulation 2(1) of the EIRs. Ms Hay has asked for information pertaining to a substantial residential development at Shields Road, specifically contributions from the developer to mitigate the impact of that development. Any information held would relate to measures affecting or likely to affect the elements of the environment referred to in paragraph (a) of the definition in regulation 2(1) of the EIRs. In this context, part (e) of the definition also appears to be relevant, as any relevant information would be likely to pertain to costs benefit and other economic analysis and assumptions used within the framework of these measures.
12. As such, the Commissioner is satisfied that Ms Hay's request would fall within paragraphs (a), (c) and (e) of the definition of environmental information (reproduced in Appendix 1).
13. Ms Hay has not disputed the Council's decision to handle the request under the EIRs, applying section 39(2) of FOISA, and the Commissioner will consider the information in what follows solely in terms of the EIRs.

Regulation 5(1)

14. Regulation 5(1) of the EIRs, subject to various qualifications (regulation 5(2)(b)), requires a Scottish public authority which holds environmental information to make it available when requested to do so by any applicant.
15. Access to information under regulation 5(1) is subject, in particular, to the exceptions in regulation 10 of the EIRs. A Scottish public authority applying any of these exceptions must, however, interpret them in a restrictive way and apply a presumption in favour of disclosure (regulation 10(2)). Even where the exception applies, the information must be disclosed unless, in all the circumstances, the public interest in making the information available is outweighed by that in maintaining the exception (regulation 10(1)(b)).

Regulation 10(4)(a) – information not held

16. In this case, the Council confirmed to the Commissioner that it wished to rely on the exception in regulation 10(4)(a) of the EIRs for the information sought by Ms Hay.
17. 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. The exception in regulation 10(4)(a) is subject to the public interest test.
18. The standard of proof in considering whether a Scottish public authority holds information is the civil standard of the balance of probabilities. In determining this, the Commissioner will consider the scope, quality, thoroughness and results of the searches carried out by the public authority. He will also consider, where appropriate, any reason offered by the public authority to explain why the information is not 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.
19. In her application, Ms Hay explained she was trying to ascertain the figure per house ("roof top tax") agreed between the Council and Taylor Wimpey. She submitted that agreement must have been reached for the final planning permission to be granted. She was not satisfied that her question had been answered.
20. Ms Hay noted that the Council had advised her to look at the Section 75 Agreement. Ms Hay commented that she did not believe the Section 75 Agreement clearly identified which areas the money would be spent on, although it suggested that the Council had "some idea" of where it would be spent and should be able to provide further detail.

The Council's submissions

21. The Council's submissions set out the context of the Section 75 Agreement with Taylor Wimpey. It stated that, on 31 May 2016, the Council granted planning permission in principle for the demolition of existing buildings, residential development and associated access, landscaping and engineering works at Shields Road. Consent was granted following the conclusion of a Section 75 legal agreement between the Council, the landowners and Taylor Wimpey (the developer).
22. The Council explained that this agreement requires the developer to deliver the following:
 - Money for on-site and off-site affordable housing. The off-site housing will be paid for through a commuted sum paid by the developer.

- Money for educational provision within the catchment area of the development. This money will be used for additional floor space.
 - Money for the improvement of five roundabouts on Greenhills Road, and signs and bus stops in Lindsayfield
 - Money for the provision of community facilities in the area which serves the development.
23. Also, the Council explained that a further, detailed application was approved on 1 December 2016, for the erection of 486 dwellings including associated infrastructure and landscaping. The Council stated that whilst construction had been started on site, no triggers in the Section 75 Agreement had yet been reached. Therefore, no payments had been received by the Council.
24. The Council also clarified its own understanding of the phrase “roof top payments”: it took this to mean the amount per dwelling that would be received in terms of planning financial contributions to mitigate the impact of the development on the provision of public services.
25. The Council further explained that, in respect of this particular development, the mitigation of the impact of the development on particular Council services was assessed and negotiated with the developer on a financial basis. The Council commented that, in accordance with its usual practice, the cumulative financial impact cost was apportioned across the number of residential units to be built on the application site.

Searches

26. The Council stated that it carried out a search of the Section 75 Agreement and the related Planning Committee report. This showed that monies due to the Council would only be submitted when the trigger point for payment was reached: this had not yet happened. The Council was unaware of the sum referred to in Ms Hay’s application: it reiterated that it had received nothing from Taylor Wimpey, and submitted that it was due nothing in respect of the development apart from lawful developer contributions under the Section 75 Agreement.
27. The Council did not search its financial management system, where any relevant payments made would be recorded, as no payments had been made, or were due, at the time of the request or requirement for review. For the same reasons, it had not considered it necessary to search records maintained by Community and Enterprise Resources, which would record any allocations and subsequent expenditure from sums received for each development.
28. The Council interpreted the request as extending only to sums already paid under the Section 75 Agreement and how these would be spent. In any event, it made it clear that specific decisions on expenditure would not be made until sufficient contributions had been received.
29. The Council was asked to look at the request again, on the basis that the part relating to expenditure could be interpreted as relating to sums still to be received as well as sums in the Council’s hands already. It confirmed it had carried out electronic searches across the entire electronic file maintained for the planning application in question (explaining that it no longer maintained paper files for such matters), and also individual searches of all officers involved in the negotiation of the developer contributions and the Section 75 Agreement. No additional information was found on the application of the contributions.

Commissioner's conclusions

30. The Commissioner has considered the terms of the request and the Council's interpretation of it carefully. It does appear reasonable to interpret it as a request for information in respect of payments actually made, rather than payments to be made. From the explanations provided by the Council, the Commissioner is satisfied that no such payments had been made, or were due, at the time the request was received, so it would be reasonable to conclude that the Council would hold no information on such payments.
31. Taking account of Ms Hay's requirement for review and application to the Commissioner – it appears that she is concerned (in relation to plans for expenditure from the contributions) with sums to be received under the Section 75 Agreement more generally, and not simply from sums paid already. However, the Commissioner must acknowledge that the Council was entitled to interpret the request literally, to include only the latter – on the face of it, that was what the Section 75 Agreement said.
32. In any event, having considered fully all of the Council's explanations of the processes for dealing with sums to be paid under the Section 75 Agreement, and its submissions on the searches actually carried out, the Commissioner is satisfied that it would be reasonable to conclude that the Council held no information – beyond that contained in the Section 75 Agreement, of which Ms Hay is clearly fully aware – on how the sums in question would be spent. It is clear from her requirement for review and application to the Commissioner that she is looking for information on specific plans for expenditure, not the kind of general information considered by the Commissioner, in respect of the same development, in *Decision 171/2017*¹.
33. The Commissioner is, therefore, satisfied that the Council has conducted adequate searches for the information sought by Ms Hay and is satisfied, on the balance of probabilities, that the Council holds (and held, on receiving the request) no information falling within the scope of the request. Having considered the Council's review outcome carefully, he is also satisfied that it sought to convey to Ms Hay that no information was held for either element of her request.
34. The exception in regulation 10(4)(a) is subject to the public interest test, but the Commissioner is satisfied that there is no conceivable public interest in requiring the disclosure of information which is not in fact held. Therefore, in this case, he is satisfied that regulation 10(4)(a) was correctly applied to the request.
35. The Commissioner is not satisfied that he can end his consideration of the application there, however. Ms Hay's request clearly rests on the assumption that an amount per house could be provided, assuming relevant payments had been made. There is, however – as the Council has acknowledged – nothing in the Section 75 Agreement to indicate that the contributions to be made by the developer under various headings are calculated on the basis of an amount per house. The Section 75 Agreement is silent on how the various contributions – relating to the development as a whole – were calculated. Was it reasonable, therefore, to leave Ms Hay with the assumption that an amount per house could be provided, if there were any relevant payments?

¹ <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2017/201701003.aspx>

Regulation 9 – Duty to provide advice and assistance

36. Regulation 9(1) of the EIRs requires a Scottish public authority, so far as it would be reasonable to expect it to do so, to provide advice and assistance to applicants and prospective applicants.
37. In this context, the Commissioner considers it important to bear in mind the reference to prospective applicants. Where the opportunity presents itself, it is important that authorities do what is reasonable to manage the expectations of those who are likely to be seeking information from them – particularly, those who have asked for information and, in the circumstances, are likely to come back seeking more.
38. The Council was asked for further information on how the various contributions to be received under the Section 75 Agreement were calculated. The Commissioner does not consider it necessary to repeat these in detail, but it is apparent that the basis of calculation was more complex than simply a single figure per house, applicable to all the headings under which contributions are to be made. House numbers, planned and completed, appear to figure to some extent, but negotiation has also played a part and there were differences in the basis of negotiation under each heading.
39. Without disclosing commercial confidences, all of this could have been explained to Ms Hay. It would have managed her expectations in relation to the present and any future requests, a key function of providing advice and assistance under regulation 9(1).
40. The Commissioner has considered whether further explanation of the workings of the Section 75 Agreement was required in the circumstances. He has concluded that it was not. From careful consideration of all of Ms Hay's submissions, he is satisfied that she understands the Section 75 Agreement, but does not believe it answers her question. It does not tell her how the various contributions were worked out. The Council has suggested that explaining the Section 75 Agreement would amount to providing legal advice, which is debatable, but clearly explaining the basis of any underpinning calculations would not be – if that can be done, simply to the extent of removing an apparent misunderstanding, without disclosing exempt information (and the Council has not suggested it could not be), the Commissioner believes that would be of clear value to the applicant in understanding the context within which they are seeking information.
41. By failing to provide an explanation of the kind outlined above, the Commissioner finds that the Council failed to comply with regulation 9(1) of the EIRs. Given the discussion of the matter above, the Commissioner does not require the Council to provide any further advice or assistance to Ms Hay in this case.

Decision

The Commissioner finds that South Lanarkshire Council (the Council) partially complied with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made Ms Hay.

The Commissioner accepts that the Council addressed Ms Hay's request and was correct to do so in terms of regulation 10(4)(a) of the EIRs.

However, the Commissioner also finds that the Council failed to provide adequate advice and assistance to Ms Hay in its review outcome, as required by regulation 9 of the EIRs, to clarify the basis on which any relevant payments would be made.

The Commissioner does not require the Council to take any action in respect of this failure in response to Ms Hay's application, for the reasons stated in the body of this Decision Notice.

Appeal

Should either Ms Hay 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

9 May 2018

Appendix 1: Relevant statutory provisions

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

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(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;

...

(e) costs benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in paragraph (c); and

...

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;

...

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