

Decision Notice 083/2022

Affordable housing delivery

Applicant: The Applicant

Public authority: Angus Council

Case Ref: 202001269



Scottish Information
Commissioner

Summary

The Council was asked for copies of all affordable housing contributions agreements between it and private developers in the last ten years. The Council stated that the information was publicly available. During the Commissioner's investigation, the Council published more information on its website. The Commissioner found that the Council had partially breached the EIRs in responding to the request because the information requested was not already available.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) (General Entitlement); 2(1)(a) (Effect of exemptions); 25(1) (Information otherwise accessible); 39(2) (Health, safety and the environment)

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (Interpretation) (parts (a), (c) and (e) of the definition of "environmental information"); 5(1) and (2) (Duty to make available environmental information on request); 6(1)(b) (Form and format of information); 9(1) (Duty to provide advice and assistance)

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. By virtue of section 75 of the Town and Country Planning (Scotland) Act 1997, a planning authority, such as Angus Council (the Council), may enter into an agreement with any person interested in land in its district, for the purpose of restricting or regulating the development or use of the land, either permanently or during such period as may be prescribed by the agreement. Such agreements are generally known as "section 75 agreements".
2. Since 2016, how affordable housing can be delivered under a section 75 agreement is - for reasons of flexibility - detailed under a separate Delivery Package document, rather than in the section 75 agreement itself.
3. On 17 August 2020, the Applicant made a request for information to the Council. The Applicant requested copies of all section 75 delivery packages for affordable housing contributions agreed between the Council and private developers/planning application applicants in the last ten years.
4. The Council responded on 10 September 2020. Although confirming that it held the requested information, the Council stated that the information was exempt under section 25 of FOISA as all Affordable Housing Delivery Packages are registered with the Registers of Scotland (RoS) alongside the section 75 agreements and are therefore public records. The Council provided contact details for RoS.
5. On 11 September 2020, the Applicant wrote to the Council requesting a review of its decision. The Applicant acknowledged that section 25 of FOISA may apply to a request for a specific delivery package. However, the Applicant wanted information to review "all delivery packages over the last ten years to ensure all applicants are being dealt with in a fair and consistent manner." Accordingly, the Applicant did not believe that the RoS would be able to provide this information, as only the Council held a record of all the planning applications where permission was granted subject to a section 75 agreement and delivery package over

the last ten years. The Applicant explained that it did not hold, and was unable to find, the relevant reference data to seek copies of this information from RoS and it believed that section 25 of FOISA could not apply. By letter, dated 29 September 2020, the Applicant also wrote to the Council referring to the relevancy of the EIRs.

6. The Council notified the Applicant of the outcome of its review on 15 October 2020. The Council confirmed the request was for environmental information in terms of regulation 2(1)(a), (c) and (e) of the EIRs and applied 39(2) of FOISA. The Council referred to regulation 6(1) of the EIRs. The Council explained that its Planning and Community Planning service does not hold a list of developments that have an associated Delivery Package within a Section 75 agreement and does not hold all Delivery Packages centrally in one file: these would be held within individual application files on the Council's electronic system where they can be accessed by the public via the [Public Access Portal](#)¹. The Council confirmed that all Delivery Packages within section 75 agreements are registered with RoS and therefore are accessible as public records.
7. The Council's review noted that information relating to section 75 agreements for the last ten years had been provided to the Applicant in response to a previous request. This information included application references and addresses, and these could be used to search the contents of section 75 agreements either through RoS, or the Council's own Planning Registers to establish whether the section 75 agreement included a delivery package. The Council concluded that the requested information was in the public domain and easily accessible in terms of regulation 6(1) of the EIRs, and that the Applicant had been provided with additional relevant information to help locate the requested information.
8. On 23 October 2020, the Applicant wrote to the Commissioner, applying 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. The Applicant stated that it was dissatisfied with the outcome of the Council's review. It argued that the information was not publicly available without a list of relevant planning application numbers and associated affordable housing delivery packages. The additional information on the Council's website only provided a [general policy](#)². To obtain the information from the RoS, the Applicant would need the relevant title numbers, which the Council would need to supply.

Investigation

9. 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.
10. 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 to answer specific questions. These related to how exactly the Applicant could obtain the information from RoS, or the Council's website.

¹ <https://planning.angus.gov.uk/online-applications/search.do?action=simple&searchType=Application>

²

https://www.angus.gov.uk/housing/information_for_developers/section_75_and_affordable_housing_contributions

11. The Council responded and explained how the information was held. It also suggested a possible way to resolve this application without recourse to a formal decision notice. The Council suggested that, to aid transparency further and to settle this matter, it would make the affordable housing delivery provisions that are contained in signed Delivery Packages available on the Council's website.
12. The Council agreed to publish its Agreed Delivery Packages on its [website](#)³ and did so on 31 March 2021. The Council also explained that, until recently, these documents were held in separate individual case files and not all files contained a delivery package.
13. The publication was conveyed to the Applicant. The Applicant replied that the "information is very helpful". However, the Applicant said that it was concerned at the low number of delivery packages, considering the timeframe of ten years. The Applicant wished the Council to confirm that it had published all of the relevant information.
14. The Council confirmed, on 8 April 2021, that all agreed section 75 delivery packages (from the introduction of such) had now been published. As these are in addition to (and separate from) the section 75 agreements, they have not been in place for ten years. They came into force in 2016. The Council added that "any delivery package that is a 'working process' and not yet agreed has not been made public. However, as soon as they are agreed they will be." This was conveyed to the Applicant on 9 April 2021.
15. The Applicant stated that it had identified two sites where it was aware of a commitment to deliver affordable housing via a section 75 agreement but had been unable to locate the delivery packages. As the houses "are currently being delivered onsite" it would be assumed the delivery package is no longer a work in progress. The Applicant supplied the reference details for these two sites, and added that the approval includes a requirement for a section 75 agreement which states that all houses will be delivered as affordable houses. The Applicant queried why the delivery packages for these two sites were not included.
16. The Council advised the investigating officer that the section 75 Delivery Packages for these two sites are either to be completed or are under re-negotiation. Neither has been agreed or signed and are therefore not on the Council's website. Once they have been agreed and signed, the Council said that it would ensure they are included.
17. This was conveyed to the Applicant, which was asked if this was sufficient and whether it was content to withdraw its application without a decision being required. The Applicant replied that, while it was now satisfied with the information provided by the Council, it wished the Commissioner to issue a decision.

Commissioner's analysis and findings

18. In coming to a decision on this matter, the Commissioner considered all 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.

³ https://www.angus.gov.uk/directories/document_category/section_75_delivery_packages

Regulation 5(1) - Duty to make available environmental information on request

19. 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. This is subject to the various qualifications contained in regulations 6 to 12 of the EIRs.

Regulation 6(1)(b) - Form and format of information

20. In its review outcome, the Council notified the Applicant that the information was in the public domain and could be accessed through its website or from other information providers (the RoS). During the investigation, the Council confirmed that it was seeking to rely on regulation 6(1)(b) in relation to information covered by the request, which was already publicly available.
21. Regulation 6(1)(b) of the EIRs states that, where an applicant requests that information is made available in a particular form or format, a Scottish public authority shall comply with that request unless the information is already publicly available and easily accessible to the applicant in another form or format.
22. In order to determine whether the Council dealt with the Applicant's request correctly, therefore, the Commissioner must be satisfied as to whether, at the time it responded to the Applicant's requirement for review, the information held by the Council (and which fell within the scope of the request) was both publicly available and easily accessible to the Applicant in another form or format.
23. The Applicant sought all Section 75 delivery packages for affordable housing contributions agreed between the Council and private developers/planning application applicants in the last ten years.
24. The Council was asked how the information was publicly available to the Applicant. The Council responded that it did not hold the information in the form requested by the Applicant, but had provided the Applicant with information which can be used to research and access publicly available information to extract and collate the information requested.
25. The Applicant said that the Section 75 agreements and delivery packages were not available on the Council's public access portal. The Council said that it did not claim that the section 75 agreements and delivery packages were available on the public access portal, as this is not the case, but rather that such information was in the public domain and could be obtained from the RoS.
26. The Council explained that the value of developer contributions is determined in the Section 75 agreement. Until 2016, all Section 75 agreements also contained any affordable housing delivery details. Since 2016, how affordable housing can be delivered under a section 75 Agreement is - for reasons of flexibility - detailed under a separate Delivery Package document, rather than in the Section 75 Agreement itself. However, this applies only to Section 75 Agreements since 2016. The Council supplied a copy of its template for a Delivery Package. The Council confirmed that it did not - and does not - hold information in accessible format which sets out the details of the delivery packages since 2016.
27. In summary, the Council determined that:
 - Affordable housing delivery details for section 75 agreements between 2010 – 2016 are contained in the actual Section 75 Agreements, which are available through RoS

- After January 2016, delivery details for affordable housing for Section 75 Agreements were detailed in contractual Delivery Packages. The valuation of affordable housing commuted sums (where that type of delivery of affordable housing is agreed in the delivery package) are determined through valuation by the District Valuers Office, using a formula set out in the Section 75 Agreement.
- The Council's initial response, which stated that full delivery details are available through RoS, should have been clearer in that regard. The Council's Planning service had erroneously been advised that Delivery Packages were registered with RoS. The Council should also have stipulated that no information on Delivery Packages is held by the Council prior to 2016.

28. The Council explained that

- Information on address and planning application reference numbers had been supplied to the Applicant in response to a previous request and again as part of the review for this request to allow for the extraction of details from section 75 agreements from 2010 – August 2020, but not details of Delivery Packages.
- Even without a search carried out directly by RoS, Section 75 information can be identified also through RoS's Scotlis [portal](#)⁴. Individual titles can be identified on a map by selecting "Search by map".
- The information provided related to where Section 75 agreements were in place. The information relating to delivery packages sits within each individual file.

Commissioner's conclusions on regulation 6(1)(b)

29. The Commissioner accepts that some of the information requested by the Applicant was publicly accessible at the time of the request: the Applicant accepts this. However, as acknowledged by the Council, not all of the requested information was accessible. Therefore, the Commissioner does not accept that the Council was entitled to rely on regulation 6(1)(b) of the EIRs in relation to all of the information falling under the scope of the request. Accordingly, the Council failed to comply fully with the EIRs in its review response to the Applicant.

30. Given that the Council has now disclosed information to the Applicant, the Commissioner requires no action of the Council in respect of this failure in response to the Applicant's application. He acknowledges that the Council has engaged in good practice by subsequently publishing information on its website.

Decision

The Commissioner finds that Angus Council (the Council) partially complied with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by the Applicant: not all of the information to which the Council applied regulation 6(1)(b) was already publicly available and easily accessible to the Applicant in another form or format.

Given that the Council has now published this information, the Commissioner does not require the Council to take any action in respect of this failure in response to the Applicant's application.

⁴ <https://scotlis.ros.gov.uk>

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.

Daren Fitzhenry
Scottish Information Commissioner

21 July 2022

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.

...

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 –

- (a) the provision does not confer absolute exemption; and

...

25 Information otherwise accessible

- (1) Information which the applicant can reasonably obtain other than by requesting it under section 1(1) is exempt information.

...

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 regulation; 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;

...

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

...

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
 - (b) is subject to regulations 6 to 12.

...

6 Form and format of information

- (1) Where an applicant requests that environmental information be made available in a particular form or format, a Scottish public authority shall comply with that request unless-
 - (b) the information is already publicly available and easily accessible to the applicant in another form or format.

...

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.

...

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