

Decision Notice 061/2020

Royal Hospital for Children and Young People: fire protection surveys

Applicant: The Applicant

Public authority: Lothian Health Board

Case Ref: 201901899



Scottish Information
Commissioner

Summary

NHS Lothian was asked for a copy of fire protection and fire compartmentation surveys for the Royal Hospital for Children and Young People. NHS Lothian withheld the full Fire Strategy on the ground that disclosure would pose a significant risk to public safety. The Applicant disagreed with this, and believed that the public interest favoured disclosure.

The Commissioner investigated and found that NHS Lothian had complied with the EIRs in responding to the request as disclosure would substantially prejudice public safety.

Relevant statutory provisions

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (Interpretation) (definitions (b), (c) and (f) of "environmental information"); 5(1) (Duty to make environmental information available on request); 10(1), (2), (5)(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 19 August 2019, the Applicant made a request for information to Lothian Health Board (NHS Lothian). The Applicant requested "a copy of all fire protection and fire compartmentation surveys commissioned by the consortium responsible for the new children's hospital building at the Little France which have been passed to NHS Lothian". (The building referred to in the request is the newly-built Royal Hospital for Children and Young People and Department of Clinical Neurosciences.)
2. NHS Lothian responded on 10 September 2019. It told the Applicant that the information was exempt from disclosure under section 39(1) (Health, safety and the environment) of the Freedom of Information (Scotland) Act 2002 (FOISA) as disclosure would, or would be likely to, endanger the physical or mental health or the safety of an individual or individuals.
3. On the following day, the Applicant wrote to NHS Lothian requesting a review of its decision. He believed there was a clear public interest in release of the information. He commented that the surveys are reports about buildings, not individuals, and that NHS Lothian had given no evidence to support the claim that disclosure would, or would be likely to, endanger the physical or mental health or the safety of an individual or individuals. The Applicant stated that he did not want names of individuals, but the substance of the reports.
4. NHS Lothian notified the Applicant of the outcome of its review on 9 October 2019. NHS Lothian decided that it should have responded to the Applicant's request under the EIRs, rather than under FOISA, as the information requested was environmental. The majority of the information was, NHS Lothian said, being withheld under regulation 10(5)(a) (substantial prejudice to international relations, defence, national security and public safety) of the EIRs: disclosure into the public domain of fire safety information for a hospital would pose "a significant risk to public safety". NHS Lothian provided the Applicant with an extract from the

contractor's Fire Strategy Report, and commented that this disclosure was in line with previous decisions of the Commissioner.

5. NHS Lothian explained that the full Fire Strategy sets out the access and egress points of the building, layout, and the location of safety and security features. The sensitivity is in the provision of technical intricacies of the building and how the building is expected to function and perform, particularly in an evacuation scenario. Given the level of detail contained in the Fire Strategy, and the uncertainty as to who would access this information if it was made available publicly, NHS Lothian concluded that the safety of the building, and therefore of the public, would be substantially prejudiced by disclosure. Disclosure heightens the risk of robbery or terrorist threat, and so – NHS Lothian claimed – it was not in the public interest to disclose this information.
6. NHS Lothian clarified that it had not originally withheld any personal data under section 38(1)(b) (Personal information) of FOISA or regulation 11(2) (Personal data) of the EIRs. However, NHS Lothian had now redacted names of non-senior staff from the disclosed extract from the Fire Strategy under regulation 11(2).
7. On 14 October 2019, the Applicant wrote to the Commissioner. The Applicant 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.
8. The Applicant stated that he was dissatisfied with the outcome of NHS Lothian's review because it did not fully explain its original reasons to reject the request. The Applicant commented that "huge swathes of detail about the hospital building are available on the Edinburgh Council planning portal and the building will be a semi-public one when it eventually opens." He also explained that he had previously (through FOI) "received fire surveys for schools across Scotland from local authorities which had great detail about the buildings and results of fire surveys." Also, the partial information release by NHS Lothian told him "nothing about the conclusions of the safety assessors." He believed there was a public interest in releasing the results of this fire survey (given the delays and snagging issues in the public domain) and that that could be done in a way which did not cause any security concerns.

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. On 8 November 2019, NHS Lothian was notified in writing that the Applicant had made a valid application. NHS Lothian was asked to send the Commissioner the information withheld from the Applicant. NHS Lothian provided the information and the case was allocated to an investigating officer.
11. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. On 6 December 2019, NHS Lothian was invited to comment on this application and to answer specific questions. These related to the information it had withheld and the reasons for doing so.
12. NHS Lothian responded on 10 January 2020. NHS Lothian continued to withhold information for the same reason as given at review, but also offered to supply other information to the

Applicant. NHS Lothian offered to supply the register of all certified fire stopping, which it had not held at the time of the Applicant's request or review. Also, NHS Lothian said it would supply a March 2019 snapshot of progress against the Fire Safety snags identified in February 2019.

13. This offer was communicated to the Applicant, who thanked NHS Lothian for this, but wished the Commissioner to decide if he should have received the Full Fire Strategy.

Commissioner's analysis and findings

14. In coming to a decision on this matter, the Commissioner considered all the withheld information and the relevant submissions, or parts of submissions, made to him by both the Applicant and NHS Lothian. He is satisfied that no matter of relevance has been overlooked.

Application of the EIRs

15. NHS Lothian's review decided that it should have replied to the Applicant under the EIRs, rather than under FOISA. In his application, the Applicant did not express dissatisfaction about this aspect of NHS Lothian's review.
16. It is clear to the Commissioner from the request, and the information itself, that the information sought by the Applicant is environmental information, as defined in regulation 2(1) of the EIRs. The information relates to measures for fire protection and compartmentalisation for a building. This information falls within the definition of environmental information in paragraphs (b), (c) and (f) of the definition. NHS Lothian was therefore correct, at review, to reconsider and to respond under the EIRs, rather than under FOISA.
17. The Commissioner will consider the information in what follows solely in terms of the EIRs.

Regulation 5(1) of the EIRs

18. Regulation 5(1) of the EIRs (subject to the various qualifications contained in regulations 6 to 12) requires a Scottish public authority which holds environmental information to make it available when requested to do so by any applicant.
19. 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. NHS Lothian submitted that the information was excepted from disclosure in terms of regulation 10(5)(a) of the EIRs.

Regulation 10(5)(a) of the EIRs (public safety)

20. In terms of regulation 10(5)(a) of the EIRs, a Scottish public authority may refuse to make information available to the extent that its disclosure would, or would be likely to, prejudice substantially international relations, defence, national security or public safety. Here, NHS Lothian submitted that disclosing the information would prejudice substantially public safety.
21. As with all exceptions in regulation 10, this exception must be interpreted in a restrictive way (regulation 10(2)(a)) and the public authority must apply a presumption in favour of disclosure (regulation 10(2)(b)).

22. As noted above, NHS Lothian disclosed an extract from the Fire Strategy to the Applicant. Any references to the Fire Strategy in what follows do not include references to the disclosed extract, unless otherwise stated.

The Applicant's submissions

23. The Applicant argued that NHS Lothian had not explained what aspect of public safety would be prejudiced by disclosure, nor had NHS Lothian provided enough justification or information for this reason to refuse disclosure. The Applicant also commented that
- “Huge swathes of detail about the hospital building are available on the Edinburgh Council planning portal and the building will be a semi-public one when it eventually opens.”
24. The Applicant also explained that he had, through FOI, “received fire surveys for schools across Scotland from local authorities which had great detail about the buildings and results of fire surveys.”
25. He also believed that the partial information release by NHS Lothian told him “nothing about the conclusions of the safety assessors” and there was a public interest in releasing the results of the “fire survey” (given the delays and snagging issues in the public domain so far) and that it can be done in a way that does not cause any security concerns.
26. The Applicant’s dissatisfaction was conveyed to NHS Lothian, which was invited to comment.

NHS Lothian's submissions

27. NHS Lothian’s submissions focused on the public safety aspect of regulation 10(5)(a) of the EIRs.
28. NHS Lothian explained that it did not hold any surveys or recognise the terminology “fire protection” and “fire compartmentation” surveys. NHS Lothian said that the Fire Strategy Report included drawings, principles and strategy for evacuation, detection and alarm systems, escape routes, access and equipment for fire-fighting and the location of safety and security features. Given the level of detail contained in the report, and the uncertainty as to who would access this information if it were made available, NHS Lothian concluded that disclosure of technical knowledge of fire-fighting capability, and how to overcome it and cause maximum disruption or harm, would substantially prejudice the safety of the building.
29. NHS Lothian also believed that to release the full fire strategy would expose staff, patients and the public using the site to potential risks from those who may wish to cause damage or harm. NHS Lothian referred to previous decisions of the Commissioner to justify its position: for example *Decision 108/2008 Mr Simon Brogan and Highland & Islands Fire Board*¹ and *Decision 091/2019 Mr S and Dundee City Council*².

The Commissioner's view

30. The newly-built Royal Hospital for Children and Young People is a building of obvious importance and significance. It is one that will be visited by many persons – as patients, staff or others uninformed in the maintenance and functioning of a hospital. It will be a building that will contain complex and valuable technology and equipment.

¹ http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2008/200800262_200800448.aspx

² [http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2019/201900015_\(1\).aspx](http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2019/201900015_(1).aspx)

31. No evidence has been given to suggest that such a building would be targeted by persons intent on a criminal purpose. However, in the current climate, the Commissioner accepts that it is reasonable for NHS Lothian to assume that it is a place that may be targeted by persons intent on criminal purpose. Clearly, such action (were it to occur) would threaten public safety.
32. The information in the Fire Strategy is not in the public domain, and it is not information that a visitor to the hospital (when opened) could obtain by observation. The Applicant is correct to say that the building will be a semi-public one when it eventually opens, but this does not mean that a member of the public would be able to obtain the same technical awareness about the building, and any fire precautions or similar, simply through being in the building and observing it.
33. The Applicant is again correct to highlight that information about the hospital is available on City of Edinburgh Council's planning portal. However, as NHS Lothian commented, the information on the portal does not have the same technical detail as the withheld information. The information available via the Council's planning portal does not include fire safety, other than the Fire Certificate/Sign Off.
34. For the exception in regulation 10(5)(a) to apply, the prejudice to public safety must be (or must be likely to be) both real and significant, as opposed to hypothetical or marginal. There must also be a genuine link between disclosure and the harm: it cannot simply be a remote or hypothetical possibility.
35. Having reviewed the information in detail, the Commissioner concludes that the knowledge that would be gained through the Fire Strategy is considerable. The document includes in-depth detail. This intelligence would assist anyone who would seek to damage (for whatever reason) the hospital, or those intent on theft or other criminal purpose in respect of the hospital, or its staff or patients. Such damage or criminal purpose would have a serious impact on public safety.
36. The Applicant stated that he had "received fire surveys for schools across Scotland from local authorities which had great detail about the buildings and results of fire surveys." The Applicant clearly took the view that if one public authority could disclose similar information, and no harm occurred following that disclosure, then it was wrong for another public authority to argue that harm would occur in this case. NHS Lothian was asked to comment on this, but said it could not comment on what information other organisations had released. However, it did state that NHS Lothian (and NHS Scotland) would not release this level of detail.
37. On balance, the Commissioner accepts that the likelihood of this happening is not unduly remote and that, in the circumstances, the disclosure would, or would be likely to, prejudice substantially public safety. He is, therefore, satisfied that the exception in regulation 10(5)(a) applies to the remaining withheld information.

The public interest test

38. Having agreed that the exception in regulation 10(5)(a) applies, the Commissioner is required to consider the public interest test required by regulation 10(1)(b) of the EIRs. The test specifies that a public authority may only withhold information to which an exception applies where, in all the circumstances, the public interest in making the information available is outweighed by the public interest in maintaining the exception.

39. In every case, the public interest factors favouring disclosure will include both general and specific arguments relating to transparency, accountability, participation in the democratic process and decision-making on environmental issues. Generally, there will always be a public interest in the disclosure of information which promotes transparency and accountability of public authorities, greater public awareness and understanding of environmental matters, a free exchange of views, and more effective public participation in environmental decision making: all of these ultimately contribute to a better environment.
40. The Commissioner must also consider the public interest factors relating more specifically to the information in question, and the likely effects of its disclosure. He must balance the factors favouring disclosure against those weighing against it.

The Commissioner's view

41. The Commissioner recognises that there is a weighty public interest in ensuring the safety of all buildings and, in particular, those to which the public has access. Equally, there is a strong public interest in transparency of the building process and public confidence that buildings are safe.
42. In the present case, both the Applicant and NHS Lothian are relying on the same public interest (i.e. public safety): the Applicant to ensure that the building is safe (for the public) by having an effective fire strategy, and NHS Lothian in ensuring that no information is disclosed that may assist a criminal purpose that would endanger the public with respect to the hospital. NHS Lothian also recognised the public interest in ensuring that the building is safe in terms of any fire risks. On balance, NHS Lothian maintained that it provided the level of assurance required and that it is in the public interest to withhold information when disclosure of that information would increase the risk to the security of premises and, ultimately, safety of the public.
43. NHS Lothian said it recognised the importance of the public knowing that organisations comply with the requirements of the Fire Scotland Act 2005 and Fire Scotland Regulations 2006 to protect public safety and public property. For this reason, it had disclosed part of IHS Lothian's Fire Strategy Report for the building, including the Design Approval Process that the contractor had to follow. NHS Lothian said that it had also requested that IHS Lothian provide the Board with their Fire Stopping records for the building, including evidence of certification on completion of the works.
44. NHS Lothian disclosed information from the Fire Strategy – albeit information that the Applicant thought said nothing about the conclusions of the safety assessors. The Commissioner acknowledges that the disclosed information goes some way to enhancing the public interest in transparency. For example, the contents pages of the report – and details of figures and tables – were disclosed and they show the various aspects and factors, albeit at a fairly high level of generality, that have been considered within the report. Information from the design approval process has been disclosed and that shows who has been consulted in the development of the Fire Safety Design Strategy. Nevertheless, the Commissioner does recognise that there is much more detailed information that is withheld.

45. There is other recorded information within the public domain that goes towards the public interest in ensuring the fire safety of the building – for example, NHS National Services Scotland report³ into compliance of all building systems at the hospital.
46. The Commissioner recognises that there is a significant public interest in ensuring that the safety of the building and those within is not compromised by disclosure of information which could be used by those with malevolent intent, to the endangerment of visitors, the building and the wider environment. On balance, having balanced the competing public interests in all the circumstances of this case, the Commissioner finds that the public interest in making the information available is outweighed by that in maintaining the exception in regulation 10(5)(a) of the EIRs.

Decision

The Commissioner finds that Lothian Health Board complied with the Environmental Information (Scotland) Regulations 2004 in responding to the information request made by the Applicant.

Appeal

Should either the Applicant or NHS Lothian 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 May 2020

³ <https://www.gov.scot/publications/nhs-lothian-royal-hospital-children-young-people-department-clinical-neurosciences-review-fire-systems-electrical-systems-medical-gas-installations/>

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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...

(b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in paragraph (a);

(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;

...

(f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in paragraph (a) or, through those elements, by any of the matters referred to in paragraphs (b) and (c);

...

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.

...

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.
- ...
- (5) A Scottish public authority may refuse to make environmental information available to the extent that its disclosure would, or would be likely to, prejudice substantially-
- (a) international relations, defence, national security or public safety;
- ...

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