

# Decision Notice



Decision 062/2013 Mr D P Simpson and East Ayrshire Council

Inspection reports

Reference No: 201202109  
Decision Date: 28 March 2013

[www.itspublicknowledge.info](http://www.itspublicknowledge.info)

**Rosemary Agnew**  
Scottish Information Commissioner

Kinburn Castle  
Doubledykes Road  
St Andrews KY16 9DS  
Tel: 01334 464610



## Summary

On 29 August 2012, Mr Simpson asked East Ayrshire Council (the Council) for information about road inspection reports. Mr Simpson was not satisfied that the Council did not hold the information requested. The Commissioner carried out an investigation and accepted that the Council did not hold the information requested by Mr Simpson.

## 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) (definitions (a) and (c) of "environmental information"); 5(1) and (2)(b) (Duty to make available environmental information on request); 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 29 August 2012, Mr Simpson, who had previously been provided with some information relative to the inspection of a particular road, wrote to the Council asking for a copy of the inspectors' reports to be sent as a matter of urgency, pointing out that he expected reports for December 2011, January 2012 and February 2012 up to the eventual repairs and its subsequent approval.
2. The Council responded on 7 September 2012. The Council informed Mr Simpson that there were no individual reports and explained that the details regarding the inspection of roads were uploaded directly into the Council's computer system and that no paper records were held.
3. On 10 September 2012, Mr Simpson wrote to the Council requesting a review of its decision. In particular, Mr Simpson asked why the computer records had not been provided and asked for an explanation as to the process followed.



4. The Council notified Mr Simpson of the outcome of its review on 17 September 2012. The Council provided Mr Simpson with an explanation of the processes followed. The Council also confirmed that any computerised reports had been provided in response to his earlier request for information.
5. On 18 October 2012, Mr Simpson 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.
6. The application was validated by establishing that Mr Simpson had made requests for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its response to those requests. The case was then allocated to an investigating officer.

## Investigation

---

7. On 15 November 2012, the investigating officer notified the Council in writing that an application had been received from Mr Simpson, giving it an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking it to respond to specific questions. In particular, the Council was asked to justify its reliance on any provisions of FOISA and the EIRs it considered applicable to the information requested and to explain the steps it had taken to identify and locate the information Mr Simpson had requested.
8. The Council responded on 4 December 2012. Whilst the Council stated that it had not recognised Mr Simpson's letter of 29 August 2012 as a request for information or his letter of 10 September 2012 as a request for review, it had provided responses to Mr Simpson explaining that any information held had been provided previously. The Council also submitted that information requested by Mr Simpson fell to be dealt with in terms of the EIRs and provided submissions in support of its position that the requested information was not held.
9. The relevant submissions received from both the Council and Mr Simpson will be considered fully in the Commissioner's analysis and findings below

## Commissioner's analysis and findings

---

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



## **FOISA or EIRs?**

11. It is clear from the Council's correspondence with Mr Simpson 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 relates to road conditions and the repair thereof and the Commissioner is satisfied and that it would fall within the definition (a) of environmental information in regulation 2(1) of the EIRs. As such, the Council relied on the exemption in section 39(2) of FOISA in relation to the information requested. For this exemption to apply, any information requested would require to be environmental information as defined in regulation 2(1) of the EIRs.

## **Section 39(2) of FOISA – environmental information**

12. The exemption in section 39(2) of FOISA provides, in effect, that environmental information (as defined by regulation 2(1)) is exempt from disclosure under FOISA, thereby allowing any such information to be considered solely in terms of the EIRs. In this case, the Commissioner accepts that the Council was entitled to apply the exemption to the withheld information, given her conclusion that it is properly classified as environmental information.
13. As there is a separate statutory right of access to environmental information available to the applicant in this case, the Commissioner also accepts that the public interest in maintaining this exemption and in dealing with the request in line with the requirements of the EIRs outweighs any public interest in disclosing the information under FOISA.

## **Regulation 5(1) of the EIRs**

14. 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. 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.
15. 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.

## **Regulation 10(4)(a) of the EIRs**

16. 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 in regulation 10(1)(b) of the EIRs and can only apply if, 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.



17. During the investigation, the Council provided submissions in response to the questions put by the investigating officer on this matter. The Council explained that any information held had previously been provided to Mr Simpson in response to an earlier request. It confirmed that it did not hold copies of Inspectors' Reports as requested by Mr Simpson.
18. The Council described the searches carried out to establish what relevant information it held. It explained that the roads inspections follow a well-established routine and information is held within a dedicated system. It further explained that further searches were carried out during the investigation, confirming that no information was held.
19. Having considered the Council's submissions, the Commissioner is satisfied that it carried out adequate searches, with a view to identifying and locating the information requested by Mr Simpson. The Commissioner notes that the Council had explained the processes followed by the Council in recording the information as explained to Mr Simpson with the response to review of 17 September 2012.
20. In this case, the Commissioner is satisfied that the Council did not hold the information requested by Mr Simpson which is specific to the inspection of the roads in question. Consequently, she does not consider there to be any conceivable public interest in requiring that any information be made available. The Commissioner therefore concludes that, in all the circumstances of this case, the public interest in making the requested information available is outweighed by that in maintaining the exception in regulation 10(4)(a) of the EIRs.
21. The Commissioner is satisfied, therefore, that the Council was entitled to refuse Mr Simpson's request under regulation 10(4)(a) of the EIRs. Consequently, the Commissioner is satisfied that in this regard the Council complied with regulation 5(1) of the EIRs.

## DECISION

The Commissioner finds that, in respect of the matters raised in Mr Simpson's application, East Ayrshire Council complied with Part 1 of the Freedom of Information (Scotland) Act 2002, and with the Environmental Information (Scotland) Regulations 2004, in responding to the information request made by Mr Simpson.



## Appeal

---

Should either Mr Simpson or East Ayrshire 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 notice.

**Margaret Keyse**  
**Head of Enforcement**  
**28 March 2013**



## Appendix

---

### 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.

...

- (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.

...



## 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.

...

### 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;

...