

# Decision Notice



Decision 102/2009 Councillor David Alexander and Falkirk Council

Falkirk Local Plan

Reference No: 200801026

Decision Date: 27 August 2009

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## Summary

Councillor Alexander requested from Falkirk Council (the Council) information relating to the Falkirk Local Plan. The Council responded by releasing certain information but withholding communications between individual Councillors and officers of the Council, on the basis that its disclosure would prejudice substantially the effective conduct of public affairs. Following a review, Councillor Alexander remained dissatisfied and applied to the Commissioner for a decision.

During the investigation, it was put to the Council that the information withheld was environmental information. While providing submissions on the potential application of the EIRs, the Council still regarded FOISA as the appropriate regime and therefore did not wish to rely on the exemption under section 39(2) of FOISA. As a result, the Commissioner was required to consider the information under both the EIRs and FOISA.

Following an investigation, the Commissioner found that the Council should have dealt with Councillor Alexander's request under the EIRs in respect of most of the withheld information. The Commissioner did not accept that the exceptions in the EIRs claimed by the Council applied to the majority of the withheld information and therefore required its release. He also found that the exemptions claimed by the Council under FOISA did not in any event apply to the majority of the withheld information. He did, however, accept that certain information had been properly withheld under regulation 10(4)(e) of the EIRs (internal communications) and section 30(b) of FOISA (prejudice to effective conduct of public affairs).

## Relevant statutory provisions and other sources

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement), 2 (Effect of exemptions), 30(b) and (c) (Prejudice to effective conduct of public affairs), 36(1) and (2) (Confidentiality).

Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (Interpretation) (definition of "environmental information"); 5(1) and (2)(b) (Duty to make available environmental information on request), and 10(1), (2), (4)(d),(4)(e) and 5(d) (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

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1. On 10 April 2008 Councillor Alexander wrote to Falkirk Council requesting:  
“...copies of all correspondence, internal documentation, minutes and agendas of meetings and any other written material involving Falkirk Council and Members of Falkirk Council’s current Administration either collectively or individually on matters pertaining to the Falkirk Local Plan since 4 May 2007.”
2. The Council responded on 19 May 2008 outlining the Local Plan process up to the time of the request, with comments on the types of material held. It released some information and advised that other key sources of advice from officers to members were already in the public domain. Regarding communications between individual members and officers, the Council asserted that these fell into a category covered by the Scottish Ministers’ Code of Conduct for Councillors (the Code) and that in consequence the exemptions in sections 30(b) and (c) and 36(2) of FOISA applied.
3. On 22 May 2008 Councillor Alexander wrote to the Council requesting a review of its decision. In particular, Councillor Alexander disagreed with the Council’s rationale for withholding information.
4. Falkirk Council notified Councillor Alexander of the outcome of its review on 27 June 2008. It confirmed that it was withholding communications between individual members and officers and upheld its original decision in this regard.
5. On 3 July 2008 Councillor Alexander 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.
6. The application was validated by establishing that Councillor Alexander had made a request 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 that request. The case was then allocated to an investigating officer.

## Investigation

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7. On 17 July 2008, the Council was notified in writing that an application had been received from Councillor Alexander and asked to provide the Commissioner with any information withheld from him. The Council responded with the information requested and the case was then allocated to an investigating officer.



8. The investigating officer subsequently contacted the Council, 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. The investigating officer asked the Council to confirm if it had supplied all the attachments referenced in certain correspondence, noting in particular certain documents which appeared to be missing. The Council was also asked to justify its reliance on any provisions of FOISA it considered applicable to the withheld information (identifying which exemptions it considered applicable to which items of information) and was invited to comment on whether it considered any of the items withheld (or parts thereof) to constitute environmental information in terms of the EIRs. In relation to any information it considered environmental, it was asked to confirm which exemptions in the EIRs it wished to apply to that information, with reasons, and also whether it wished to apply the exemption in terms of section 39(2) of FOISA.
9. The Council provided a submission with a schedule of documents. It indicated it was not persuaded that the withheld information was environmental information for the purposes of the EIRs and therefore advised that it did not wish to rely on section 39(2) of FOISA. However, it provided arguments in support of the EIR exceptions it would consider applicable should the information be found to be environmental, along with arguments on the FOISA exemptions claimed. The schedule indicated which exemptions/exceptions were considered applicable to each document.
10. The Council also supplied a number of email attachments which had been inadvertently omitted from the original set of withheld material at the time this information was supplied to the Commissioner's office. It indicated that some of the attachments had been deleted and were no longer held. The Council explained that the pressure to reduce the size of inboxes together with operational differences between the previous email system (Pegasus) and the present one (Outlook) as regards document version control and the storage of these attachments resulted in some of the attachments being deleted. The Commissioner is now satisfied that the Council has identified and supplied to him all information falling within the scope of Councillor Alexander's request.
11. Councillor Alexander was also invited to comment on this case, particularly in relation to his views on why the public interest would be served by the disclosure of the information which was being withheld.

## **Commissioner's analysis and findings**

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12. In coming to a decision on this matter, the Commissioner has considered all of the withheld information and the submissions made to him by both Councillor Alexander and the Council and is satisfied that no matter of relevance has been overlooked.



## Background to request

13. It may be helpful to provide some explanation of the process by which local plans are approved by local authorities in Scotland and the timing of Councillor Alexander's request in relation to this process. Development plans are the basis for decisions on planning applications and contain policies for the future development and use of land in an area, covering a wide range of issues such as housing, transport, employment, shopping, recreation and conserving and protecting the countryside. The development plan is made up of two parts - the structure plan and the local plan. Between them they show how much development may take place, where it will take place and where it is unlikely to be allowed.
14. Whilst the structure plan for an area takes a relatively broad, long-term view of development, local plans are produced for smaller areas. They set out more detailed policies and proposals to guide development. Local authorities must consult widely on the content of a local plan as everyone has the right to information on planning matters that affect them. After considering all views and objections and making suitable changes, local authorities will adopt the local plan as the basis for their decision making in the area and the local plan must be in line with the approved structure plan.
15. In this case, a draft version of the Falkirk Local Plan was made available for public scrutiny approximately a year prior to Councillor Alexander's request (on 20 April 2007) for a 6 week period. There followed a period during which objections could be lodged, after which the Council gave consideration to all the representations made and began formulating its response. A special meeting of the Environment and Heritage Committee was held on 9 April 2008 (the day before Councillor Alexander submitted his request to the Council) to consider a number of specific representations with proposed responses. The full Council then met on 30 April 2008 at which time its response was approved. It should be noted that this stage of the Local Plan process coincided with the 20 day review period for Councillor Alexander's request as a review was requested on 22 April 2008.
16. Thereafter, a set of proposed pre-inquiry modifications intended to resolve objections were advertised in the period May to July 2008. This allowed a further opportunity for objectors to withdraw or maintain their objections in light of the Council's proposed modifications. By the end of September 2008, there were 597 outstanding objections of which 324 were to be considered by oral evidence (either a hearing or a formal inquiry session) at the Local Plan Inquiry. The remainder were to be considered by means of written submissions. A pre-inquiry meeting, to which objectors were invited, was scheduled for December 2008. The planning inquiry process commenced in March 2009 and the Council indicates on its website that it is likely to take 4 months or so with final adoption of the Local Plan likely to take place in 2010.

## EIRs or FOISA?

17. Environmental information is defined in regulation 2(1) of the EIRs (the definition is reproduced in full in the Appendix to this decision). Where information falls within the scope of this definition, a person has a right to access it under the EIRs, subject to various restrictions and exceptions contained in the EIRs.



18. The Commissioner will not repeat his full discussion of the relationship between FOISA and EIRs in this decision. He would consider, however, that the reasoning set out in *Decision 218/2007 Professor A D Hawkins and Transport Scotland* applies equally here. Broadly, the Commissioner's general position on the interaction between the two regimes 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 dealt with 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 then **also** deal with 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)
  - vi. The Commissioner is entitled (and indeed obliged) where he considers a request for environmental information has not been dealt with under the EIRs to consider how it should have been dealt with under that regime.
19. The implication of the Hawkins Decision for the Commissioner's consideration of Councillor Alexander's request is that he must first determine whether the information withheld is environmental information. If it is, he must go on to consider the Council's handling of the request in terms of both the EIRs and FOISA.
20. Upon an initial review of the information withheld in this case, the Commissioner reached the view that it was likely to include environmental information. The investigating officer relayed this view to the Council in a letter dated 1 October 2008, which invited comments on this point and provided a reference to the Hawkins Decision for further guidance. The Council was also asked to confirm (with reasons) whether it would consider the information withheld to fall under the scope of any of the exceptions from disclosure contained within the EIRs. As indicated above, it took the view that the information was not environmental but provided arguments in relation to the EIR exceptions it would consider relevant should the Commissioner take a different view. It did not believe the Councillor/officer exchanges to be measures affecting or designed to protect the environment, although it conceded that the Local Plan itself might be. It did not apply the exemption in section 39(2) of FOISA.
21. The Council withheld 55 documents relating to Councillor Alexander's request. The Commissioner has considered the Council's approach to these documents and he has concluded that the information in them can be placed into three groups as set out below:
  - a. **Group 1** comprises the five documents identified by the Council as relating to advice on the Committee process (45, 48, 51, 52 and 53) rather than the Local Plan, together with one other document (document 20) that appears (following the Council's reasoning) to fall into the same category



- b. **Group 2** consists of documents which the Council identified as being wholly or partially factual (documents 2, 3, 4, 5, 7, 8, part of 10, 11, 14, 15, 16, part of 23, 29, part of 30, 32, 46 and 55)
  - c. **Group 3** is made up of those documents which do not fall into groups 1 or 2 (documents 1, 6, 9, part of 10, 12, 13, 17, 18, 19, 21, 22, part of 23, 24, 25, 26, 27, 28, part of 30, 31, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 47, 49, 50 and 54)
22. The Commissioner will now consider whether the information in each of these groups should have been responded to under the EIRs.

#### *Analysis of Group1 Documents*

23. The Council stated that whilst the Local Plan itself might constitute a *measure* either affecting the environment or designed to protect the environment, it did not follow that the Councillor/officer exchanges in themselves amounted to measures. It contended that, without prejudice to this general statement, the five documents numbered 45, 48, 51, 52 and 53 pertained to advice not on the Local Plan but on the Committee process itself.
24. Given the Council's approach to classifying the documents in respect of the Committee process, the Commissioner has identified another document (document 20) within the withheld information which contains references of a similar character to the Committee process. For the sake of consistency, he has included document 20 in Group 1 for the purposes of this analysis.
25. The Commissioner notes that there are elements of sensitive personal data contained in document 45 (in the first and final paragraphs of the email dated 7 April 2009 17:29), but the Council did not comment on how the data protection principles would apply to these: having considered these paragraphs, however, the Commissioner is satisfied that the following sections (containing the sensitive personal data) relate to personal matters wholly unrelated to the subject matter of Councillor Alexander's request and therefore do not require to be considered as falling within the scope of the request:
- a. The final sentence of the first paragraph;
  - b. The words between (but excluding) "xda" and "and" in the final paragraph.
26. The Commissioner also notes that documents 51 and 52 (along with its attachment) post-date the Council's receipt of Councillor Alexander's request and therefore fall outwith the scope of the request, as do the following elements of documents 48 and 53:
- Document 48 – email of 21 April 2008
  - Document 53 – emails of 21, 27 and 28 April 2008

It is therefore the remaining elements of these documents which fall to be considered in this decision as part of Group 1, along with documents 20 and 45 (less the elements of sensitive personal data identified in paragraph 25).



27. The Commissioner is satisfied that the information in documents 48 and 53 (insofar as falling within the scope of the request) relate directly to proposals in the Local Plan. The Local Plan will be used to determine what measures can be taken in the future development of the local area with the potential to affect the state of the elements of the environment (as defined in regulation 2(1)(a)), including in this case land, landscape and natural sites, and is itself a measure likely to effect these elements, as defined in regulation 2(1)(c). In the circumstances, therefore, the Commissioner is satisfied that this information falls within the definition of "environmental information" in regulation 2(1) and should properly have been dealt with in terms of the EIRs. The information in documents 20 and 45, however, insofar as falling within the scope of the request, relates more directly to the conduct of Committee and analogous processes and the Commissioner accepts in the circumstances that it would not be reasonable to consider it as environmental information.

#### *Analysis of Group 2 Documents*

28. The Council identified documents (Group 2) which it believed to be either wholly or partially factual. Of these, the Commissioner notes that document 55 post dates the Council's receipt of Councillor Alexander's request and therefore falls outwith the scope of the request. Consequently, it will not be considered further in this decision.
29. While some of the information in Group 2 is more general in nature, these documents mostly comprise briefings by officers to Councillors containing background information or historical information on specific geographical areas (and proposals for them) within the planning context. These documents mostly comprise a covering email with a report or map attached detailing the planning situation at that point in time: to some extent they could be said to contain professional opinion on planning matters. Having considered the information in Group 2, the Commissioner is satisfied that all of it was created (or at least held) for the purpose of producing the Local Plan. He considers all of it to be information about the state of the elements of the environment or about a measure (the Local Plan) affecting or likely to affect those elements, and therefore has concluded that it falls within the definition of "environmental information" in regulation 2(1) and should properly have been dealt with in terms of the EIRs.

#### *Analysis of Group 3 Documents*

30. This Group contains documents which were not considered to be factual by the Council and which it did not consider to be related to the Committee process as distinct from the Local Plan. Of these, the Commissioner notes that documents 47, 49, 50 and 54 (along with their respective attachments) all post-date the Council's receipt of Councillor Alexander's request. In addition, having considered the content of document 17 the Commissioner does not believe any of it to fall within the subject matter of Councillor Alexander's request. Consequently, he does not require to (and will not) consider the information in any of these documents further in this decision.





31. Broadly, these comprise officers' observations on the comments/objections of Councillors and others on the Local Plan proposals (with supporting information such as maps), together with Councillors' requests for advice on these. Having considered their content, the Commissioner is satisfied that all of the information relates to the proposed measures within the Local Plan. For this reason, the Commissioner is satisfied that all the withheld information in Group 3 is environmental information in terms of regulation 2(1) of the EIRs and therefore should have been dealt with under the EIRs. The investigating officer noted individuals' mobile phone numbers in certain of these documents: Councillor Alexander was consulted on these and confirmed that he did not require them, and consequently they will not be considered further in this decision.

### **Consideration of the withheld information under the EIRs**

32. Having concluded that most of the withheld information is environmental information, and given that the Council has chosen not to apply section 39(2) of FOISA to it, the Commissioner must now consider how the Council dealt with (or should have dealt with) Councillor Alexander's request under the EIRs and FOISA. He will start by considering whether the Council would have been correct to withhold the environmental information under the EIR exceptions referred to in its submissions to him.
33. The Council indicated that it would apply two exceptions under regulation 10 of the EIRs to all three groups of documents and a further exception to the Group 2 documents (factual information). The Commissioner will now look at the application of each exception to determine whether it has been claimed appropriately.

### ***Regulation 10(5)(d) - Confidentiality***

34. The Council considered all of the withheld information to be confidential and applied the exception in regulation 10(5)(d) of the EIRs to all of it.
35. Under regulation 10(5)(d) of the EIRs, 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 the confidentiality of the proceedings of any public authority where such confidentiality is provided for by law.
36. As with all of the exceptions under regulation 10, a Scottish public authority applying this exception must interpret it in a restrictive way and apply a presumption in favour of disclosure (regulation 10(2)). Even where the exception applies, the information must be released 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)).



37. The Council cited the Code, which takes its force from section 1 of the Ethical Standards in Public Life etc. (Scotland) Act 2000 (the Ethical Standards Act), as the basis for the confidentiality of the information. It argued that the Code gave elected Councillors and officers the expectation that the types of communication under consideration here would be confidential and explained the quality of confidence in them. It was a “statutory based” affirmation of the nature of the relationship between officers and Councillors, moving that relationship into a situation akin to the “more traditionally accepted confidential relationships ... not based on contract”. The Council went on to argue that the fact of disclosure of information of this kind to political opponents, who could then use it for their own purposes, would be sufficient detriment to found an action of breach of confidence.
38. The Council referred in particular to paragraph 14 of the *Protocol for relations between Councillors and Employees in Scottish Councils* forming Annex C to the Code, which in its view created a requirement of strict confidentiality in respect of any discussions between officers and political groups or councillors. It also referred to its own Code of Conduct for Members and Officers, which it submitted was intended to supplement the Code: the Council argued that this reinforced the need for strict confidentiality in relation to advice to party groups. The convention, it argued, was that there was no “need to know” in relation to such information and therefore no “right to inspect a document forming part of the internal workings of another party group”.
39. Acknowledging that paragraph 14 of the *Protocol*, made provision for factual information on which advice to Councillors was based being available to all political groups on request, the Council confirmed that if Councillor Alexander had asked officers directly for information on the same subjects he would have been given it. It pointed out that the opposition (of which Councillor Alexander formed part) had been given a briefing on the amendments made to the Local Plan by the Administration. The Council went on to argue, however, that paragraph 14 did not allow for one Councillor simply to ask for the factual information that had been requested by another Councillor or political group in order to find out what that other Councillor or group was doing and was interested in. It also acknowledged that a Councillor might pursue their own stance on a particular matter individually, rather than working as part of a political group.



40. The Ethical Standards Act requires that the Ministers create a Code of Conduct (the Code). This in turn creates the standards and rules of conduct which Councillors are required to follow. These standards and rules can be enforced by the Standards Commission for Scotland in accordance with the Ethical Standards Act. However, the Code itself does not have the status of primary or delegated legislation and therefore it must be questioned whether it can create legal obligations which would not exist in its absence. In any event, it appears clear from its terms that the *Protocol* referred to in paragraph 38 above simply represents guidance on good practice for Councillors and employees of local authorities. The Commissioner does not believe it to be capable of creating new legal obligations, and while he acknowledges that paragraph 14 of the *Protocol* might be relevant in determining whether an obligation of confidentiality exists in certain circumstances he does not accept that it creates an independent statutory right to confidentiality, applicable to every communication between an officer and a Councillor. If information of this kind is to be confidential in any given case, it must be under the common law of confidence.
41. For information to be confidential under the common law, two main requirements must be met. These are:
- the information must have the necessary quality of confidence about it. It must not be generally accessible to the public already; and
  - the information must have been communicated in circumstances importing an obligation of confidentiality. The obligation may be express (for example, in a contract or other agreement), or implied from the circumstances or the nature of the relationship between the parties.
42. To have the necessary quality of confidence, the information should not be generally accessible. In this regard, while the Commissioner notes the Council's comments on the circumstances in which the withheld factual information would be made available to other Councillors, the fact remains that this information *could* be made available to Councillors other than those to whom the advice in question was given, in accordance with paragraph 14 of the *Protocol*. In the circumstances, the Commissioner cannot accept that the withheld factual information possessed the necessary quality of confidence. Given the potential availability of this information to others, neither can he accept that it was communicated to the Councillors to whom it was given in circumstances importing an obligation of confidentiality. Accordingly, he cannot uphold the Council's assertions of confidentiality in relation to the factual information.



43. In relation to the remainder of the withheld environmental information, the Commissioner understands that Councillors might in certain circumstances expect communications from officers to be communicated in confidence. Whether such an expectation is justified will, however, depend on the circumstances of each particular case. The rationale for confidentiality appears to be to protect the internal workings of party groups. Here, the Commissioner is not satisfied that such deliberations would be disclosed were the withheld information to become public. Although the amendments to the local plan put forward by Administration Councillors were eventually (presumably for administrative convenience) brought together into one motion for presentation to Committee, up to that point they appear to have been developed by the individual Councillors independently. In any event, it appears to the Commissioner that insofar as not factual or simply administrative, the withheld environmental information represents the advice of professional planning officers acting in that capacity. In much the same way as the factual information, the officers concerned would have been obliged to provide the same advice impartially to whichever Councillors had asked for it.
44. In the circumstances, therefore, the Commissioner can identify no basis for accepting that the remaining environmental information either possessed the necessary quality of confidence or was communicated in circumstances in which there could be a reasonable expectation of confidentiality. He must bear in mind, of course, that regulation 10(5)(d) refers to the confidentiality of a public authority's *proceedings* rather than the confidentiality of the withheld information. In this connection, he has no difficulty accepting the imparting of advice of the kind under consideration here as an element of the Council's proceedings. Given the nature of the information and the circumstances in which it was imparted, however, in this particular case he can identify no confidentiality to be protected in these proceedings and as a consequence is not prepared to uphold the Council's assertions that the regulation 10(5)(d) exception applies.
45. The Commissioner also notes the Council's contention that the withheld information is confidential because it is subject to litigation privilege, to the extent that it comprises advice given in contemplation of legal proceedings (i.e. the Local Plan Inquiry, which at the relevant time had yet to take place). While acknowledging that litigation privilege is a form of confidentiality provided for by law (and that if it existed in this context it would do so in relation to the proceedings of the Council), he cannot accept in this case that privilege applies. For it to do so the information would, as the Council acknowledges, require to have been created in contemplation of legal proceedings. A local plan inquiry is a process whereby the reporter appointed by the planning authority considers evidence with a view to arriving at an independent view on proposals in the authority's local plan, particularly those proposals which have been the subject of objections. The inquiry is not intended to take the form of a judicial arbitration between opposing parties and the reporter's function is to make recommendations to the authority rather than binding determinations (see the Scottish Ministers' Circular 32/1996 *Code of Practice for Local Plan Inquiries*).



46. The Commissioner does not, therefore, believe the Local Plan Inquiry to have the character of legal proceedings such as would be required for litigation privilege to apply. Even if a contrary view were taken, however, he could not accept that any of the information under consideration here was created in *contemplation* of legal proceedings. It was created in the course of developing a document (the Falkirk Local Plan) which would later be considered in a process which might arguably be deemed to be legal proceedings, but that is not the same as being created in contemplation of that process. In this case, having considered the information in question and the context in which it was created (the provision of advice to Councillors so that they could arrive at their own respective positions in respect of certain Local Plan proposals), the Commissioner cannot accept that any of it is sufficiently closely related to the Council's preparations for the Local Plan Inquiry for it to be regarded as created in contemplation of that Inquiry.
47. For the reasons stated above, the Commissioner concludes that the exception provided for in regulation 10(5)(d) of the EIRs does not apply to any of the withheld environmental information. As he is satisfied that the exception does not apply, he is not required to consider the public interest test.

***Regulation 10(4)(d) - incomplete data***

48. The Council additionally cited regulation 10(4)(d) of the EIRs in relation to the information in Groups 1 and 3 as described above. This regulation provides that a Scottish public authority may refuse to make environmental information available to the extent that it relates to material which is still in the course of completion, to unfinished documents or to incomplete data.
49. Regulation 13(d) provides that where a Scottish public authority refuses to make information available on the basis of the exception in regulation 10(4)(d), the authority shall state the time by which it considers that the information will be finished or completed.
50. In support of its argument in relation to regulation 10(4)(d), the Council provided little detail other than to argue that whilst the complete documents were the amendments as submitted to Committee, the different versions and options of the withheld documents were incomplete. The Council made no reference to the requirement contained in regulation 13(d) of the EIRs.
51. The Commissioner has considered the content of the documents in Groups 1 and 3 and has referred to *The Aarhus Convention: an implementation guide* (produced by the United Nations Economic Commission for Europe as guidance on the international convention from which the EIRs are derived) for guidance on the application of exception 10(4)(d). This guide indicates (at page 58) that the mere status of something as a draft does not automatically bring it under the exception, but that the terms "unfinished documents" and "materials in the course of completion" suggest reference to individual documents that are actively being worked on by the public authority. Once those documents are no longer in the "course of completion" the guide takes the view that they may be released, even if they are still unfinished and even if the decision to which they pertain has not yet been resolved. "In the course of completion" suggests, in the view of the guide, that the document will have more work done on it within some reasonable time-frame.



52. The Commissioner accepts that any advice and opinion detailed in the documents could be subject to further amendment, but that is not the issue for the purposes of regulation 10(4)(d). The Council has not provided evidence that the withheld environmental information requires further work to make it complete. Each document is a finished piece of work in itself and the content of each, while it may be subject to revision or development in subsequent versions, can in no sense be described as incomplete. Consequently, the Commissioner is unable to accept that the information in the documents in question can be described as material which is still in the course of completion, unfinished documents or incomplete data, and therefore concludes that it does not fall within any part of the exception contained in regulation 10(4)(d). As he is satisfied that the exception does not apply, he is not required to consider the public interest test.

***Regulation 10(4)(e) - internal communications***

53. The Council also claimed regulation 10(4)(e) as an exception in relation to all the withheld information, arguing that correspondence between officers and Councillors should be considered internal communications for the purposes of the EIRs. For information to fall within the scope of this exception, it need only be established that it is an internal communication. The first thing for the Commissioner to do, therefore, is to determine whether each item of environmental information withheld can be described as an internal communication.
54. It should be noted that **environmental information** held by a public authority on behalf of an elected representative **is** information held by the authority for the purposes of the EIRs, regardless of the purpose for which it was created. There is no equivalent in the EIRs of section 3(2)(a)(i) of FOISA, under which information held by an authority on behalf of another person is not held by that authority for the purposes of FOISA (see paragraph 43 of the Code of Practice on the Discharge of Functions by Scottish Public Authorities under the EIRs, and also the Commissioner's Elected Member Factsheet B, section B.3 on page 2). This being the case, there is no doubt that the withheld information (whether held by the Council in its own right or on behalf of Councillors) is held by the Council for the purposes of the EIRs.
55. The Council noted that internal communications were not defined in the EIRs. It submitted that whilst Council and Councillors would normally be separate legal persons they were still inextricably linked, as it believed to be self-evident from the Code. Further, it argued that a Councillor or group of Councillors might be engaged on Council business albeit not legally part of the Council at that time (e.g. when acting for a constituent or as the Administration or as a party group considering Council business). It would then be part of officers' duties to provide advice and assistance to the Councillor or Councillors in the performance of their roles. Overall, given the nature of the officer/Councillor relationship, it took the view that correspondence between them should be regarded as internal communications for the purposes of the EIRs.



56. The Commissioner accepts that there might be situations where it is difficult to clearly establish which role is being performed by Councillors at any given time and also that more than one role might be undertaken simultaneously. In this case, he is satisfied that the communications under consideration here took place in the course of, and as part of, the development of Council policy (i.e. the Falkirk Local Plan), whatever other interests the Councillors may have been pursuing at the same time. In the circumstances, therefore, the Commissioner is willing to accept that the withheld environmental information could be considered to be internal communications within the Council for the purposes of the EIRs and therefore to be subject to the exception in regulation 10(4)(e) of the EIRs.

*Public interest regarding regulation 10(4)(e)*

57. As the Commissioner has indicated above, regulation 10(4)(e) is also subject to the public interest test contained in regulation 10(1)(b) of the EIRs, so the request might legitimately be refused only if, in all the circumstances, the public interest in making the information available was outweighed by that in maintaining the exception. The Commissioner must also bear in mind the presumption in favour of disclosure in regulation 10(2)(b).
58. The Council argued that in this case the Code, in requiring strict confidentiality, was a strong statement of where the public interest lay. It argued that it would require a very strong counter public interest to overturn this interest in non-disclosure and submitted that no such public interest argument for disclosure existed.
59. Further, the Council noted that a public inquiry on the Local Plan was scheduled to begin in March 2009. It argued that to release the withheld information prior to this would cause substantial prejudice to the workings of local democracy (and particularly to the policy development process) as Councillors would be deterred from taking advice in the absence of assurances of confidentiality, thus inhibiting them from developing policies and strategies privately in an atmosphere of certainty. Without this filtering process, the Council argued, policy development would be hindered and the Committee system would become clogged because all issues would have to be addressed at Committee. It considered that in any event the Committee process offered adequate scrutiny.
60. Councillor Alexander focused on the importance of strategic planning, indicating that there was no greater responsibility on elected members of any public authority than ensuring openness and transparency in their processes, particularly where these involved third parties. He suggested that a decision might be made in private by Councillors representing a majority group within a local authority, effectively altering the shape and structure of communities irrevocably. He did not agree that decisions of this nature should be made behind closed doors, but rather that they should be open to scrutiny. He did not believe it unreasonable to ensure that all correspondence regarding strategic matters was in the public domain, including individual submissions made by elected members, pointing out that such submissions made as part of the regulatory planning process (for example planning applications) would be classified as public documents and background papers and therefore open to scrutiny. He asked why strategic planning issues such as the Local Plan should not be approached in a similar fashion by placing all correspondence in the public domain.



61. The Commissioner will not generally accept arguments that there is an inherent public interest in protecting certain information because it falls into a particular class (such as internal communications). As indicated above, he does not accept that the Code provides all-embracing assurances of confidentiality in relation to advice provided to Councillors outwith the formal processes of a local authority and its committees. However, he does accept that there may be a public interest in allowing Councillors and officials time and space to receive and impart advice on matters of importance in order that the settled view of a group of Councillors on a question of policy or strategy can be arrived at in private in advance of that formal process. Whether this is appropriate in the circumstances will depend on the content of the information and the context in which it is imparted: while there may be stronger arguments for protecting the internal deliberations of political groups, for example, it does not follow that there will necessarily be a compelling public interest in protecting advice given by officers to such groups.
62. In this particular case, the Commissioner has already noted that the Local Plan process is subject to wide public consultation. Generally, the development planning process is open to public scrutiny and comment. Having examined the withheld environmental information, he is not persuaded that there is anything in the majority of it the disclosure of which would have been capable of having any significant detrimental effects on this process, either at the time of Councillor Alexander's request or subsequently. In particular, for the most part there is nothing of substance which is particularly revealing of the Councillors' drafting or deliberative processes, and (as indicated above) to a very large extent the information appears to relate to specific proposals developed by individual Councillors rather than collective ones developed within a political group or groups. Much of the information is in any event descriptive, historical or factual in nature, and the same information on the relevant Local Plan proposals would have been provided to other Councillors if requested. As indicated above, most of the remainder of the information is basically professional advice which the officers in question would have been obliged to provide impartially to whichever Councillors had sought it.
63. The Commissioner must also bear in mind the presumption in favour of disclosure in regulation 10(2)(b) of the EIRs. The public nature of the Local Plan process during which the withheld documents were created is a key consideration in the context of this request. It should also be noted that the Code itself also places a general duty upon Councillors to be as open as possible about their decisions and actions, giving reasons for decisions and restricting information only when the wider public interest (as distinct from party political considerations, which are in any event of questionable relevance to the development planning process) clearly demands.
64. In all the circumstances of this case, therefore, having considered the withheld environmental information along with all relevant submissions, the Commissioner concludes on balance that the public interest in making the majority of the information available is not outweighed by that in maintaining the exception in regulation 10(4)(e) of the EIRs. Therefore, he does not consider the Council to have been justified in withholding most of the information under that exception.





65. The Commissioner has reached a different conclusion, however, in respect of certain of the withheld environmental information. The information in documents 42 and 48 (insofar as falling within the scope of the request) relates to the handling of issues of some political sensitivity which clearly remained current at the time of Councillor Alexander's request, while that in documents 9 and 31 deals with questions concerning specific sites which appear to have retained a considerable degree of sensitivity at that time. In these cases, the Commissioner accepts that disclosure at the time at which the Council dealt with the request would have compromised the ongoing exchange between officials and Councillors to the detriment of refining proposals which would affect the Local Plan. Consequently, in these cases he considers the public interest in making the information available to have been outweighed by that in maintaining the exception in regulation 10(4)(e).

### ***Conclusions under the EIRs***

66. The Commissioner is entitled (and indeed obliged), where he considers a request for environmental information has not been dealt with under the EIRs, to consider how it should have been dealt with under that regime. He has considered most of the withheld information to be environmental information in terms of regulation 2(1) of the EIRs and (with the exception of the information in documents 9, 31, 42 and 48) has not been persuaded by the Council's submissions that the exceptions in regulation 10(4)(d) and (e), or that in regulation 10(5)(d), should be maintained. Therefore, he must conclude that the remaining environmental information requires to be made available under regulation 5(1) of the EIRs. In the circumstances, however, he also considers it necessary to consider the application of the FOISA exemptions claimed by the Council.

### **Consideration of the withheld information under FOISA**

67. As indicated above, the Council's view is that the information is not environmental and that certain exemptions in FOISA apply to it. These are the exemptions in sections 30(b), 30(c), 36(1) and 36(2) of FOISA and the Commissioner will consider them in turn: in any event, he is required to do so in relation to documents 20 and 45 (insofar as falling within the scope of the request), as he has accepted that these do not contain environmental information. As also indicated above, the Council indicated that it was not choosing to rely on the exemption in section 39(2) of FOISA.

### ***Section 30(b) and (c) – prejudice to effective conduct of public affairs***

68. The text of each of these exemptions is set out in full in the Appendix. The basis for the Council's reliance on section 30(b) is that Councillors are understood have a reasonable belief (in reliance on the Code) that they can take advice from officers on a confidential basis, that they would not take such advice without the protection of confidentiality and that without the "filtering" that follows from the taking of such advice the Committee process would become clogged as all issues would require to be considered there. The Council goes on to argue in support of the section 30(c) exemption that general access to information provided to political groups would alert others to the developing plans of those groups, to the detriment of the policy-making process.



69. It will be clear from the Commissioner's consideration of the exceptions in regulations 10(4)(e) and 10(5)(d) of the EIRs that he does not accept there to have been a reasonable expectation of confidentiality in relation to the majority of the withheld information. In the absence of such a reasonable expectation, he has difficulty accepting the risk of restraint from seeking advice which the Council has put forward. In any event, as should be clear from the Commissioner's analysis in relation to regulation 10(4)(e), having considered the content of the information and the context in which it was provided the Commissioner cannot (with certain exceptions, as specified in paragraph 65 above) accept that its disclosure would be capable of having any of the prejudicial effects on its processes argued by the Council. Given that he does not accept the Council's claims of prejudice, he cannot on the whole accept the application of either section 30(b) or section 30(c) based on these arguments. Insofar as he does not consider the information to be exempt under either of these sections, he is not required to go on to consider the public interest.
70. However, for the same reasons as stated above in relation to regulation 10(4)(e), the Commissioner accepts that disclosure of the information in documents 9, 31, 42 and 48 (insofar as falling within the scope of the request) would, or would be likely to, prejudice substantially the free and frank provision of advice and the free and frank exchange of views for the purposes of deliberation. Having considered this information, he does not consider it to have been in the reasonable expectation of those who expressed the relevant advice and views that they would pass into the public domain so soon after they were recorded. He is also of the view that the same can be said of the information in documents 20 and 45 (insofar as falling within the scope of the request). Having considered both the public interest in the benefit of those exchanges in refining the proposals for the Local Plan at the relevant time and the public interest in transparency, he would conclude in the circumstances of this case that the public interest in disclosure of this particular information is outweighed by that in maintaining the exemptions in section 30(b) of FOISA. Having reached this conclusion, he does not consider it necessary in addition to consider the application to this information of the exemption in section 30(c) of FOISA.

### ***Section 36(1) and (2) – confidentiality***

71. The text of each of these exemptions is also set out in full in the Appendix. Key requirements for an actionable breach of confidence (and therefore for the application of section 36(2)) are that the information in question has the necessary quality of confidence and has been communicated in circumstances importing an obligation of confidentiality. As the Commissioner has not accepted that the withheld information meets these requirements in the context of regulation 10(5)(d) of the EIRs, he cannot accept that it meets them for the purposes of section 36(2) of FOISA. Accordingly, he does not accept in the circumstances that the withheld information is exempt under section 36(2). The exemption is an absolute one and therefore not subject to the public interest test.
72. The Council's arguments in relation to section 36(1) were on the basis that the withheld information was subject to litigation privilege. As will be clear from paragraphs 45 and 46 above, the Commissioner does not accept this premise. Consequently, he cannot agree that the section 36(1) exemption is applicable: having reached this conclusion, he is not required to consider the public interest.



### **Conclusions under FOISA**

73. As the Commissioner has not found the majority of the withheld information to have been properly withheld under any of the exemptions in section 30(b), 30(c), 36(1) or 36(2) of FOISA, and given that the Council did not choose to claim the exemption in section 39(2) of FOISA (which applies to environmental information as defined in regulation 2(1) of the EIRs), the Commissioner concludes that the Council was not entitled to withhold this information under FOISA and should have given it to Councillor Alexander in accordance with section 1(1) of FOISA. He is satisfied, however, that the information in documents 9, 20, 31, 42, 45 and 48 (insofar as falling within the scope of the request) was properly withheld under the exemptions in section 30(b) of FOISA.

### **DECISION**

The Commissioner finds that Falkirk Council failed to comply with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by Councillor Alexander. In particular, he finds that (with the exception of the information in documents 20 and 45) the request related to environmental information (as defined by regulation 2(1) of the EIRs) and therefore should have been responded to in accordance with regulation 5(1) of the EIRs.

The Commissioner also finds that the Council was not entitled to withhold the majority of the environmental information under the exceptions in regulation 10(4)(d) or (e), or that in regulation 10(5)(d), of the EIRs. However, he does find that the Council was entitled to withhold the information in documents 9, 31, 42, and 48 (insofar as falling within the scope of the request) under regulation 10(4)(e).

In addition, the Commissioner finds that the Council was not entitled to withhold the majority of the information under the exemptions in sections 30(b), 30(c), 36(1) or 36(2) of FOISA, and that in doing so (and not having relied on section 39(2) of FOISA in relation to any environmental information withheld) it failed to comply with Part 1 (and in particular section 1(1)) of FOISA. However, he does find that the Council was entitled to withhold the information in documents 9, 20, 31, 42, 45 and 48 (insofar as falling within the scope of the request) under section 30(b).

The Commissioner therefore requires Falkirk Council to provide Councillor Alexander with the withheld information, insofar as falling within the scope of his request, with the exception of the information in documents 9, 20, 31, 42, 45 and 48 and subject to redaction of the mobile phone numbers which Councillor Alexander has indicated he does not require, by 11 October 2009.



## **Appeal**

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Should either Councillor Alexander or Falkirk 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.

**Kevin Dunion**  
**Scottish Information Commissioner**  
**27 August 2009**



## Appendix

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### 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 –

- (a) the provision does not confer absolute exemption; and
- (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

- (2) For the purposes of paragraph (a) of subsection 1, the following provisions of Part 2 (and no others) are to be regarded as conferring absolute exemption –

...

- (c) section 36(2);

...

##### 30 Prejudice to effective conduct of public affairs

Information is exempt information if its disclosure under this Act-

...

- (b) would, or would be likely to, inhibit substantially-
  - (i) the free and frank provision of advice; or



- (ii) the free and frank exchange of views for the purposes of deliberation; or
- (c) would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs.

### **36 Confidentiality**

- (1) Information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings is exempt information.
- (2) Information is exempt information if-
  - (a) it was obtained by a Scottish public authority from another person (including another such authority); and
  - (b) its disclosure by the authority so obtaining it to the public (otherwise than under this Act) would constitute a breach of confidence actionable by that person or any other person.

## **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;
- (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;



- (d) reports on the implementation of environmental legislation;
- (e) costs benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in paragraph (c); and
- (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.
- (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.
- (3) Where the environmental information requested includes personal data, the authority shall not make those personal data available otherwise than in accordance with regulation 11.



- (4) A Scottish public authority may refuse to make environmental information available to the extent that

...

(d) the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data; or

(e) the request involves making available internal communications.

- (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-

...

(d) the confidentiality of the proceedings of any public authority where such confidentiality is provided for by law;

...