

# Decision Notice



Decision 132/2011 Livingstone Terrace Residents Action Group and Falkirk Council

Failure to respond within the required timescale

Reference No: 201101010  
Decision Date: 5 July 2011

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**Kevin Dunion**

Scottish Information Commissioner

Kinburn Castle  
Doubledykes Road  
St Andrews KY16 9DS  
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## Summary

This decision considers whether Falkirk Council (the Council) complied with the technical requirements of the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to information requests made by Livingstone Terrace Residents Action Group (LTRAG).

## Background

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1. This decision considers two information requests made to Falkirk Council by Livingstone Terrace Residents Action Group. These are referred to as request 1 and request 2 in what follows.

### Request 1

2. On 12 December 2010, LTRAG wrote to the Council, requesting a long list of information relating to a Tesco Development at Redding Road in Falkirk with the planning reference P/07/0422/FUL. The full details of the request can be found in Appendix 1.
3. The Council acknowledged LTRAG's request on 19 January 2011, and advised that it would contact LTRAG again within 14 days.
4. LTRAG received no response to this request and, on 28 February 2011, it wrote to the Council to request a review.
5. LTRAG received no response to this request for review.
6. On 3 June 2011, LTRAG wrote to the Commissioner, stating that it was dissatisfied with the Council's failure to respond to their request of 12 December 2010 and requirement for review of 28 February 2011, 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.

### Request 2

7. On 30 January 2011, LTRAG wrote to the Council, under FOISA requesting additional information in relation to the Tesco Development. The full details of the request can be found in Appendix 2.



8. LTRAG did not receive any response to this request, and so submitted a request for review to the Council on 5 April 2011, asking when the Council would supply the information regarding road inspections on the site in question.
9. The Council provided a response to part d) of LTRAG's request (which dealt with road inspections) on 13 May 2011.
10. LTRAG did not otherwise receive a response to their request for review and on 3 June 2011 wrote to the Commissioner, stating that they were dissatisfied with the failure of the Council to respond to their request and requirement for review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA. As noted above, 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.
11. LTRAG's applications in relation to requests 1 and 2 were both validated by establishing that LTRAG 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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12. On 15 June 2011, the Council was notified in writing that an application had been received from LTRAG and was invited to comment on the application as required by section 49(3)(a) of FOISA.
13. The Council responded in a letter dated 28 June 2011, which provided its comments in relation to both requests.
14. In providing its reasons as to why it has breached the technical requirements of the EIRs, the Council explained that LTRAG has submitted numerous requests for information, under both FOISA and the EIRs, and other correspondence to it regarding Tesco at Redding. The Council has advised that the total recorded time taken to respond to these requests has been considerable (around 57 hours). This, the Council submits, is a very considerable burden on the case officer for the Tesco planning application, who has significant other responsibilities. The Council states that there have been occasions when several of LTRAG's enquiries have been live simultaneously.
15. The fact that LTRAG asked the Council's Development Services section about a range of matters which are dealt with by other units and this required cross referencing of information, is another reason why, the Council asserts, it took time to address LTRAG's requests in this case.
16. The Council also commented that the progress of these requests was monitored and it always appeared that a response to them was imminent, but other urgent work intervened.



17. In relation to request 1, the Council explained that an acknowledgement email had been sent to LTRAG on 19 January 2011, but it acknowledged that it had not provided a response to request 1 within the required timescale.
18. The Council explained that LTRAG's email of 28 February 2011 was not identified as a request for review, but was considered to be a reminder email. The Council advised that it accepts that this email should have been considered as a request for review, and that this has been identified as a training issue for staff.
19. The Council responded in full, under the terms of the EIRs to the request for review for request 1 during the course of the investigation (response sent to LTRAG by letter dated 23 June 2011).
20. With respect to LTRAG's second request of 30 January 2011, the Council explained that a reply was sent to LTRAG in line with the EIRs, answering their questions a), b) and c), on 31 January 2011 (a copy of this letter was provided to the Commissioner during the investigation). The Council submitted that part d) of LTRAG's request was responded to under the terms of the EIRs in a letter dated 13 May 2011 (a copy of this letter was also provided to the Commissioner).
21. The Council explained that LTRAG's email of 5 April 2011 was not identified as a request for review, but was considered to be a reminder email, which led to the provision of the response letter of 13 May 2011. The Council again indicated that this has been identified as a training issue for staff.
22. The Council advised that a letter was sent to LTRAG on 28 June 2011 (a copy of which was provided to the Commissioner) conveying its decision following a review being carried out. The Council also apologised for the delay in responding to part d) of LTRAG's request.
23. The Council has apologised for its failure to meet the statutory timescales in relation to both of these information requests, and in an effort to avoid a recurrence of these failures the Council has advised that reminders have been issued verbally to employees on some key points regarding FOISA and the EIRS, and that written reminders and further training will be arranged. The Council also commented that there will also be a more robust approach by management.

## Commissioner's analysis and findings

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24. Regulation 5(1) of the EIRs requires a Scottish public authority which holds environmental information to make it available when requested to do so by any applicant. Regulation 5(2)(a) of the EIRs requires a Scottish public authority to comply with its duty under regulation 5(1) as soon as possible and in any event no later than 20 working days after the date of receipt of the request for information, subject to certain exceptions which are not relevant in this case.



25. Since the Council did not provide a response to LTRAG's first request for information within 20 working days, the Commissioner finds that the Council failed to comply with regulation 5(2)(a) of the EIRs.
26. As the Council did not provide a response to part 4 of LTRAG's second request for information within 20 working days, the Commissioner finds that it failed to comply with regulation 5(2)(a) of the EIRs.
27. Regulation 16(4) of the EIRs gives authorities a maximum of 20 working days after the date of receipt of the applicant's representations to comply with the requirement for review, subject to exceptions which are not relevant in this case. Other parts of regulation 16, particularly paragraphs (3) and (5), govern the review process and the giving of notice of the outcome to the applicant (see appendix below).
28. The Council did not provide a response to LTRAG's requirement for review of 28 February 2011 for its first request, or carry out the review it had requested within the timescale required by regulation 16(4) of the EIRs. Consequently, the Commissioner finds that the Council failed to comply with regulation 16(4) of the EIRs.
29. The Council did not provide a response to LTRAG's requirement for review of 5 April 2011 for its second request, or carry out the review it had requested, within the timescale required by regulation 16(4) of the EIRs. Consequently, the Commissioner finds that the Council failed to comply with regulation 16(4) of the EIRs.
30. However the Commissioner notes that the Council has since undertaken a review and provided a notice of its outcome to LTRAG in relation to its first request of 12 December 2010 in line with regulations 16(3) and (4) of the EIRs.
31. The Commissioner also notes that the Council has since undertaken a review and provided a notice of its outcome to LTRAG in relation to its second request of 30 January 2011 in line with regulation 16 of the EIRs.
32. The Commissioner has noted the Council's comments in respect of the causes of its failure to respond in full to both of these requests, and requirements for review within the statutory timescales, and the steps it has taken and intends to take to avoid similar breaches in future. He therefore does not require the Council to take any action in relation to these breaches in response to this decision.



## DECISION

The Commissioner finds that Falkirk Council failed to comply with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in dealing with the information requests made by Livingstone Terrace Residents Action Group (LTRAG) , in particular by failing to respond to LTRAG's first request for information within the timescale laid down in regulation 5(2) of the EIRs.

The Commissioner also found that the Council failed to respond to both of the requirements for review submitted by LTRAG within the timescale laid down by regulation 16(4) of the EIRs.

Given that a response was provided to part d) of LTRAG's second request for information, and a response has been provided to both requirements for review during the course of the investigation, the Commissioner does not require Falkirk Council to take any action in response to these failures.

## Appeal

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Should either Livingstone Terrace Residents Action Group 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.

**Margaret Keyse**  
**Head of Enforcement**  
**5 July 2011**



## Appendix

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### Relevant statutory provisions

#### The Environmental Information (Scotland) Regulations 2004

##### 5 Duty to make available environmental information on request

- (1) Subject to paragraph (2), a Scottish public authority that holds environmental information shall make it available when requested to do so by any applicant.
- (2) The duty under paragraph (1)-
  - (a) shall be complied with as soon as possible and in any event no later than 20 working days after the date of receipt of the request; and
  - (b) is subject to regulations 6 to 12.

##### 16 Review by Scottish public authority

- (1) Subject to paragraph (2), an applicant may make representations to a Scottish public authority if it appears to the applicant that the authority has not complied with any requirement of these Regulations in relation to the applicant's request.
- (2) Representations under paragraph (1) shall be made in writing to the Scottish public authority no later than 40 working days after either the date that the applicant receives any decision or notification which the applicant believes does not comply with these Regulations or the date by which such a decision or notification should have been made, or any other action should have been taken, by the authority but was not made or taken.
- (3) The Scottish public authority shall on receipt of such representations-
  - (a) consider them and any supporting evidence produced by the applicant; and
  - (b) review the matter and decide whether it has complied with these Regulations.
- (4) The Scottish public authority shall as soon as possible and no later than 20 working days after the date of receipt of the representations notify the applicant of its decision.
- (5) Where the Scottish public authority decides that it has not complied with its duty under these Regulations, it shall immediately take steps to remedy the breach of duty.



## Appendix 1

### Information request 1

- 1 Can Falkirk Council inform as to when the Phase 1 report of the Contaminated Land Assessment was undertaken and completed with regard to this development? Also, when was it submitted to Falkirk Council?
- 2 Can you supply an actual copy (not summarised as in previous correspondence) of the approval in writing by Falkirk Council of the above report?
- 3 (not an information request)
- 4 Can you inform us as to when the Phase 2 Report was undertaken and completed with regard to this development? Also, when was it submitted to Falkirk Council?
- 5 Can you supply an actual copy (not summarised as in previous correspondence) of the approval in writing of the above report?
- 6 (not an information request)
- 7 Can Falkirk Council inform us if any contamination was found on this site?
- 8 Can Falkirk Council inform us if an options Appraisal has/had been submitted with regard to this development?
- 9 If so, when was it submitted?
- 10 Can we have an actual copy (not summarise (sic) as in previous correspondence) of the approval in writing by Falkirk Council of the above report?
- 11 Can we have access to the Options Appraisal as soon as possible?
- 12 Was a Remediation Strategy submitted to Falkirk Council with regard to the above development?
- 13 When was the Remediation Strategy submitted to Falkirk Council?
- 14 Can we have an actual copy (not summarised as in previous correspondence) of the approval in writing by Falkirk Council to the above report?
- 15 Can we have a copy of the Remediation Validation Report as soon as possible? Can you give us a detailed cost of this report so that we can make payment to Falkirk Council?
- 16 An email sent by [named individual] to [named individual] dated 19 July 2010 at 16:10 states that "there was additional emailed information dated 29/6/10 and 1/7/10". Can we have access to both emails? We can supply a copy of the email if needed.





- 17 In a letter from you reference P/07/0422/FUL/BW/ES dated 10 March 2010 see Condition 6. Can you give us a copy of the additional information supplied by Goodson Associates (2009 October) which was reviewed by the Council's Contaminated Land Team with regard to the above development. Can we have a copy of the "copy of comments received, dated 14 October 2009 for your information and would appreciate your attention to the matters raised". We request the full details of these comments.
- 18 This letter dated 10 March mentions a letter dated 17 November 2009 to RDPC Ltd, [named individual]. Building works were already ongoing as confirmed by your own Council colleagues so was Condition 6 met in full before the development commenced?
- 19 Was the planning condition number 7 met before the development commenced?
- 20 A letter from SEPA dated 6 June 2007, SEPA ref SD/EM/FC/2007/1255 was copied and sent by [named individual] to [named individual] of Falkirk Council on 31 May 2007 with regard to a relevant exert relating to Policy EP17 (see Appendix A of the letter). Were the changes recommended by SEPA to the Falkirk Council Local Plan – Finalised Draft (Deposit Version) of 31 May 2007 implemented as requested by SEPA?
- 21 Can we have a copy of the Developers (sic) Noise Assessment report? Please advise the cost of this copy.
- 22 Can we have a copy of the Environmental Health Officers (sic) assessment of this report.
- 23 Did the Developer supply scale plans of new foul drainage arrangements, vocation plans, cross sections/elevations to Falkirk Council from 1 January 2010? Can we have copies?
- 24 Did the developer supply any drawings, scale plans with regard to new surface water drainage since 1 January 2010? Can we have copies?
- 25 We have been informed by letter from Scottish Water on 17 September 2010 that the Developer "recently submitted formal submission of the drainage proposals for the development".
- (a) Is Falkirk Council aware of these submissions?
- (b) When were Falkirk Council informed of these submissions?
- (c) If Falkirk Council were not informed of these submissions, why not?
- (d) If Falkirk Council have copies of these submissions can we have copies as soon as possible?
- (e) Can Falkirk Council explain these drainage submissions and Scottish Water's comments that "negotiations would need to be undertaken with regard to these new submissions"?
- (f) Was Planning Condition 8 met before the store opened on 19 July 2010?
- 26 Does Falkirk Council have any correspondence with/from Historic Scotland with regard to this development?
- 27 Can we have copies of all correspondence with Historic Scotland, Tesco and Muir Construction and Falkirk Council?



- 28 Does Falkirk Council have any correspondence with British Waterways with regard to this development?
- 29 Can we have copies of all correspondence with British Waterways, Tesco and Muir Construction and Falkirk Council?
- 30 Can Falkirk Council confirm on what date building works commenced on this development?
- 31 Can Falkirk Council confirm when they received a Notification of Initiation of Development under Section 27A(i) from the Developer?
- 32 We have evidence in writing from Falkirk Council that works had commenced on the site in November 2009.
  - (a) Can you answer how these works had started before the "Initiation of Development" was agreed? Was the work legal?
  - (b) Have Muir Construction and Tesco illegally undertaken works without authorisation from Falkirk Council?
  - (c) Did Falkirk Council give Muir Construction and Tesco authorisation to start works on this development in November 2009?



## Appendix 2

### Information request 2

- a) When was a Method Statement for the stabilisation of mine workings submitted and approved by Falkirk Council as mentioned in your letter dated 21 December 2010, your reference EIR030?
- b) When was a Method Statement for the grouting operations submitted and approved by Falkirk Council as mentioned in your letter dated 21 December 2010, your reference EIR030?
- c) Were there two Method Statements issued for this site? Can Falkirk Council explain which Method Statement consolidated works to mineworkings on this site before the specialist works were carried out?
- d) Can Falkirk Council supply a list of dates of visits to the site, and any reports and assessments undertaken by Falkirk Council's Roads Officers? Can we have copies of all of the above since the Roads Construction Consent was authorised in October 2009 until 19 July 2010 with regard to this development? Can Falkirk Council also identify the Roads Officers present on each day of the visits?