

# Decision Notice



Decision 153/2010 Mr Eric Marwick and Dundee City Council

Roadside gullies and sewer connections

Reference No: 201000364

Decision Date: 2 September 2010

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**Kevin Dunion**

Scottish Information Commissioner

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## Summary

Mr Marwick requested from Dundee City Council (the Council) information on roadside gullies and their sewer connections at certain locations in Barnhill, Broughty Ferry. The Council responded, indicating it did not hold the information requested by Mr Marwick. Following a review, Mr Marwick remained dissatisfied and applied to the Commissioner for a decision.

During the investigation, the Council accepted that Mr Marwick's information request should have been dealt with under the EIRs. It therefore relied upon section 39(2) of FOISA and regulation 10(4)(a) of the EIRs, on the grounds that it did not hold the information.

Following an investigation, while accepting that the information was not held by the Council, the Commissioner found that the Council had failed to identify the information requested as environmental information and therefore deal with Mr Marwick's request in accordance with the EIRs. While finding that the Council should have done more to meet its obligation to provide advice and assistance, he did not require it to take any action.

## 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(1)(b) (Effect of exemptions) and 39(2) (Health, safety and the environment)

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (Interpretation – definition of environmental information); 5(1) and (2)(b) (Duty to make environmental information available on request); 9(1) and (3) (Duty to provide advice and assistance); 10(1), (2) and (4)(a) (Exceptions from duty to make environmental information available) and 14(1) (Transfer of a request)

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 25 November 2009, Mr Marwick wrote two letters to the Council requesting any and all information held, in any format, regarding the roadside gullies at certain locations in Barnhill, Broughty Ferry. He stated that he wished to know the reason for the position of these gullies, when they were installed and to which sewers they were connected.



2. The Council responded to the above requests in separate letters dated 22 and 29 December 2009, both responses indicating that it did not hold records of the information requested by Mr Marwick.
3. On 15 January 2010, Mr Marwick wrote to the Council requesting a review of each of its decisions. Given the Council's responsibilities in respect of the gullies, he believed that it must hold the information he had requested.
4. The Council notified Mr Marwick of the outcome of both of its reviews on 10 February 2010, confirming that it held no records showing gully locations or sewer connection details in the areas requested.
5. On 17 February 2010 Mr Marwick 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 Marwick 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 26 March 2010 the investigating officer 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. In particular, the Council was asked for detailed information on the steps it had taken to identify and locate the information requested.
8. In responding, the Council acknowledged that any information falling within the scope of the request would be environmental information as defined in regulation 2(1) of the EIRs. It confirmed that it considered section 39(2) of FOISA and section 10(4)(b) of the EIRs to apply.
9. The submissions provided by Mr Marwick and the Council, insofar as relevant, will be considered in the Commissioner's analysis and findings below.

## Commissioner's analysis and findings

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10. 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 Mr Marwick and the Council and is satisfied that no matter of relevance has been overlooked.



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

11. The Commissioner set out his thinking on the relationship between FOISA and the EIRs in some detail in *Decision 218/2007 Professor A D Hawkins and Transport Scotland* and need not repeat it in full here. In this case, the Council confirmed in the course of the investigation that it was entitled to withhold the information requested, as environmental information, under section 39(2) of FOISA. For this exemption to apply, any information requested would require to be environmental information as defined in regulation 2(1) of the EIRs, which is reproduced in the Appendix below.
12. In this case, Mr Marwick has requested information relating to gullies for surface water drainage at specified locations. Given the terms of the request, the Commissioner takes the view that any relevant information held by the Council would relate to measures affecting, or likely to affect, the elements of the environment (in particular water and land). Consequently, he considers that any such information would fall within the definition of environmental information set out in regulation 2(1) of the EIRs, specifically paragraph (c) of that definition. However, while he is pleased to note that the Council accepted this in the course of the investigation, he must also note that it did not do so (and act accordingly under the EIRs) when dealing with Mr Marwick's information request. As he found in *Decision 218/2007*, a Scottish public authority has an obligation to deal with a request for environmental information under the EIRs: in failing to do so, he finds that the Council failed to comply with regulation 5(1) of the EIRs.
13. The exemption in section 39(2) of FOISA provides that environmental information as defined by regulation 2(1) of the EIRs is exempt from disclosure under FOISA, thereby allowing any such information to be considered solely in terms of the EIRs. This exemption is subject to the public interest test in section 2(1)(b) of FOISA. In this case the Commissioner accepts that the Council was entitled to apply the exemption to the withheld information, given his conclusion that it is properly considered to be environmental information.
14. 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 dealing with the request in line with the requirements of the EIRs outweighs any public interest in disclosure of the information under FOISA. The Commissioner has consequently proceeded to consider this case in what follows solely in terms of the EIRs.

### Whether the information requested by Mr Marwick was held by the Council

15. Regulation 10(4)(a) of the EIRs states 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.



16. Mr Marwick explained in his application to the Commissioner that his property was subject to flooding which he attributed to a “rogue” sewer. He explained his research to date into sewers and gullies in particular streets, advising that he considered maps, drawings etc of specific gullies to be of fundamental importance in establishing a possible source of the flooding. He believed surface water (and therefore the gullies) to be within the Council’s remit, submitting that the gullies “could not have been constructed without planning and to plan you need drawings”. He noted references to plans in minutes of the Council’s statutory predecessors.
17. In a telephone conversation with the investigating officer, Mr Marwick referred to a recent meeting relating to the problem and asked how the Council could participate meaningfully in this meeting if it did not have the relevant maps/drawings to hand. In the course of the investigation, he also provided the investigating officer with further information he considered relevant.
18. In responding to Mr Marwick, the Council stated that it did not hold any relevant information, without providing any further information or explanation.
19. In its submissions to the Commissioner, the Council explained that information of the type requested by Mr Marwick was not ordinarily held. Had it been available, historically it would have been recorded on Ordnance Survey plans and in more recent times in the Council’s GIS system.
20. The Council indicated that the only information it held on gullies had been collected recently via GPS recording on the gully emptying machines. This could, in theory, provide information and details of the visual condition of the gullies and dates when they were cleaned, although the Council advised (given the stage of development of the process) that the data was very incomplete and not of very good quality. The Council also referred to the location information being “freely available by site inspection”. Following further clarification, it became evident that (with the exception of the information on cleaning dates) the GPS information was simply that which could be gleaned from a basic visual inspection of the relevant surface drains: in the circumstances, the Commissioner is satisfied that this is not the information Mr Marwick was seeking (even if it had been held in respect of the locations Mr Marwick was concerned about, which he is satisfied was not the case).
21. The Council also advised that its senior roads staff were unaware of any information being held which was relevant to Mr Marwick’s request. No reference was made, however, to any searches having been carried out. It went on to suggest that Mr Marwick’s expectations as to the information the Council should hold were unreasonable, being based on assumptions which were not consistent with the current level of development of the management of its drainage assets.



22. From the submissions the Commissioner has received, it appears at least likely that Dundee Corporation (and presumably Tayside Regional Council, as its statutory successor in this respect) held detailed records of its drainage assets. Given that the whole drainage system, including both the sewers and the surface water drains connecting to them from the public road network (i.e. the gullies referred to in Mr Marwick's request), would at that time have been maintained by a single authority, it seems unlikely that separate records would have been maintained in respect of the gullies and the main sewers.
23. While the gullies are now the responsibility of the local roads authority (in this case, the Council), the sewers to which they connect are the responsibility of Scottish Water. They have been the responsibility of a separate water authority, rather than the relevant local authority, since local government reorganisation in 1996. The Commissioner understands that there were substantial transfers of water and drainage records from the former Regional Councils to the new regional water authorities at the point of that reorganisation. While the Commissioner is not in a position to confirm the present location of such records, having considered all of the submissions he has received, it appears more likely than not that if detailed records of the kind Mr Marwick is seeking are held by a Scottish public authority, they will be held by Scottish Water as complete records of the publicly maintained drainage system, rather than the Council holding separate records in respect of the elements it is responsible for maintaining.
24. In all the circumstances, therefore, the Commissioner accepts the Council's assertions that, at the time it received Mr Marwick's request for information, it held no information falling within the scope of that request. Consequently, he is satisfied that the information was properly excepted under regulation 10(4)(a) of the EIRs. He is disappointed, however, at the limited extent to which the Council's submissions have been of assistance to him in reaching this conclusion, given their lack of specification.

*Public Interest test*

25. The exception set out in regulation 10(4)(a) is subject to the public interest test in regulation 10(1)(b) of the EIRs. Therefore, a Scottish public authority may only withhold information to which the exception applies where, in all the circumstances, the public interest in making the information available is outweighed by the public interest in maintaining the exception. In this case, the Commissioner is satisfied that the information in question is not held by the Council, and was not so held at the time it received Mr Marwick's request. Consequently, he does not consider there to be any conceivable public interest in requiring that the information be made available.
26. The Commissioner therefore concludes that the Council was entitled to rely upon regulation 10(4)(a) of the EIRs as a basis for refusing Mr Marwick's request.



## Provision of advice and assistance

27. Regulation 9(1) of the EIRs requires a Scottish public authority to provide advice and assistance to applicants and prospective applicants, so far as it would be reasonable to expect it to do so. The Code of Practice on the Discharge of Functions by Scottish Public Authorities under the EIRs (the section 62 Code) available at <http://www.scotland.gov.uk/Publications/2006/08/14104256/6> sets out (at paragraph 23) examples of appropriate assistance, including;

- assisting in defining better the information required
- advising the person that another person or agency (such as Citizens Advice Bureau) may be able to assist them with the application.

This list is not exhaustive, and Scottish public authorities should be helpful in offering advice and assistance most appropriate to the circumstances. Conformity to the Section 62 Code in any particular case is, to the extent that the authority so conforms, taken to be compliance with the duty under regulation 9(1).

28. In the circumstances of this particular case, the Commissioner finds it necessary to consider the Council's compliance with its duty under regulation 9(1). Given the information available to him, it is not possible for the Commissioner to say whether the Council had a view on where else the requested information might be found if it did not hold that information itself: the Commissioner does, not, therefore, consider himself to be in a position to conclude that the Council was required to transfer the request to another authority (such as Scottish Water) under regulation 14 of the EIRs. On the other hand, the Council clearly (although it does not appear to have articulated this to the applicant) believed Mr Marwick to have been unreasonable in expecting it to hold the information. That being the case, the Commissioner considers that the Council should, in pursuance of its duty under regulation 9(1), have made an effort to explain to Mr Marwick why it believed his expectations on this matter to be unreasonable. This might have included an explanation of the historical context in which it maintained the gullies, but not the sewers to which they were connected.

29. Given the terms of this decision, however, and the fact that Mr Marwick is also in dialogue with Scottish Water on this matter, the Commissioner does not find that any valuable purpose would be served by the Council providing any further explanation to Marwick at this stage.



## DECISION

The Commissioner finds that Dundee City Council (the Council) failed to comply with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in dealing with Mr Marwick's request for information. In particular, in failing to identify the information requested as environmental information (as defined in regulation 2(1)) and deal with the request accordingly under the EIRs, it failed to comply with regulation 5(1) of the EIRs. In addition, he finds that the Council failed to discharge its duty to provide Mr Marwick with advice and assistance under regulation 9(1) of FOISA.

The Commissioner also finds, however, that the Council was entitled to refuse Mr Marwick's request under section 39(2) of the Freedom of Information (Scotland) Act 2002 and regulation 10(5)(d) of the EIRs, on the basis that it did not hold the information requested.

Given that Mr Marwick is also in communication with Scottish Water (the only other public authority likely to hold information of the kind requested) on this matter, the Commissioner does not require the Council to take action in response to Mr Marwick's application in respect of the failures he has identified.

## Appeal

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Should either Mr Marwick or Dundee City 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**  
**2 August 2010**





## 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 –

...

- (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.

...



## The Environmental Information (Scotland) Regulations 2004

### 2 Interpretation

(1) In these Regulations –

...

"environmental information" has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on

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- (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.

...

**9 Duty to provide advice and assistance**

- (1) A Scottish public authority shall provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to applicants and prospective applicants.  
...
- (3) To the extent that a Scottish public authority conforms to a code of practice under regulation 18 in relation to the provision of advice and assistance in a particular case, it shall be taken to have complied with the duty imposed by paragraph (1) in relation to that case.

...

**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;

...

#### **14 Transfer of a request**

(1) Where a Scottish public authority has received a request to make environmental information available and does not hold that information but believes that another public authority holds the information requested then it shall either –

(a) transfer the request to the other authority; or

(b) supply the applicant with the name and address of that other authority,

and inform the applicant accordingly with the refusal sent in accordance with regulation 13.

...