

# Decision Notice

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## **Decision 168/2019: The Applicant and Dumfries and Galloway Council**

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### **Road measurements**

Reference No: 201900974

Decision Date: 19 November 2019



Scottish Information  
Commissioner



## Summary

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The Council was asked about measurements taken to determine a particular road's unsuitability for refuse collections. The Council stated the information was not held. An application was made to the Commissioner, questioning whether the Council held the information requested.

Following an investigation, the Commissioner found that the Applicant had made a request for environmental information and that the Council had failed to respond properly under the EIRs.

However, the Commissioner was satisfied that the Council did not hold the information.

## Relevant statutory provisions

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 39(2) (Health, safety and the environment)

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (paragraphs (a) and (c) of definition of "environmental information") (Interpretation); 5(1) and (2)(b) (Duty to make available environmental information on request); 10(1), (2) and (4)(a) (Exceptions from duty to make environmental information available)

The full text of each of the statutory provisions cited above is reproduced in Appendix 1 to this decision. The Appendix forms part of this decision.

## Background

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1. On 15 April 2019, the Applicant made a request for information to Dumfries and Galloway Council (the Council). So far as this application is concerned, the information requested was a map detailing the precise locations of 10 road width measurements taken on Rawer Road [U53w] as part of the risk assessment undertaken by [named staff] on 19th October 2018 to determine the unsuitability of Rawer Road for Council Roadside Refuse Collections.
2. The Council responded on 13 May 2019, advising that, in accordance with section 17(1) of FOISA, it did not hold the information requested.
3. On 15 May 2019, the Applicant wrote to the Council, requesting a review of its decision. He considered it highly unlikely that the information was not held as, in previous correspondence, he had been informed that 10 points had been measured.
4. The Council notified the Applicant of the outcome of its review on 10 June 2019. It upheld the response in terms of section 17(1) of FOISA.
5. On 12 June 2019, the Applicant wrote to the Commissioner. He applied to the Commissioner for a decision in terms of section 47(1) of FOISA. By virtue of regulation 17 of the EIRs, Part 4 of FOISA applies to the enforcement of the EIRs as it applies to the enforcement of FOISA, subject to specified modifications. The Applicant was dissatisfied with the outcome of the Council's review, reiterating that he considered it inconceivable that the Council did not hold the information requested.

## Investigation

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6. The application was accepted as valid. The Commissioner confirmed that the Applicant made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to him for a decision.
7. On 18 July 2019, the Council was notified in writing that the Applicant had made a valid application. The case was allocated to an investigating officer.
8. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Council was invited to comment on this application and to answer specific questions. These included whether the request should have been dealt with under the EIRs. The Council was asked to explain the steps it had taken to identify and locate the information requested.
9. The Council responded, accepting that the request was for environmental information and should have been dealt with under the EIRs: as a result, it applied the exemption in section 39(2) of FOISA (see below).
10. The Council further submitted that it wished to rely upon regulation 10(4)(a) of the EIRs, as it did not believe it held the information requested.
11. The Applicant provided submissions as to why he considered that the Council should hold the information.

## Commissioner's analysis and findings

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

### Application of the EIRs

13. The Commissioner's thinking on the relationship between FOISA and the EIRs is set out in detail in *Decision 218/2007 Professor A D Hawkins and Transport Scotland*<sup>1</sup> and need not be repeated in full here.
14. In its submissions to the Commissioner, the Council acknowledged that the Applicant's request should have been responded to under the EIRs and stated that it wished to rely on the exemption in section 39(2) of FOISA in relation to all the information requested. For this exemption to apply, any information requested would require to be environmental information as defined in regulation 2(1) of the EIRs.
15. Having considered the terms of the request and the Council's submissions on this point, it is clear that any information falling within the scope of the request would be environmental information, as defined in regulation 2(1) of the EIRs. The information in question concerns waste management and, as such, the Commissioner is satisfied that it would fall within either paragraph (a) or paragraph (c) of the definition of environmental information in regulation 2(1) of the EIRs (reproduced in Appendix 1 to this decision).

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<sup>1</sup> <http://www.itspublicknowledge.info/applicationsanddecisions/Decisions/2007/200600654.asp>

16. In this case, therefore, the Commissioner accepts that the Council was entitled to apply the exemption in section 39(2) of FOISA, given his conclusion that it is properly considered to be environmental information. This exemption is subject to the public interest test in section 2(1)(b) of FOISA.
17. As there is a separate statutory right of access to environmental information available to the applicant in this case, the Commissioner 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. As such, he has consequently proceeded to consider this case in what follows solely in terms of the EIRs.
18. As the Council failed to recognise and respond to the request as a request for environmental information, the Commissioner must find that it failed to respond in accordance with regulation 5(1) of the EIRs.

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

19. Regulation 5(1) of the EIRs (subject to the various qualifications contained in regulations 6 to 12) requires a Scottish public authority which holds environmental information to make it available when requested to do so by any Applicant. It is important to bear in mind that this obligation relates to information actually held by an authority when it receives the request, as opposed to information an Applicant believes the authority should hold (but which is not in fact held).
20. Under the EIRs, a public authority may refuse to make environmental information available if one or more of the exceptions in regulation 10 apply and, in all the circumstances of the case, the public interest in maintaining the exception or exceptions outweighs the public interest in making the information available.
21. If no such information is held by the authority, the exception in regulation 10(4)(a) of the EIRs should apply.
22. The Commissioner has taken into account the submissions provided by the Applicant, in which he provides reasons why he believes the Council should hold the information requested.

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

23. Regulation 10(4)(a) of the EIRs provides that a Scottish public authority may refuse to make environmental information available to the extent that it does not hold that information when an Applicant's request is received. As indicated above, the exception in regulation 10(4)(a) is subject to the public interest test. As with all exceptions, it is subject to requirements to give notice in terms of regulation 13.
24. During the investigation, the Council provided submissions in response to the questions put by the investigating officer on this matter. The Council confirmed the searches and enquiries it undertook to ascertain whether it held any information falling within the scope of the Applicant's request, detailing the places searched. This included consultation with relevant staff.
25. The Council explained that any information held would be held within the records for the risk assessment carried out in relation to the route in question. It described the process of inspection for the purposes of the risk assessment, confirming that the information requested by the Applicant was not recorded on a map or by GPS (or indeed in any other form).

26. Having considered all relevant submissions and the terms of the Applicant's request, the Commissioner accepts that the Council took adequate, proportionate steps to establish whether it held any information falling within the scope of the request. At the very least, fulfilment of the request would require recorded information showing the precise locations measured, which the Commissioner is satisfied is not held.
27. As mentioned above, the Commissioner can only consider whether information is actually held by the Council, not what information it should hold or what an Applicant believes it should hold.
28. In this case, therefore, the Commissioner is satisfied that the Council did not hold the information requested by the Applicant, accepting that the locations of the road measurements were not recorded.
29. The exception in regulation 10(4)(a) is subject to the public interest test in regulation 10(1)(b) of the EIRs and can only be upheld if, in all the circumstances, the public interest in maintaining the exception outweighs the public interest in making the information available. The Commissioner is satisfied that the Council does not (and did not) hold the information in question. Consequently, he does not consider there to be any conceivable public interest in requiring that the information be made available. The Commissioner therefore concludes that the public interest in making the requested information available is outweighed by that in maintaining the exception in regulation 10(4)(a) of the EIRs.
30. The Council was, therefore, entitled to apply regulation 10(4)(a) of the EIRs in this case. In doing so, it should have given the Applicant notice in terms of regulation 10(4)(a). As indicated above, in failing to apply the EIRs, it failed to comply with regulation 5(1) of the EIRs.

## Decision

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The Commissioner finds that Dumfries and Galloway Council (the Council) failed to comply with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in dealing with the Applicant's request for information.

By failing to identify the information requested as environmental information (as defined by regulation 2(1) of the EIRs) and respond to the request accordingly under the EIRs, the Council failed to comply with regulation 5(1) of the EIRs.

However, the Commissioner is satisfied that the Council does not (and did not, on receipt of the request) hold any information falling within the scope of the request.

## **Appeal**

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Should either the Applicant or the Council wish to appeal against this decision, they have the right to appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days after the date of intimation of this decision.

**Margaret Keyse**  
**Head of Enforcement**

**19 November 2019**

## Appendix 1 Relevant statutory provisions

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### Freedom of Information (Scotland) Act 2002

#### 1 General entitlement

- (1) A person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority.

...

- (6) This section is subject to sections 2, 9, 12 and 14.

#### 2 Effect of exemptions

- (1) To information which is exempt information by virtue of any provision of Part 2, section 1 applies only to the extent that –

...

- (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

...

#### 39 Health, safety and the environment

...

- (2) Information is exempt information if a Scottish public authority-
- (a) is obliged by regulations under section 62 to make it available to the public in accordance with the regulations; or
  - (b) would be so obliged but for any exemption contained in the regulations.



# Environmental Information (Scotland) Regulations 2004

## 2 Interpretation

(1) In these Regulations –

...

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

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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;

...

(c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in paragraphs (a) and (b) as well as measures or activities designed to protect those elements;

...

## 5 Duty to make available environmental information on request

(1) Subject to paragraph (2), a Scottish public authority that holds environmental information shall make it available when requested to do so by any Applicant.

(2) The duty under paragraph (1)–

...

(b) is subject to regulations 6 to 12.

...

## 10 Exceptions from duty to make environmental information available–

(1) A Scottish public authority may refuse a request to make environmental information available if–

(a) there is an exception to disclosure under paragraphs (4) or (5); and

(b) in all the circumstances, the public interest in making the information available is outweighed by that in maintaining the exception.

(2) In considering the application of the exceptions referred to in paragraphs (4) and (5), a Scottish public authority shall–

- (a) interpret those paragraphs in a restrictive way; and
  - (b) apply a presumption in favour of disclosure.
- (4) A Scottish public authority may refuse to make environmental information available to the extent that
- (a) it does not hold that information when an Applicant's request is received;
  - ...

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