

# Decision Notice



Decision 187/2011 Craig Mitchell and Fife Council

Correspondence relating to a complaint

Reference No: 201100923

Decision Date: 15 September 2011

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**Kevin Dunion**

Scottish Information Commissioner

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



## Summary

Mr Craig Mitchell requested from Fife Council (the Council) specified correspondence between a named councillor and the Office of the Chief Investigating Officer, Ethical Standards in Public Life. The Council responded by giving notice in terms of section 17(1) of FOISA that the information was not held. Following a review, Mr Mitchell remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner was satisfied that the Council did not hold the requested information for the purposes of FOISA. He therefore concluded that it had complied with Part 1 of the FOISA by providing Mr Mitchell with written notice to that effect, as required by section 17(1) of FOISA.

Although Mr Mitchell argued that his request should have been considered also in terms of the Environmental Information (Scotland) Regulations 2004 (the EIRs), the Commissioner concluded that the Council had acted correctly by considering his request solely in terms of FOISA.

## Relevant statutory provisions and other sources

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (4) (General entitlement) and 17(1) (Notice that information is not held)

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulation 2(1) (Interpretation) (definition of “environmental information”)

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 4 November 2010, Mr Mitchell emailed the Council requesting correspondence between a named councillor and the Office of the Chief Investigating Officer, Ethical Standards in Public Life [in relation to a complaint regarding the conduct of that councillor]. Mr Mitchell asked the Council to ask the councillor concerned for any relevant information that he held.



2. The Council responded on 5 November 2011, advising Mr Mitchell (in terms of section 17(1) of FOISA) that it did not hold the requested information. The Council indicated that it had not contacted the named councillor to establish whether he held the information requested by Mr Mitchell. It advised Mr Mitchell that, in its view, councillors do not fall within the scope of FOISA and that any information created by councillors as part of their duties and stored on Council systems would not be covered by FOISA.
3. Also on 5 November 2011, Mr Mitchell emailed the Council requesting a review of its decision. In particular, Mr Mitchell stated that he believed the information under consideration comprised environmental information as defined in regulation 2 of the EIRs, and so his request should have been considered in terms of the EIRs.
4. He argued that the relevant correspondence would be environmental information since the complaint to which it related was concerned with the councillor's conduct in relation to a planning application, and since planning applications relate to proposed changes to the land and landscape. Mr Mitchell also referred to the Commissioner's guidance for elected members<sup>1</sup> which reflects the definition of "held" in the EIRs (which differs slightly from the definition in FOISA).
5. The Council notified Mr Mitchell of the outcome of its review on 3 December 2010, upholding its previous decision that the requested information was not held. In its response, the Council disagreed with Mr Mitchell's assertion that the information comprised environmental information for the purposes of the EIRs and therefore considered that it had correctly dealt with the information request in terms of FOISA. The Council also stated that it had contacted the councillor in question and had been advised by him that the correspondence in question was not stored on the councillor's Council computer or on any Council systems. Accordingly, the Council's view was that, even if it accepted that the requested information was environmental, it did not physically hold any relevant information.
6. On 3 December 2010, Mr Mitchell 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.
7. The application was validated by establishing that Mr Mitchell 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.

<sup>1</sup> <http://www.itspublicknowledge.info/nmsruntime/saveasdialog.asp?IID=2914&SID=3084>



## Investigation

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8. The investigating officer contacted the Council on 17 June 2011, 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 its views on Mr Mitchell's submission that the requested information comprised environmental information in terms of the EIRs. The Council was also asked to confirm the steps it had taken to establish that no relevant information was stored on Council systems or within Council premises. Additionally, the Council was asked whether, if any relevant information did comprise environmental information and was held on Council premises or in Council systems, the Council would consider such information to be held for the purposes of the EIRs.
9. The Council responded on 14 July 2011 providing comments on the matters raised in the application and explaining the steps it had taken to establish whether any relevant information was actually held by it.

## 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 submissions made to him by both Mr Mitchell and the Council and is satisfied that no matter of relevance has been overlooked.

### Does the information comprise environmental information?

11. Environmental information is defined in regulation 2(1) of the EIRs, (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 regulations 6 to 12 of the EIRs.
12. For the purposes of the EIRs, information is held by a Scottish public authority if it is in its possessions and it has been produced or received by that authority or it is held by another person on that authority's behalf.
13. In this case, Mr Mitchell argued that since the requested correspondence related to the investigation of a complaint about the conduct of a councillor during the consideration of a planning application, this information should be considered to fall within definition (c) of environmental information in regulation 2(1) of the EIRs. Mr Mitchell submitted that the Chief Investigating Officer's decision on the complaint affected a planning decision.
14. In its submissions, the Council argued that the information in question related to a complaint about the conduct of a councillor and comprised correspondence between the councillor and the Chief Investigating Officer, the content of which would not involve wider environmental issues.



15. Part (c) of the definition of environmental information applied to information on 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) (of the definition) as well as measures or activities designed to protect those elements.
16. Having considered the nature of the information under consideration, the Commissioner is not persuaded that it falls within the scope of definition (c) of environmental information for the purposes of the EIRs.
17. In particular, the Commissioner does not consider that the investigation of a complaint regarding the conduct of a councillor can be construed either as a measure or activity which affects or is likely to affect either the elements of the environment (as defined in part (a) of the definition) or a factor (as defined in part (b) of the definition) which itself affects or is likely to affect an element of the environment. The Commissioner also does not accept that the correspondence requested by Mr Mitchell constitutes information on a measure or activity designed to protect the elements of the environment.
18. In reaching this conclusion, the Commissioner has recognised that the context in which a complaint regarding a councillor's conduct is raised might involve measures relevant for part (c) of the definition of environmental information (such as planning applications and the consideration thereof).
19. This is the case for the complaint to which Mr Mitchell's information request relates. However, the Commissioner has noted that the information requested by Mr Mitchell is not directly related to those measures, and so he considers that the information requested cannot be considered to be information on those measures.
20. The Commissioner has also considered the remaining definitions of environmental information contained in regulation 2(1) of the EIRs and is satisfied that the information under consideration in this case does not fall within the scope of any of these definitions.
21. Accordingly, the Commissioner considers that the Council was correct to deal with Mr Mitchell's information request solely in terms of FOISA. He will now go on to consider whether any information, if held by the Council, would be held for the purposes of FOISA.

**Is the information held on behalf of the named councillor? – section 3(2)(a)(i) of FOISA**

22. Section 1(1) of FOISA states that a person who requests information from a Scottish public authority which *holds* it is entitled to be given it by the authority. However, section 3(2)(a)(i) of FOISA makes it clear that if the authority holds the information on behalf of another person, then the information is not held by the authority for the purposes of FOISA.
23. The Council referred to the Commissioner's guidance for elected members which states:



*“Information created by elected representatives as part of their duties and stored on public authority systems (e.g., parliamentary) will not normally be covered by FOISA, even if the public authority receives a request for it. This is because FOISA excludes information which is held by a public authority only on behalf of another person (e.g., an elected member).”*

24. In this case, the Commissioner is satisfied that if any relevant information were physically or electronically held by the Council within its premises or IT systems, it would have been created by the councillor as part of his duties and would only be held by the Council on behalf of the councillor. Accordingly, it would not be held by the Council for the purposes of FOISA.
25. As the Commissioner is satisfied that the Council does not hold any relevant information for the purposes of FOISA, he has concluded that the Council was correct in notifying Mr Mitchell in terms of section 17(1) of FOISA that it did not hold the information requested by him.

## **DECISION**

The Commissioner finds that Fife Council complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information request made by Mr Mitchell.

## **Appeal**

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Should either Mr Mitchell or the 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**  
**15 September 2011**



## 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.
- ...
- (4) The information to be given by the authority is that held by it at the time the request is received, except that, subject to subsection (5), any amendment or deletion which would have been made, regardless of the receipt of the request, between that time and the time it gives the information may be made before the information is given.
- ...

##### 3 Scottish public authorities

- ...
- (2) For the purposes of this Act but subject to subsection (4), information is held by an authority if it is held-
- (a) by the authority otherwise than-
- (i) on behalf of another person;
- ...

##### 17 Notice that information is not held

- (1) Where-
- (a) a Scottish public authority receives a request which would require it either-
- (i) to comply with section 1(1); or
- (ii) to determine any question arising by virtue of paragraph (a) or (b) of section 2(1),

if it held the information to which the request relates; but



(b) the authority does not hold that information,

it must, within the time allowed by or by virtue of section 10 for complying with the request, give the applicant notice in writing that it does not hold it.

## 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);

...