

# Decision Notice



Decision 297/2013 Robert Potter and Partners LLP and Dumfries and Galloway Council

Development of site at Ladyfield, Dumfries

Reference No: 201301737  
Decision Date: 19 December 2013

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**Rosemary Agnew**  
Scottish Information Commissioner

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## Summary

On 22 March 2013, Robert Potter and Partners asked Dumfries and Galloway Council (the Council) for information relating to the development of a site at Ladyfield, Dumfries. Some information was released to Robert Potter and Partners in response to their request, during the process of carrying out a review and following completion of the review. The Council notified Robert Potter and Partners that it did not hold any other relevant information.

During the Commissioner's investigation, the Council acknowledged (in line with the Commissioner's view) that the request should have been dealt with under the EIRs. Following the investigation, the Commissioner found that the Council generally complied with the EIRs in respect of the matters raised by Robert Potter and Partners in their application.

## 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) (Duty to make environmental information available on 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 22 March 2013, Robert Potter and Partners asked the Council for copies of all documentation in its possession in relation to a site at Ladyfield in Dumfries, other than that provided to them in response to a previous request. Robert Potter and Partners asked for documentation held by the Council up to the date of their letter.



2. Robert Potter and Partners explained that their request was to cover the period commencing from the earliest point when the idea first emerged of developing the site at Ladyfield for housing, through the charrette process (a design workshop involving all stakeholders in the proposed development), to the allocation of the site in the Proposed Local Development Plan, which was the subject of public consultation in the period ending 11 March 2013. Robert Potter and Partners also indicated that the request was to cover information held by all departments of the Council.
3. Robert Potter and Partners also explained that they intended documentation to mean copies of all reports, consultations, memos (internal and external), emails (internal and external), minutes of all meetings, business plans and the like, work commissioned from such as the Crichton Trust, Crichton Development Company and other third parties, file notes, diary notes, working papers, drafts and all correspondence. They also intended the requested documentation to include all exchanges with third parties, including the funding arrangements for the charrette either by way of direct payments made by the Council or payments made by the Council via third parties (such as the Crichton Trust and Crichton Development Company).
4. Robert Potter and Partners also asked that where minutes, agendas and reports pertaining to the site were in the public domain, the Council provide them with a link to those covering the period of their request.
5. The Council responded on 7 May 2013, providing information it considered to fulfil Robert Potter and Partners' request.
6. On 3 June 2013, Robert Potter and Partners wrote to the Council requesting a review of its decision. They asked the Council to review its decision as a whole, referring to particular documents and suggesting that what had been provided appeared to be incomplete. They noted the scale and complexity of the project and the fact that the majority of the information related to one particular year. Robert Potter and Partners asked the Council to carry out further searches for the information.
7. Further information was released by the Council, and Robert Potter and Partners acknowledged that these addressed certain points in their requirement for review.
8. On 27 June 2013, the Council notified Robert Potter and Partners of the outcome of its review. Further information was disclosed by the Council, which confirmed that it held no further information falling within the scope of the request. However, it wrote to Robert Potter and Partners again on 1 July 2013, enclosing information identified following a further search.
9. On 25 July 2013, Robert Potter and Partners wrote to the Commissioner, stating that they 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.



10. The application was validated by establishing that Robert Potter and Partners made a request for information to a Scottish public authority and 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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11. On 12 August 2013, the Council was notified in writing that an application had been received from Robert Potter and Partners and was invited to provide comments on the application (as required by section 49(3)(a) of FOISA). Questions focused on the steps taken by the Council to identify and locate any relevant information they held.
12. The Council was also asked whether it considered the information covered by Robert Potter and Partners' request to be environmental information and, if so, whether (i) it should have dealt with the request under the EIRs (rather than FOISA) and (ii) it was now seeking to rely on the exemption in section 39(2) of FOISA. The Council explained why it had processed the request in line with FOISA, but confirmed that it would accept the Commissioner's view that it should have been dealt with under the EIRs and in that case would apply the exemption in section 39(2) of FOISA.
13. Further submissions were sought and obtained from the Council during the investigation. Additional comments were also received from Robert Potter and Partners during the investigation.

## Commissioner's analysis and findings

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14. In coming to a decision on this matter, the Commissioner considered all of the relevant submissions, or parts of submissions, made to her by both Robert Potter and Partners and the Council. She is satisfied that no matter of relevance has been overlooked.

### FOISA v EIRs

15. The Commissioner's thinking on the relationship between FOISA and the EIRs is set out in some detail in *Decision 218/2007 Professor A D Hawkins and Transport Scotland* and the Commissioner does not consider it necessary to repeat it here. The central point in that decision is that where a person requests information which would fall within the definition of environmental information set out in regulation 2(1) of the EIRs, that request should be considered and responded to in line with the EIRs.
16. Where information falls within the definition of environmental information, it is exempt from disclosure under section 39(2) of FOISA, allowing its consideration solely in terms of the EIRs.



17. In this case, the Council responded to Robert Potter and Partners' request and requirement for review in terms of FOISA. During the investigation, the Council indicated that, if the Commissioner was of a mind that the request should have been dealt with under the EIRs, then it would apply the exemption in section 39(2) of FOISA to all of the information.
18. Given the subject matter of the information request and the content of the information disclosed to Robert Potter and Partners, the Commissioner is satisfied that the information covered by the request would meet the definition of environmental information in paragraph (c) of regulation 2(1) of the EIRs. Since Robert Potter and Partners' request sought information about a substantial residential development (even if it is intended to be sustainable and its implementation would be some time in the future), the Commissioner considers it to be a request for information relating to measures affecting or likely to affect the elements of the environment, in this case particularly land and landscape.
19. While the Commissioner is pleased to note that the Council accepted this in the course of the investigation, she must note that it did not do so (and act accordingly under the EIRs) when dealing with Robert Potter and Partners' request and requirement for review. 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, the Council failed to comply with regulation 5(1) of the EIRs.

### **Section 39(2) of FOISA – Environmental Information**

20. 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 relation to Robert Potter and Partners' information request, the Commissioner finds that the Council was entitled to apply the exemption, given her conclusion that any information caught by the request is properly considered to be environmental information.
21. As there is a separate statutory right of access to environmental information available to the applicant in this case, the Commissioner also accepts that, in this case, the public interest in maintaining this exemption and in dealing with the request in line with the requirements of the EIRs outweighs the public interest in disclosure of the information under FOISA. The Commissioner has consequently considered this case in what follows solely in terms of the EIRs.

### **Did the Council identify all relevant information falling within the scope of Robert Potter and Partners' request?**

22. 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. 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 (but which it does not in fact) hold.



23. As mentioned earlier, throughout the process of responding to Robert Potter and Partners' request and requirement for review, the Council disclosed information to them falling within scope of their request.
24. In their application to the Commissioner, Robert Potter and Partners explained that they were surprised that the information disclosed by the Council did not include more extensive and thorough documentation on:
- a) the funding arrangements for the charrette and the promotion in general by the Council of the Ladyfield site, given their financial interest.
  - b) governance, given the financial interest of the Council in the Ladyfield site and their regulatory function in respect of the planning system.
- They also commented on;
- c) the general lack of documentation provided, given the scale and complexity of the proposal to develop the Ladyfield site, especially in relation to the years 2011, 2012 and 2013. In the case of 2010, they noted that the documentation (while fairly extensive) related largely to the arrangements for the charrette.
  - d) their concern that there might still not be complete disclosure, given the amount of documentation provided since the original release on 7 May 2013.
  - e) the lack of documentation released in relation to the allocation of the Ladyfield site in the Proposed Local Development Plan. They could not believe that no such documentation existed.
25. The Commissioner will address each of these points in turn below. Generally, the Council described the searches it carried out of both electronic and manual resources, detailing the resources searched, the individuals involved (with reasons why they were involved) and the search methodologies applied. Confirmation of the nature and scope of the searches was provided from all of those involved.

*Point a)*

26. The Council explained the background to the charrette process for the Ladyfield site.
27. Referring to the Proposed Local Development Plan, which allocated Ladyfield as a housing site in the period up to 2024, the Council noted that this stated, "it is likely that this site will not commence until towards the end of the plan period due to the current legal and lease issues relating to this site". As a result, the Council did not consider it surprising that little material has been provided for the years after the charrette took place, as this was not an imminent development site. It also noted that the charrette was led by the Scottish Government, through the Scottish Sustainable Communities Initiative and the Crichton Development Company, with the Council playing a partner role.





*Point b)*

28. In terms of governance arrangements, the Council submitted that any relevant information should have been discovered during the searches it carried out.

*Point c)*

29. The Council submitted that the reasons put forward in relation to point a) explained why it held no further information, particularly for the years specified by Robert Potter and Partners.

*Point d)*

30. The Council acknowledged that it required several searches to locate all the information which was disclosed to Robert Potter and Partners. It explained that this was due, in part, to the fact that the searches involved several officers from different services and different locations. Overall, however, it concluded that it had carried out several thorough, systematic and detailed searches to locate the information. It believed it had evidenced its view that all reasonable steps had been taken to provide the requested information.

*Part e)*

31. The Council submitted that the searches referred to above would have identified any information held regarding the allocation of the Ladyfield site in the Proposed Local Development Plan. The Council re-iterated that all relevant information held by it regarding this had already been disclosed to Robert Potter and Partners, in response to this or the previous request referred to in paragraph 1 above.
32. In relation to the Local Development Plan process, the Council explained that the relevant Scottish Government regulations, circulars and advice described the processes, procedures and consultation to be undertaken for the Local Development Plan. They did not, however, prescribe the information that should be held in terms of site allocation, apart from the Schedule of Land owned by the Council.
33. The Council went on to explain that Scottish Planning Policy provided information on the form and content of the Local Development Plan, but did not prescribe the information to be held on allocating sites. As a consequence, local authorities followed best practice. In this case, the Council indicated that it followed best practice in applying the tests in Planning Advice Note 2/2010 Affordable Housing and Housing Land Audits, by seeking consultation responses from key agencies and internal consultees to enable an overall planning assessment to be made for each site. The Council submitted that planning agents in Dumfries and Galloway, including Robert Potter and Partners, had been consulted by the Council on its Housing Land Audits. This was evidenced to the Commissioner.



34. Having considered these submissions from the Council, including details of the searches it carried out, the Commissioner accepts, on the balance of probabilities, that the Council holds (and held, at the time it dealt with Robert Potter and Partners' request) no information falling within the scope of that request, in addition to that disclosed in dealing with the request and requirement for review.

## **DECISION**

The Commissioner finds that Dumfries and Galloway Council (the Council) should have dealt with Robert Potter and Partners information request under the EIRs and that, in failing to do so, it failed to comply with regulation 5(1) of the EIRs.

Given that she is satisfied that the Council has disclosed all the information it held and which fell within the scope of the request, the Commissioner does not require the Council to take any action in relation to this breach.

## **Appeal**

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Should either Robert Potter and Partners or Dumfries and Galloway 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 December 2013**





## 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;

...

(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.

...