

# Decision Notice



Decision 171/2010 Mr Craig Mitchell and Fife Council

New footway to Dale Steadings, Inverkeithing

Reference No: 201001089

Decision Date: 1 October 2010

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**Kevin Dunion**

Scottish Information Commissioner

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

Mr Mitchell requested from Fife Council (the Council) information it held relating to a new footway to Dale Steadings, Inverkeithing. The Council provided a weblink to the information available on its website in response. Following a review, Mr Mitchell remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the Council had dealt with Mr Mitchell's request for information in accordance with the Environmental Information (Scotland) Regulations 2004, by providing him with all the information that it held and fell within the scope of his request. He did not require the Council 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)

Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (Interpretation) (definitions (a), (b) and (c) of "environmental information") and 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 10 March 2010, Mr Mitchell wrote to the Council requesting all information contained in all documents held by the Council relating to the new footway to Dale Steadings, Inverkeithing (the new footway) which was approved as part of the Area Transportation Works Programme for 2010/2011. Mr Mitchell's request stated that this should include, but not be limited to:
  - a. details of any assessments, reports or otherwise carried out by or on behalf of the Council;
  - b. copies of any internal correspondence between Fife Council employees including meeting minutes, internal memos and notes;
  - c. copies of any correspondence between the Council and its elected representatives and



- d. all external correspondence between the Council and all non-Fife Council employees and organisations and members of the public.
2. The Council responded on 16 April 2010, indicating that the request had been handled in terms of FOISA. It provided Mr Mitchell with a weblink to papers from a Council Committee meeting in which the Area Transportation Works Programme for 2010-11 (which included the relevant footway as a “category 2” project) had been approved. The Council indicated that no further correspondence was held on the footway proposal by any service. .
3. On 22 April 2010, Mr Mitchell emailed the Council requesting a review of its decision. He commented that he found it astonishing that there was no further correspondence held on the planned footway, the cost of which had been estimated at £25,000 and which was included in the Area Transportation Works Programme for 2010/2011.
4. The Council notified Mr Mitchell of the outcome of its review on 19 May 2010. It indicated that, having considered the matter further, it had concluded that the information requested by Mr Mitchell was environmental information, and so it had concluded that a response should be made in terms of the EIRs.
5. The Council provided further guidance to Mr Mitchell as to where the relevant information could be found among the papers for the Council Committee meeting. The Council upheld its previous decision that this was all relevant information that was held, and explained that, in reaching this conclusion, it had consulted staff in its Development Management, Roads Management and Traffic Management Teams and had checked archive databases for references to Dale Steadings.
6. The Council highlighted that the planned new footway had been an item in the Area Transportation Plan for some time, and that it was a category 2 scheme, which meant that it would only be completed either when there were funds available or all category 1 schemes that could be done had been done. The Council noted that, since there were many category 1 schemes still to be done, and given the current financial climate, it was unlikely that any action would be taken with respect to the new footway at Dale Steadings in the foreseeable future.
7. On 27 May 2010, Mr Mitchell emailed 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.
8. 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.



## Investigation

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9. On 15 June 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). In seeking comments from the Council, the investigating officer asked the Council to justify its assertion that it had provided Mr Mitchell with all the information it held relevant to his request. The Council was also asked to provide details of the searches it had undertaken to determine this (including which individuals' and departments' records had been searched) and to provide copies of its internal correspondence in dealing with Mr Mitchell's request.
10. The investigating officer also asked the Council to confirm that it still considered that any information falling within the scope of Mr Mitchell's information request would be environmental information and therefore subject to the EIRs. The Council was asked to comment on this point and provide its submissions in line with the EIRs. The Council was also asked if it wished to rely on section 39(2) of FOISA, which provides that information is exempt from disclosure under FOISA if it is environmental information which the authority is obliged to make available to the public in accordance with the EIRs.
11. In its response, the Council provided an overview of the searches it had undertaken to establish what information it held with respect to Mr Mitchell's request and the other information requested by the investigating officer. The Council confirmed that it still considered the requested information was environmental and that it was relying upon the exemption in 39(2) of FOISA.
12. The investigating officer requested and received additional submissions from the Council regarding the status of the new footway to establish whether any records of proposals, or discussions regarding this footway, could be located.
13. The investigating officer provided a copy of the Council's submissions to Mr Mitchell and obtained his comments as to whether he considered that the Council held any further information that fell within the scope of his request.

## Commissioner's analysis and findings

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14. 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.



## FOISA or the EIRs?

15. From the point where it conducted a review of its initial handling of Mr Mitchell's request (which is the relevant point for the purposes of this decision notice) the Council dealt with Mr Mitchell request on the basis that the information requested was environmental information, as defined in regulation 2(1) of the EIRs.
16. As the information requested by Mr Mitchell concerns the development of a new footway, it concerns measures such as plans or programmes likely to affect the elements of the environment including soil, land and landscape and natural sites or factors that can in turn affect these elements, such as substances, noise and waste. In the circumstances, therefore, the Commissioner is satisfied that the information requested by Mr Mitchell falls within the definition of environmental information set out in regulation 2(1), in particular part (c) of that definition insofar as it relates to plans and programmes.

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

17. 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. In this case, having concluded that the information requested by Mr Mitchell is environmental information, the Commissioner accepts that the Council was entitled apply this exemption in its response to Mr Mitchell's request for information.
18. 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 in 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 therefore proceeded to consider this case in what follows solely in terms of the EIRs.

## Regulation 5 of the EIRs

19. Regulation 5(1) of the EIRs requires authorities which hold environmental information to make it available to an applicant when requested to do so by any applicant.
20. In its initial response to Mr Mitchell, the Council provided him with a link to an internet page containing information from a Council committee meeting in which the new footway was noted in the Area Transportation Works Programme for 2010/2011. Following its review, the Council indicated that this was all information held concerning the new footway, and provided further background information about the status of the plan to develop the footway and the searches undertaken to establish whether any further information was held.



21. Mr Mitchell has expressed dissatisfaction with the Council's response because he does not accept that the information to which he was directed represented all recorded information held on the subject of the new footway. The Commissioner's investigation in this case has focussed on establishing whether or not the Council holds (or held at the relevant time) any further information regarding the new footway.
22. Along with its submissions to the Commissioner, the Council provided copies of internal correspondence generated in the course of its handling Mr Mitchell's request for information. This confirmed that all Council Services had checked whether relevant information was held. Transport Services identified that it was likely to hold relevant information. An email from this Service described the searches undertaken within this area to identify relevant information. The only relevant information found to be held was that contained in the Committee papers to which Mr Mitchell had been directed.
23. The investigating officer subsequently questioned the Council further regarding the new footway, in particular whether any information was held with respect to:
  - adding the new footway to the work plan
  - calculation of cost of the footway
  - additional reports on the new footway
  - why the new footway was left on the plan if it is not to be completed in the foreseeable future.
24. To respond to these questions, the Council consulted with a range of individuals within the Transport, IT and HR Services and provided notes of the points made by each. Although some additional searches were conducted in response to the investigating officer's questions, no additional relevant information was located.
25. The responses from the Council noted that the new footway had been added to the Area Transportation Works Programme some years previously. The Lead Officer responsible for the programme at that time has since left the Council and his email account was deleted in 2009. The Council noted that no files or folders of earlier emails were handed over when this individual left and it appeared that this officer dealt with most issues verbally and relied on memory.
26. The Council explained that the continued inclusion of a project on the Area Transportation Works Programme is discussed locally (between elected representatives, Traffic Management and Roads Management) to agree the contents of the list. It noted that such discussions are not recorded.



27. The Council reiterated that the new footway was a Category 2 project and no work had been undertaken since. It noted that if priorities and budget permitted a project to go ahead, a design brief would be issued and detailed design and costing would be done at that stage. The Council noted that the costing of the new footway appeared to have been developed in 2003, although nothing specific to the project had been found. It provided some explanation of how the estimated cost might have been developed.
28. In his submissions to the Commissioner, Mr Mitchell stated that he still considered that the Council held further information. Mr Mitchell queried the fact that the Council had not documented its verbal conversations about the new footway, had deleted emails of an employee one year after they left the Council and that the new footway had been on the transportation plan for many years without amendment.
29. The Commissioner has some sympathy with Mr Mitchell's frustrations with the lack of recorded information located in response to his request. However, it is outwith his remit to consider whether certain types of information should have been recorded. While he is aware that Mr Mitchell has concerns about the recording of information by the Council, the Commissioner's locus extends only to determining whether the Council acted in accordance with the EIRs (and Part 1 of FOISA) when responding to Mr Mitchell's information request, and whether it identified and supplied all relevant (and non-exempt) recorded information that it held in doing so.
30. Having considered the submissions from the Council regarding the searches undertaken to locate any relevant information, and having noted that the circumstances surrounding the new footway and the change of staff responsible for developing such plans, the Commissioner is satisfied that the Council has taken reasonable steps to determine whether it held any additional information that fell within the scope of Mr Mitchell's request. The Commissioner accepts that if additional information was generated when the proposal for the new footway was first made, this is no longer held by the Council.
31. Having considered the Council's submissions and the steps taken by it in order to ascertain whether it held additional information, the Commissioner is satisfied on balance of probabilities that no additional information falling within the scope of Mr Mitchell's request was held by the Council at the time the request was received. Therefore the Commissioner has concluded that the Council complied with regulation 5(1) of the EIRs.

## DECISION

The Commissioner finds that Fife Council complied with the Environmental Information (Scotland) Regulations 2004 in responding to the information request made by Mr Mitchell and providing him with the information he sought.



## Appeal

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Should either Mr Mitchell or Fife 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**  
**1 October 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;

...

...

### 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.

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