

# Decision Notice



Decision 071/2012 Mr John Young and South Lanarkshire Council

Planning application

Reference No: 201102333  
Decision Date: 13 April 2012

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**Margaret Keyse**

Acting Scottish Information Commissioner

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## Summary

Mr Young requested from South Lanarkshire Council (the Council) information about a specified planning application and the Council's decision in respect of that application. The Council dealt with the request under the EIRs and refused to provide the information on the basis that (as it was available for inspection at the Council's offices) it was already publicly available and easily accessible. Following a review, Mr Young remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the Council had dealt with Mr Young's request for information in accordance with Part 1 of FOISA and the EIRs, by refusing to provide the information in terms of regulation 6(1)(b) of EIRs. She 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); 39(2) (Health, safety and the environment)

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (Interpretation) (definitions (a), (b) and (c) of "environmental information"); 5(1) and (2)(b) (Duty to make available environmental information on request); 6(1)(b) (Form and format of 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.

All references in this decision to "the Commissioner" are to Margaret Keyse, who has been appointed by the Scottish Parliamentary Corporate Body to discharge the functions of the Commissioner under section 42(8) of FOISA.

## Background

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1. On 17 August 2011, Mr Young wrote to the Council requesting a copy of a specified planning application for the infilling of a former stone quarry at Dovesdale, Stonehouse, Lanarkshire, together with a copy of the local authority's decision notice in respect of the application.



2. The Council responded on 16 September 2011. It stated that the information Mr Young had requested was subject to the EIRs and therefore exempt from the provisions of FOISA in terms of section 39(2). The Council refused to provide the information in terms of regulation 6(1)(b) of the EIRs, as it considered the information to be publicly available and easily accessible in another form or format. It explained that Mr Young could arrange to inspect the information at a specified Council office, providing a telephone number to allow him to arrange a mutually convenient time for inspection.
3. On 21 September 2011, Mr Young wrote to the Council requesting a review of its decision. He noted the disclosure of information by the Council in response to a previous request, submitting that he had a genuine interest in seeking to ensure transparency in relation to the information he had requested (which he considered to be public information).
4. The Council notified Mr Young of the outcome of its review on 18 October 2011, upholding its previous decision without modification. It acknowledged his interest in transparency, but pointed out that the information was publicly available as described earlier.
5. On 8 December 2011, Mr Young 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 Young 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 6 January 2012, 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 (with specific reference to the requirements of regulation 6(1)(b)) to justify its reliance on any provisions of FOISA or the EIRs it considered applicable to the information requested.

## Commissioner's analysis and findings

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8. In coming to a decision on this matter, the Commissioner has considered all the submissions made to her by both Mr Young and the Council and is satisfied that no matter of relevance has been overlooked.



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

9. The exemption in section 39(2) of FOISA provides, in effect, 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.
10. Mr Young has not challenged the Council's decision that the information he requested was environmental. Considering the subject matter of the planning application referred to in Mr Young's request, the Commissioner is satisfied that the information can properly be regarded as environmental information as defined in paragraph (c) of the definition in regulation 2(1), as information on a measure likely to affect the elements of the environment (specifically, land or landscape). Consequently, the Commissioner accepts that the Council was entitled to apply the exemption in section 39(2) to the information.
11. This exemption is subject to the public interest test in section 2(1)(b) of FOISA. In this case, as there is a separate statutory right of access to environmental information available to the applicant, 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. The Commissioner is therefore satisfied that the Council was entitled to withhold the information under section 39(2) of FOISA, and she has proceeded to consider this case solely in terms of the EIRs.

### Regulation 6(1)(b) - Form and format of information

12. Regulation 6(1)(b) of the EIRs provides that, where an applicant requests that information is made available in a particular form or format, a Scottish public authority shall comply with that request unless the information is already publicly available and easily accessible to the applicant in another form or format. In this instance, Mr Young requested that the Council provide him with a copy of the information.
13. To interpret this regulation, the Commissioner has considered Article 3(4) of Directive 2003/4/EC<sup>1</sup> from which the EIRs are transposed. Article 3(4) includes the following: "where an applicant requests a public authority to make environmental information available in a specific form or format (including in the form of copies)". The Commissioner therefore accepts that by requesting the information in the form of a copy, to be supplied to him, Mr Young has requested the information in a specific form and format in terms of regulation 6(1).
14. In order to determine whether the Council dealt with Mr Young's request correctly, the Commissioner must be satisfied as to whether, at the time it received the request, all the information held by the Council (and which fell within the scope of the request) was both publicly available and easily accessible to Mr Young in another form or format (i.e. by inspection).

<sup>1</sup> <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:041:0026:0032:EN:PDF>



15. The Council explained that the information sought by Mr Young was held in the register kept under section 36(1) of the Town and Country Planning (Scotland) Act 1997 (the 1997 Act), the Town and Country Planning (Development Management Procedure) (Scotland) Regulations 2008 (the 2008 Regulations) prescribing the contents of that register.
16. Section 36(4) of the 1997 Act states, “Every register kept under this section shall be available for inspection by the public at all reasonable hours”, while paragraph 7 of Schedule 2 of the 2008 Regulations states, “Where the register kept by a planning authority under this Schedule is kept using electronic storage, the authority may make the register available for inspection by the public on a website maintained by the authority for that purpose.”
17. Consequently, the Council noted, it was only required to make the information available through inspection. It could publish information of this kind on its website, and did so in respect of applications received from 2000 onwards, but the information sought by Mr Young related to an earlier application and was therefore only available in hard copy.
18. The Council also stated that the requested information was referred to in its Publication Scheme in *Class 9.10 - Planning and building standards*. This stated that “Public registers including applications and associated plans are also available for inspection at Planning and Building Standards area offices.” Information on the location of these offices was also provided.
19. The Council also provided links to pages on its website describing the relevant access arrangements, noting that an appointment was required because of the time required to retrieve archived records and to permit the reservation of an appropriate room. Describing such access arrangements as “routine business”, it noted that inspection was free of charge, although there would be a charge for obtaining copies of relevant documents (which could be arranged).
20. In the circumstances, having considered the above submissions, the Commissioner accepts that the information in question is (and was, at the time the Council received Mr Young’s request) publicly available in terms of regulation 6(1)(b) of the EIRs. She will therefore consider whether it was easily accessible by Mr Young by virtue of being so available.
21. Mr Young commented that he was unable to take time off work to inspect the information during the Council’s opening hours, and that he wished to consider the document at length. The Council acknowledged that it would consider making copies of the information available to an applicant where it was unreasonable for them to inspect the records in person, for example because they resided some distance away or could not attend in person for some other reason beyond their control. It did not, however, accept that such circumstances applied to Mr Young, who it understood to reside within South Lanarkshire (a relatively short distance from the relevant Council office).



22. In response to Mr Young's first point, the Council found it unusual to have employment where it was impossible to take annual leave or some other leave of absence to inspect the records. Mr Young had not provided any evidence that his employment prohibited him from taking annual leave and it suggested that he was unwilling, rather than unable, to take the necessary time off. It also suggested that he could have arranged for someone to inspect the records on his behalf if he was unable to do so in person
23. The Council commented that there were a large number of employed people in Scotland. It believed that had Parliament considered it was unreasonable for such people to take time off work to inspect records, then the legislation could have been changed to allow for additional or alternative rights of access. Further, both Parliaments – the UK Parliament with the 1997 Act and the Scottish Parliament in its review of the planning process in the Town and Country Planning (Scotland) Act 2006 (which the Commissioner assumes to be a reference to the Planning etc. (Scotland) Act 2006) and regulations made under it (including the 2008 Regulations) – had the opportunity to revise the obligations on the Council in relation to making the register available to the public. They had kept access to the Register as inspection only. It was suggested by the Council that it would go beyond the intention of Parliament to conclude that, because the applicant was employed but unwilling to take leave to inspect the records, this meant that the information was not easily accessible to the applicant.
24. Responding to Mr Young's second point, the Council submitted that this did not make inspection of the records unreasonable to Mr Young. In addition, the Council indicated that it would be happy to make copies of any records after Mr Young had inspected them, allowing him to consider them at home. It acknowledged that it would charge for this service, at the rates set down in its Publication Scheme.
25. The Commissioner asked the Council to comment upon a paragraph relating to form of provision in the *Arhus Convention: An Implementation Guide*<sup>2</sup>. The Guide states [at page 55]:
- The issue of form also means that public authorities must provide copies of documents when requested, rather than simply providing the opportunity to examine documents.*
26. The Council agreed that this would apply where the Council was making information available, but submitted that it was not doing so in this case. The Council drew the Commissioner's attention to the comments in the Guide as they related to paragraph 1(b)(ii) of Article 4 of the Convention (implemented by regulation 6(1)(b) of the EIRs):

*A second exception is that the public authority is not required to give the information in the form requested if it is already publicly available in another form, such as in a government-published book that may be found in a public library. Instead, the public authority may refer to or give the already publicly available form. Clearly accessibility to the publicly available version of the information should be taken into account. Informing an applicant about the existence of a single copy of a book in a library 200km from his or her residence would probably not be a satisfactory response...*

<sup>2</sup> <http://www.unece.org/fileadmin/DAM/env/pp/acig.pdf>



27. The Council suggested that reference to a library book was no different from inspection of a public register. The Council acknowledged that, if it was unreasonable to expect Mr Young to exercise the right of inspection, then it might not have applied regulation 6(1)(b). Having considered all the circumstances, however, it did not believe that expectation was unreasonable.
28. Having considered the Council's submissions, the Commissioner is satisfied that the information was easily accessible by Mr Young through inspection at the Council's offices. She notes in this connection that Parliament has reviewed the relevant planning legislation since the introduction of FOISA and the EIRs and has not found it necessary to extend the statutory obligations of planning authorities with regard to making information of this kind available. In any event, having considered Mr Young's own circumstances as he has described them, she does not consider the Council's expectation that he exercise access by way of inspection to have been unreasonable or in any way contrary to the obligations imposed by either the EIRs or the underlying Directive or Convention.
29. The Commissioner therefore accepts that the Council was entitled to apply regulation 6(1)(b) of the EIRs to the information, and therefore that the Council was not required to make the information available in the form and format requested by Mr Young.

## DECISION

The Commissioner finds that South Lanarkshire Council complied with Part 1 of the Freedom of Information (Scotland) Act 2002 and the Environmental Information (Scotland) Regulations 2004 in responding to the information request made by Mr Young.

## Appeal

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Should either Mr Young or South Lanarkshire 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**  
**Acting Scottish Information Commissioner**  
**13 April 2012**



## 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.

(2) The duty under paragraph (1)-

...

(b) is subject to regulations 6 to 12.

...



**6 Form and format of information**

- (1) Where an applicant requests that environmental information be made available in a particular form or format, a Scottish public authority shall comply with that request unless-
- ...
- (b) the information is already publicly available and easily accessible to the applicant in another form or format.
- ...