

# Decision Notice

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**Decision 083/2016: Councillor McCabe and Falkirk Council**

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## **Planning information**

Reference No: 201502393

Decision Date: 8 April 2016



Scottish Information  
Commissioner

## Summary

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On 21 July 2015, Councillor McCabe asked Falkirk Council (the Council) for information relating to the Denny Regeneration Project. In particular, he sought records of internal meetings or discussions regarding the failure of two developers to provide contribution for the construction of DEAR (the Denny Eastern Access Road). The Council provided some information whilst withholding other information as commercially sensitive and legally privileged.

Councillor McCabe did not challenge the fact that the Council had withheld information, but asked the Commissioner to investigate whether the Council had considered all of the information it held and which fell within the scope of his request. Following an investigation, the Commissioner was satisfied that it had.

## Relevant statutory provisions

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and 1(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 available environmental information on request)

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 21 July 2015, Councillor McCabe wrote to the Council, referring to an earlier response to an information request he had made regarding the Denny Regeneration Project. He considered this response to have been incomplete and asked the Council for information relating to "internal meetings or discussions regarding the failure of two developers to provide a contribution for the construction of DEAR [Denny Eastern Access Road]."
2. The Council responded on 19 August 2015. It stated there was an overlap with previous requests. It also confirmed that it was approaching that part of his 21 July 2015 communication relating to DEAR as a new information request and disclosed some of the information it had identified. It withheld other information, on the basis that disclosure would either substantially prejudice commercial interests (section 33(1)(b) of FOISA) or the information was subject to legal professional privilege (section 36(1) of FOISA).
3. On 2 September 2015, Councillor McCabe wrote to the Council and requested a review, on the basis that the response made no reference to internal meetings or discussions as requested. He also referred to an internal Council email of 22 January 2015 (which had been disclosed in relation to the earlier request), where the author had asked for "the sale particulars". He could identify no such information in what had been disclosed to him. He did not challenge the Council's application of exemptions.
4. The Council notified Councillor McCabe of the outcome of its review on 3 November 2015. With reference to the internal enquiries it had undertaken, it explained why there was no

further information on internal meetings or discussions which was not subject to legal professional privilege.

5. In relation to his reference to “the sale particulars”, the Council informed him that there was nothing held other than the Marketing Document and Guidance Brief, which had already been provided to him. The Council also acknowledged that the request should have been dealt with under the EIRs.
6. On 9 December 2015, Councillor McCabe 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. Councillor McCabe stated he was dissatisfied with the outcome of the Council’s review because, in summary, he was not satisfied that the Council had identified all of the information it held and which fell within the scope of his request.

## Investigation

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7. Councillor McCabe’s application was accepted as valid. The Commissioner confirmed that Councillor McCabe made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to her for a decision.
8. On 22 January 2016, the Council was notified in writing that Councillor McCabe had made a valid application. The case was allocated to an investigating officer.
9. 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 Councillor McCabe’s application, and answer specific questions relating to its handling of his request.
10. The Council responded, providing submissions to the effect that the request fell to be dealt with in terms of the EIRs and, as a result, applying the exemption in section 39(2) of FOISA (see below). It also provided submissions to support of its position that it had considered all the relevant information it held and which fell within the scope of Councillor McCabe’s request.

## Commissioner’s analysis and findings

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11. In coming to a decision on this matter, the Commissioner considered all of the withheld information and the relevant submissions, or parts of submissions, made to her by both Councillor McCabe and the Council. She is satisfied that no matter of relevance has been overlooked.

### FOISA or EIRs

12. The Council responded to Councillor McCabe’s request solely in terms of FOISA.
13. The relationship between FOISA and the EIRs is set out in some detail in *Decision 218/2007 Professor A D Hawkins and Transport Scotland*<sup>1</sup> and need not be repeated in full here. However, it is relevant to reiterate some of the key points which are relevant in this decision:

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<sup>1</sup> <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2007/200600654.aspx>

- The definition of what constitutes environmental information should not be viewed narrowly, but in line with the definition of environmental information in the EIRs.
  - There are two separate statutory frameworks for access to environmental information and an authority is required to consider any request for environmental information under both FOISA and the EIRs.
  - Any request for environmental information therefore **must** be dealt with under the EIRs.
  - In responding to a request for environmental information under FOISA, an authority may claim the exemption in section 39(2), thereby removing the need to consider that request further in terms of FOISA.
14. Given the subject matter of the request (which relates to a substantial urban regeneration project) and having considered the information identified by the Council in responding to it, the Commissioner is satisfied that any information falling within the scope of the request would be environmental information, as defined in regulation 2(1) of the EIRs. She considers the information would fall within either paragraph (a) of the definition of environmental information contained in regulation 2(1) (as information on the state of the elements of the environment) or paragraph (c) of that definition (as information on measures affecting or likely to affect those elements).
15. In providing its response to Councillor McCabe's requirement for review and in its submissions to the Commissioner, the Council accepted that it should have considered Councillor McCabe's request in terms of the EIRs. In its submissions to the Commissioner, the Council confirmed that it wished to rely upon section 39(2) of FOISA.

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

16. 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. In this case, the Commissioner considers the Council would have been entitled to apply the exemption to Councillor McCabe's request, given her conclusion that it is properly classified as environmental information.
17. As there is a separate statutory right of access to environmental information available to the applicant, the Commissioner also considers 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 any public interest in disclosing the information under FOISA. Therefore, the Commissioner will consider the Council's handling of the request in terms of the EIRs only.

### **Was all relevant information identified, located and provided by the Council?**

18. 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 hold (but which it does not in fact hold).
19. The Commissioner notes the submissions provided by Councillor McCabe as to the importance of the information requested and why he believes the Council should hold further information.

20. The Council submitted that all of the information that it held, falling within the scope of Councillor McCabe's request, had been considered at the time it had responded to his requirement for review, and as such it had responded adequately to the request.
21. The Council explained (with details and evidence of the outcomes) that it had carried out specific searches and enquiries in identifying and locating the information requested. It confirmed the searches it had carried out, at both initial response and review stage of the request.
22. The Council further explained that the email of 22 January 2015, which referred to "the sales particulars", was responded to that day with explanation that "the marketing particulars" would be provided the next day. The following day, the initial author was provided with copies of the Marketing Brief and the Guidance Brief. The Council explained that these documents were the "sales particulars", as requested by the initial author of the email of 22 January 2015. The only difference was that they were not called "sales particulars". The Council explained that Councillor McCabe was provided with a copy of both said emails. Having considered these submissions and the associated correspondence, the Commissioner accepts this explanation as reasonable in the circumstances.
23. The Council confirmed that all information falling within the scope of Councillor McCabe's request had been considered and no further information was held.
24. Having considered all relevant submissions and the terms of the request, the Commissioner accepts that the Council interpreted Councillor McCabe's request reasonably and took adequate, proportionate steps to establish what information it held and which fell within the scope of the request.
25. Consequently, in this respect, she is satisfied that the Council dealt with the request in accordance with section 1(1) of FOISA and regulation 5(1) of the EIRs.

## Decision

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

## Appeal

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Should either Councillor McCabe or Falkirk 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**

**8 April 2016**

## 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.

...

# 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.

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