

# Decision Notice

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**Decision 259/2016: Mrs W and South Lanarkshire Council**

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## **Minutes of meetings**

Reference No: 201601405

Decision Date: 6 December 2016



Scottish Information  
Commissioner

## Summary

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On 18 March 2016, South Lanarkshire Council (the Council) was asked for minutes of meetings and documentation relating to proposed building works, including a decision about work to be carried out under the Council's roof repair and maintenance programme. The Council disclosed some information.

The investigation focussed on whether the Council had conducted adequate searches for the information and whether it held any information other than that it had already disclosed.

The Commissioner accepted that the Council had conducted reasonable and proportionate searches and she found that it did hold not any information falling within the scope of the request. However, the Commissioner also found that the Council should have considered the request under the EIRs and not under FOISA.

## 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), (b), (c) and (f) of definition of "environmental information") (Interpretation); 5(1) and (2)(b) (Duty to make available environmental information on request); 10(1), (2) and (4)(a) (Exceptions from duty to make environmental information available)

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 18 March 2016, Mrs W made a request for information to the Council. She asked for:
  1. Minutes of the initial meeting held on 26 May 2015, between the Council and Keepmoat, where they "agreed a way forward" regarding roofline works (subject HEEPS2 East Kilbride blocks).
  2. Copies of relevant minutes/documentation created after 5 June 2015 where the "agreement decision" to carry out the extension to the roofline overhang was reversed.
2. The Council responded on 20 April 2016. It notified Mrs W, in terms of section 17(1) of FOISA, that it did not hold any of the information she had requested.
3. On 7 June 2016, Mrs W wrote to the Council requesting a review of its decision. She challenged the Council's statement that it did not hold any relevant information.
4. The Council notified Mrs W of the outcome of its review on 12 July 2016. It maintained its previous view that it did not hold any information regarding request (2) but it identified some information falling within the scope of request (1) and it disclosed this to Mrs W.
5. On 10 August 2016, Mrs W 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. Mrs W stated she was dissatisfied with the outcome of the Council's review because she did not accept that it did not hold any relevant information.

## **Investigation**

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6. The application was accepted as valid. The Commissioner confirmed that Mrs W 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.
7. The case was allocated to an investigating officer and, on 14 November 2016, the Council was notified in writing that Mrs W had made a valid application.
8. 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 this application and answer specific questions including justifying 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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9. 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 Mrs W and the Council. She is satisfied that no matter of relevance has been overlooked.

### **FOISA or the EIRs?**

10. The Council responded to Mrs W's request and request for review under FOISA. However, the Commissioner has concluded that any information falling within the scope of the request would be environmental information, as defined in regulation 2(1) of the EIRs. The request was for minutes of meetings with contractors regarding building work that was to be undertaken on the exterior of Mrs W's property, along with other documentation relating to these meetings. One of the key issues was the question of water ingress and damage.
11. The Council argued that the effect of the water is merely to change the colour of the external render, while Mrs W believes that there is damage from water penetration. In either case, the information which Mrs W requested is about the effect of water on a built structure. The Commissioner finds that the requested information falls within the definition of environmental information in regulation 2(1) of the EIRs (paragraphs (a), (b), (c) and (f)).
12. The Commissioner must therefore conclude that, by failing to consider this information and respond to Mrs W's request in terms of the EIRs, the Council failed to comply with regulation 5(1) of the EIRs.
13. During the investigation, the Council reiterated that it had provided Mrs W with information falling under the scope of request (1), after reviewing its response to her request.
14. The Council acknowledged that it should have handled both request (1) and request (2) under the EIRs, but indicated that the outcome under the EIRs would have been the same as under FOISA. In practical terms, the only difference in processing would have been that it would have refused request (2) under regulation 10(4)(a) of the EIRs (rather than under section 17(1) of FOISA). The Council submitted that it would now apply regulation 10(4)(a) (the exception for information which is not held by the public authority) to request (2).

15. The Council applied the exemption in section 39(2) of FOISA to the information requested by Mrs W. 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.
16. The exemption in section 39(2) is subject to the public interest test in section 2(1)(b) of FOISA. As there is a separate statutory right of access to environmental information available to Mrs W in this case, the Commissioner has concluded that the public interest in maintaining this exemption, and responding to the request in line with the EIRs, outweighs the public interest in disclosure under FOISA.
17. The Commissioner will consider the information in what follows solely in terms of the EIRs.

### **Does the Council hold the information requested by Mrs W?**

18. The Council submitted that it does not hold any information (other than that which it identified and disclosed at review stage) that falls within the scope of Mrs W's request, and it provided submissions to support this view.

#### *Request (1)*

19. The Council noted that request (1) is very narrow in scope, seeking a record of the matters discussed at a meeting held on 26 May 2015 and/or the outcome of those discussions. The Council explained that it initially considered that it did not hold any information falling within its scope, but, when reviewing its response, it conducted additional searches and located hand written notes which it disclosed to Mrs W. The Council maintained that it does not hold any further information regarding this request.
20. The Council explained that it had searched the electronic records (emails) and paper records (personal notebooks) of the two employees who attended the meeting and had not identified any further information. Another member of staff, who (as a result of the agreement made at the 26 May 2015 meeting) had carried out surveys of the East Kilbride blocks, also checked their email and paperwork and also found no emails or documents relating to this meeting.

#### *Request (2)*

21. The Council noted that request (2) was for information contained within minutes/documentation in respect of the "decision regarding the roofline extension". The Council understood this to relate to the decision regarding the need for further works arising from the fitting of the new fascia.
22. In response to this request, the Council identified that the individuals who might hold any information were the employees who attended the regular fortnightly meeting with Keepmoat. These employees explained that they had never made any formal record of the meetings. As formal minutes were not taken, the Council submitted that the only information that might be held would be within records created by these employees for a purpose other than record keeping, e.g. references in note books, emails or other correspondence.
23. The Council confirmed that it conducted the same searches as it did for request (1), in that it searched the electronic records (emails) and paper records (personal notebooks) of the employees who attended the Keepmoat meetings but it did not locate any information that fell within the scope of the request.

### *Mrs W's submissions*

24. Mrs W provided extensive background information to help explain her concerns. Some of her submissions related to other requests she had made, or matters relating to the building works: the Commissioner cannot comment on these matters.
25. Mrs W did not accept that the Council did not hold any more information than it had provided.

### *Commissioner's findings*

26. In this case, the Commissioner must decide whether the Council identified and provided all of the information falling under request (1), and therefore complied with regulation 5(1) of the EIRs when responding to this request. She must also decide whether the Council was correct to state that it did not hold any information covered by request (2) and was therefore justified in relying upon the exception in regulation 10(4)(a) of the EIRs in relation to this request.
27. The standard of proof to apply in determining whether a public authority holds the requested information is the civil standard of the balance of probabilities. In deciding where the balance lies, the Commissioner will consider the scope, quality, thoroughness and results of the steps taken by the public authority to identify and locate the information in question. She will also consider, where appropriate, any other reason offered by the public authority to explain why it does not hold the information. While it may be relevant as part of this exercise to explore expectations as to what information the authority should hold, ultimately the Commissioner's role is to determine what relevant information is actually held by the public authority (or was, at the time it received the request).
28. The Council has submitted that its Housing and Technical Resources department does not, as a matter of practice, take minutes of all meetings with contractors. The Commissioner has no reason to doubt this. She cannot comment on the work practices of the Council, but she would observe that transparency is often aided by the creation of minutes or note taking at meetings, especially when decisions are being made or altered.
29. Having carefully considered the Council's submissions, the Commissioner accepts that the Council has disclosed all of the information it holds which is covered by request (1). Accordingly, she accepts that the Council complied with regulation 5(1) when responding to request (1).
30. The Commissioner also accepts that the Council does not hold any information falling within the scope of request (2). The Council has searched the electronic and paper files of those employees who could have held relevant information and none has been identified. The Commissioner considers that the searches undertaken by the Council were reasonable and proportionate and, in all the circumstances of this case, the Commissioner is satisfied that the Council does not hold any relevant information. She accepts that the exception in regulation 10(4)(a) is engaged.

### *Public interest test*

31. The exception in regulation 10(4)(a) is subject to the public interest test in regulation 10(1)(b) of the EIRs and can only be upheld if, in all the circumstances, the public interest in maintaining the exception outweighs the public interest in making the information available. The Commissioner is satisfied that the Council does not hold the information in question. Consequently, she does not consider there to be any conceivable public interest in requiring that the information be made available. The Commissioner therefore concludes that the

public interest in making the requested information available is outweighed by that in maintaining the exception in regulation 10(4)(a) of the EIRs.

32. The Commissioner is satisfied that, in relation to request 2, the Council was entitled to rely on the exception in regulation 10(4)(a), on the basis that it did not hold the information requested by Mrs W.

## Decision

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The Commissioner finds that South Lanarkshire Council (the Council) failed to comply in full with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in dealing with Mrs W's request for information.

The Council failed to recognise that the information requested by Mrs W was environmental information (as defined by regulation 2(1) of the EIRs) and in this respect failed to comply with regulation 5(1) of the EIRs.

The Commissioner accepts that the Council provided all information covered by request 1 when responding to Mrs W's requirement for review, as required by regulation 5(1).

The Commissioner accepts that the Council was entitled to rely on regulation 10(4)(a) of the EIRs in relation to request 2.

## Appeal

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Should either Mrs W or South Lanarkshire 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**

**6 December 2016**

### 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;

...

- (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);

...

## 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.

...

## 10 Exceptions from duty to make environmental information available–

(1) A Scottish public authority may refuse a request to make environmental information available if-

- (a) there is an exception to disclosure under paragraphs (4) or (5); and
- (b) in all the circumstances, the public interest in making the information available is outweighed by that in maintaining the exception.



- (2) In considering the application of the exceptions referred to in paragraphs (4) and (5), a Scottish public authority shall-
  - (a) interpret those paragraphs in a restrictive way; and
  - (b) apply a presumption in favour of disclosure.

...

- (4) A Scottish public authority may refuse to make environmental information available to the extent that
  - (a) it does not hold that information when an applicant's request is received;

...

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