

# Decision Notice

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**Decision 003/2018: Mr Ross Aitken and City of Edinburgh Council**

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**Edinburgh tram line: safe crossing points for cyclists**

Reference No: 201701414

Decision Date: 12 January 2018



Scottish Information  
Commissioner

## Summary

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The Council was asked for the number of safe crossing points for cyclists on the Edinburgh tram line. The Council considered the request under the EIRs, and responded by explaining that it did not hold the information, with reasons.

Following an investigation, the Commissioner accepted the Council did not hold the information sought.

## Relevant statutory provisions

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The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (Interpretation) (paragraphs (a), (c) and (f) of definition of "environmental information"); 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 31 May 2017, Mr Aitken made a request for data about the Edinburgh tram line and cyclists. There were eight parts to the request. The last part (the only part in respect of which he has made an application to the Commissioner) asked for the following information:  
  
"I'd like to know how many safe crossing points there are for cyclists for the entire length of the tram line?"
2. The Council responded on 28 June 2017, providing information for the first seven parts of the request. For the last part, the Council explained that, other than specific areas where cyclists were prohibited, cyclists were permitted to cross the rails where they chose to do so. It referred to relevant guidance in the Highway Code.
3. On 6 July 2017, Mr Aitken wrote to the Council, requesting a review of its decision on the last part of his request. He did not accept that the Council had fully addressed this part and indicated he was seeking a specific figure for the number of safe crossing points.
4. The Council notified Mr Aitken of the outcome of its review on 3 August 2017. It stated it did not hold a figure which would fulfil the last part of his request. Accordingly, it concluded that it did not hold this information and applied the exception in regulation 10(4)(a) of the EIRs.
5. On 9 August 2017, Mr Aitken wrote to the Commissioner. Mr Aitken applied to the Commissioner for a decision in respect of the final part of his request, in terms of section 47(1) of the Freedom of Information (Scotland) Act 2002 (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. Mr Aitken stated he was dissatisfied with the outcome of the Council's review, submitting that the information should be held given what he considered to be the serious nature of injuries to cyclists caused by the tram tracks.

## Investigation

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6. The application was accepted as valid. The Commissioner confirmed that Mr Aitken made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to him for a decision.
7. On 8 November 2017, the Council was notified in writing that Mr Aitken had made a valid application and the case was allocated to an investigating officer. 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 on its recording systems and how it established that it held no information falling within the scope of the relevant part of the request.

## Commissioner's analysis and findings

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8. In coming to a decision on this matter, the Commissioner considered all of the relevant submissions, or parts of submissions, made to him by both Mr Aitken and the Council. He is satisfied that no matter of relevance has been overlooked.

### Application of the EIRs

9. It is clear from the Council's correspondence with both Mr Aitken and the Commissioner that any information falling within the scope of this request would be environmental information, as defined in regulation 2(1) of the EIRs. Mr Aitken has asked for information pertaining to the tram tracks and measures in place for cyclists crossing them safely. Any information held would relate to human health and safety, which it is likely to be affected in this context by the state of the elements of the environment (for example, the interaction of the weather with the surfaces in question). As such, the Commissioner is satisfied that Mr Aitken's request would fall within paragraphs (a), (c) and (f) of the definition of environmental information (reproduced in Appendix 1).
10. Mr Aitken has not disputed the Council's decision to handle the request under the EIRs and the Commissioner will consider the information in what follows solely in terms of the EIRs.

### Regulation 5(1)

11. Regulation 5(1) of the EIRs, subject to the various qualifications contained in regulations 6 to 12 (regulation 5(2)(b)), requires a Scottish public authority which holds environmental information to make it available when requested to do so by any applicant.
12. Access to information under regulation 5(1) is subject to the exceptions in regulation 10 of the EIRs. A Scottish public authority applying any of these exceptions must, however, interpret them in a restrictive way and apply a presumption in favour of disclosure (regulation 10(2)). Even where the exception applies, the information must be disclosed unless, in all the circumstances, the public interest in making the information available is outweighed by that in maintaining the exception (regulation 10(1)(b)).
13. In this case, the Council confirmed to the Commissioner that it wished to rely on the exception in regulation 10(4)(a) of the EIRs for the information sought by Mr Aitken.

## Regulation 10(4)(a)

14. Regulation 10(4)(a) of the EIRs states that a Scottish public authority may refuse to make environmental information available to the extent that it does not hold that information when the applicant's request is received.
15. The standard of proof in considering whether a Scottish public authority holds information is the civil standard of the balance of probabilities. In determining this, the Commissioner will consider the scope, quality, thoroughness and results of the searches carried out by the public authority. He will also consider, where appropriate, any reason offered by the public authority to explain why the information is not held. While it may be relevant as part of this exercise to explore what information should be held, ultimately the Commissioner's role is to determine what relevant information is (or was, at the time the request was received) held by the public authority.
16. In his application, Mr Aitken indicated he was trying to find out how many safe crossing points there were for cyclists. He was not satisfied that the Council had answered his question and queried its statement that it did not hold this information. He considered the response unsatisfactory because of the serious nature of injuries he believed were caused by the tram tracks.

### *The Council's submissions*

17. The Council commented that it had disclosed statistics for the first seven parts of Mr Aitken's request but submitted that, as it did not hold information for the last part of Mr Aitken's request (under scrutiny here), it was not possible to provide the figure he sought. It highlighted that it did inform Mr Aitken as to why it did not hold a quantifiable number for safe crossing points, referring to the explanations given in its review decision.

### *Searches*

18. The Council submitted that the relevant service did not need to conduct searches of their records as they (and the Council as a whole) would not hold the information requested. It did not believe there were any relevant search terms it could use to conduct searches for the information.
19. The Council commented that although Mr Aitken wanted it to provide a number of "safe crossing points" for cyclists crossing the tram track, this was not how the tram system was devised. It was not designed with furniture such as pelican crossings of similar crossing points. The Council stated there were no places deemed more or less safe for cyclists to cross (apart from where cyclists were prohibited from cycling) and, for this reason, there were no figures recorded of the nature Mr Aitken sought.
20. In conclusion, the Council's position was that it held no information falling within the scope of the final part of Mr Aitken's request. The Council said it could not give the numerical response Mr Aitken was seeking, given that no number was held.

### *Conclusions*

21. The Commissioner's remit under FOISA and the EIRs is to investigate and reach a determination on information, if held. He cannot consider the wider issue of whether the network has been designed appropriately for cyclists to cross the tram tracks.
22. Having considered all relevant submissions and the terms of the request, the Commissioner is satisfied that the Council took adequate, proportionate steps in the circumstances to establish whether it held any information falling within the scope of the final part of Mr

Aitken's request. While it may be going too far to say that there were no relevant search terms the Council could use for the requested information, the Commissioner has considered the Council's explanations fully and accepts that any searches conducted would be highly unlikely to locate any relevant information. In the circumstances, the Commissioner is satisfied that the Council could not be expected to hold a figure of the nature sought by Mr Aitken.

23. Consequently, the Commissioner accepts that the Council was correct to inform Mr Aitken that it did not hold the information. In the absence of any relevant information held by the Council, the Commissioner does not consider there to be any conceivable interest in requiring that any information be made available. The Commissioner therefore concludes that, in all the circumstances of this case, 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.
24. Therefore, the Commissioner is satisfied that the Council was entitled to refuse Mr Aitken's request under regulation 10(4)(a) of the EIRs.

## Decision

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The Commissioner finds that, in respect of the matters specified in the application, City of Edinburgh Council complied with the Environmental Information (Scotland) Regulations 2004 in responding to the information request made by Mr Aitken.

## Appeal

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Should either Mr Aitken or City of Edinburgh 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**

**12 January 2018**

### 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;

...

(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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