

# Decision Notice 016/2021

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## Notes on a planning application

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**Applicant: The Applicant**

**Public authority: South Ayrshire Council**

**Case Ref: 202000291**



Scottish Information  
Commissioner

## Summary

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The Council was asked for notes made in relation to a specific planning application. Following a review, the Council supplied one note, with the redaction of personal data, and said that it held no other information falling within the request.

After an investigation, the Commissioner found that the Council had complied with the request.

## Relevant statutory provisions

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The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (definitions (a), (b) and (c) of definition of “environmental information”); 5(1) (Duty to make environmental information available 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 9 September 2019, the Applicant made a request for information to South Ayrshire Council (the Council). The Applicant requested all notes made by Council employees in relation to Planning Application 16/01145/APP.
2. The Council responded on 18 September 2019, stating that that it held no information, and that “no personal notes were taken in relation to this planning application.” The Council’s response was under the EIRs.
3. On 29 September 2019, the Applicant wrote to the Council requesting a review of its decision. He did not believe there were no notes for this application. He also questioned why the Council had referred to “personal” notes in its response, as his original request had not been worded in this way.
4. Following an application to the Commissioner by the Applicant, which led to *Decision 040/2020*<sup>1</sup>, on 21 February 2020 the Council notified the Applicant of the outcome of its review. The Council apologised for not carrying out its review on time and confirmed that its planning officers do have the facility to record general comments. As this could be considered to be notes, the Council supplied the Applicant with “the only entry in relation to planning application 16/01145/APP” subject to the redaction of staff initials, which it considered to be personal data.
5. On 22 February 2020, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of the Freedom of Information (Scotland) Act 2002 (FOISA). By virtue

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<sup>1</sup> <https://www.itspublicknowledge.info/202000189.aspx>

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. The Applicant stated that he was dissatisfied with the outcome of the Council's review as he believed more information was held by the Council that fell within his request.

## **Investigation**

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6. The application was accepted as valid. The Commissioner confirmed that the Applicant 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. 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 to answer specific questions that related to how it had established what recorded information it held that fell within the Applicant's request.
8. The Applicant was also invited to comment on his concerns.

## **Commissioner's analysis and findings**

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

### **Handling in terms of the EIRs**

10. The Council processed the Applicant's request and requirement for review in accordance with the EIRs.
11. Where information falls within the scope of the definition of "environmental information" in regulation 2(1) of the EIRs, a person has a right to access it (and the public authority a corresponding obligation to respond) under the EIRs, subject to various restrictions and exceptions contained in the EIRs.
12. The Applicant has not challenged the Council's decision to deal with the information as environmental information. The Commissioner is satisfied that the information does comprise environmental information and will consider the handling of the request in what follows solely in terms of the EIRs.

### **Regulation 5(1) - Duty to make available environmental information on request**

13. Regulation 5(1) of the EIRs requires a Scottish public authority that holds environmental information to make it available when requested to do so by any applicant. This obligation relates to the information held by an authority when it receives a request.
14. In this case, the Applicant believed that the Council held more information than it had identified and disclosed. The Applicant has not disputed the Council's redaction of personal data from the information supplied by the Council at review. The Commissioner will therefore not consider the personal data that was withheld. The question for the Commissioner is solely whether the Council identified all the recorded information held by it at the date of the request falling within the terms of the Applicant's request.
15. The question whether recorded information is held is a factual question. First, the Council was asked how it had interpreted the request, which was for "All notes made by Council

employees in relation to Planning Application 16/01145/APP". The Council explained that, as the Applicant had made previous requests in relation to this planning application, the Council believed he had been provided with all relevant recorded information. In light of this, Council staff within the Council's planning department interpreted the request to mean "personal" notes taken by staff.

16. The Council said that this misunderstanding arose as "notes" were associated with jottings or a brief record of points or ideas written down as an aid to memory: hence the assumption that this was a request for informal personal notes. (The Council acknowledged that if personal notes were recorded and held they would fall within the scope of this request.) The Council also acknowledged that the word "personal" was introduced by it in its response to the Applicant, who had simply requested all notes.
17. On liaising with its planning department, the Council's reviewing officer determined that the planning department record management system could record general comments in relation to planning applications. Such information was considered to fall within the Applicant's request for notes. This information was then disclosed to the Applicant, with the redaction of Council staff initials. The Council apologised for this omission, and indicated that online training on FOISA and the EIRs was being developed.
18. The Council said:

"Although [the Applicant] should have been provided with the above record as it fell within the scope of his original information request, the information contained in this planning note was replicated in more detail in the main records previously provided to [the Applicant]".
19. In order to ascertain whether all information has been identified, the Council was asked to explain the steps it took to establish what information it held within the terms of the Applicant's request.
20. The Council explained that its reviewing officer spoke directly with the planning officer, who showed the entry on the planning department record management system for planning the application. The reviewing officer can attest that information supplied to the Commissioner for the purposes of this investigation was a direct copy, and that there were no more entries in relation to this planning application. The Council commented that:

"The Council can only confirm that the above is the only entry. It is unclear exactly what information [the Applicant] believes has not been provided and perhaps if he could be more specific it would allow the reviewing officer to make further enquiries with the relevant departments."
21. The Applicant was invited to comment on whether there was any specific information that he believed fell within his request, and that had not been provided. If there were, the Council could then be asked to that information had been looked for - or to confirm that such information would have been identified by any search it had already conducted. The Applicant was also asked to confirm if information he had referred to in his requirement for review was information he believed was held, by the Council, but had not been provided to him. The Applicant replied with reference to information he expected to see.
22. Finally, the Council was asked to confirm that it had asked the planning officers concerned to check their emails/personal records/etc., i.e. that it had searched beyond the planning file for notes falling within the scope of this request. The Council replied, confirming this had been done, and supplied a copy of its search form. The Council explained that, in response to a

previous investigation, which led to *Decision 124/2019*<sup>2</sup>, evidence was provided to the Commissioner by the Council of multiple searches (there the Applicant had requested all planning department emails, both external and internal relating to a named property and buildings on a plot at a specified address from 12 May 2014).

23. The Commissioner must decide whether the Council complied with regulation 5(1) of the EIRs in locating all relevant information falling within the Applicant's request. The standard of proof to determine 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 the extent of the information likely to be held by the authority and, where appropriate, any reason offered by the public authority to explain why the information is not held.
24. Having considered all the relevant submissions, the Commissioner accepts that the Council has now taken adequate and proportionate steps to establish the information it held that fell within the scope of the Applicant's request.
25. In reaching this conclusion, the Commissioner has taken into account the following:
  - the Council officials involved in assessing what information was held by the authority had experience and knowledge of the subject matter of the request, reducing the likelihood of error and misunderstanding in locating the information requested.
  - the Council has identified information, albeit at review, and this shows that its searches were capable of locating the appropriate information; it is likely that similar information would also have been identifiable by such searches as being similarly filed, stored or categorised.
26. It must be noted that the Council supplied the Commissioner with the search form used to locate information falling within the Applicant's previous request and this form indicates that the Council searches would have located the information requested here. The searches there included details that would find the information requested in the present request. The searches also looked in the areas, and among the staff, that it would be most reasonable to expect the Council to so do.
27. The Commissioner is satisfied, on the balance of probabilities, that the Applicant has received all the information held by the Council (except the redacted personal data) that falls within the scope of the request. The Commissioner therefore finds that the Council complied with regulation 5(1) of the EIRs in responding to the Applicant's request.

## Decision

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The Commissioner finds that South Ayrshire Council complied with the Environmental Information (Scotland) Regulations 2004 in responding to the information request made by the Applicant.

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<sup>2</sup> <https://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2019/201900089.aspx>

## **Appeal**

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Should either the Applicant or the 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**

**29 January 2021**

### The Environmental Information (Scotland) Regulations 2004

#### 2 Interpretation

(1) In these Regulations –

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"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;

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#### 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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