

# Decision Notice



Decision 011/2013 Mrs Christina Wands and Fife Council

Letters to a developer

Reference No: 201202207

Decision Date: 25 January 2013

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**Rosemary Agnew**

Scottish Information Commissioner

Kinburn Castle  
Doubledykes Road  
St Andrews KY16 9DS  
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## Summary

Mrs Wands requested from Fife Council (the Council) specific correspondence relative to a planning application. She did not accept the Council's assertion that it did not hold the information requested. The Commissioner carried out an investigation and accepted that the Council did not hold the information requested by Mrs Wands.

## 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) (definitions (a) and (c) 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 the Appendix to this decision. The Appendix forms part of this decision.

## Background

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1. On 15 August 2012, Mrs Wands wrote to the Council and requested the following information:  
"The letter from Fife Council to Lomond Homes, or its agents, requesting an extension of time for planning application ref 09/00659/COPP, registered on 18 March 2009, and any letters Fife Council received from Lomond Homes, or its agents, about it."
2. The Council responded on 11 September 2012. It informed Mrs Wands, in terms of regulation 10(4)(a) of the EIRs, that it did not hold any information falling within the scope of her request. The Council explained that no extension of time was formally sought in relation to the application in question.



3. On 11 September 2012, Mrs Wands wrote to the Council requesting a review of its decision. She drew the Council's attention to Lomond Homes' appeal statement regarding another planning application. In that case, there was no letter seeking an extension, but she understood from the statement that Lomond Homes did receive such a letter in relation to application 09/00659 ("the other, alleged duplicate, planning application").
4. The Council notified Mrs Wands of the outcome of its review on 19 October 2012. The Council provided Mrs Wands with an explanation as to why it did not hold the information.
5. On 29 October 2012, Mrs Wands wrote to the Commissioner, stating that she 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 Mrs Wands 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 those requests. The case was then allocated to an investigating officer.

## Investigation

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7. On 15 November 2012, the investigating officer notified the Council in writing that an application had been received from Mrs Wands, 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 to justify its reliance on any provisions of FOISA and the EIRs it considered applicable to the information requested, and to explain the steps it had taken to identify and locate the information Mrs Wands had requested.
8. The Council responded on 10 December 2012, providing submissions to the effect that the request fell to be dealt with in terms of the EIRs and in support of its position that it did not hold the information Mrs Wands had requested.
9. The relevant submissions received from both the Council and Mrs Wands will be considered fully in the Commissioner's analysis and findings below.

## Commissioner's analysis and findings

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



## **FOISA or EIRs?**

11. It is clear from the Council's correspondence with both Mrs Wands and the Commissioner that any information falling within the scope of the request would be environmental information, as defined in regulation 2(1) of the EIRs. The information, if held, would relate to an application for planning permission in respect of a proposed development of some significance, and the Commissioner is satisfied that it would fall within either paragraph (a) of the definition of environmental information contained in regulation 2(1) of the EIRs (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).

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

12. The exemption in section 39(2) of FOISA provides, in effect, that environmental information (as defined in regulation 2(1)) 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 accepts that the Council was entitled to apply the exemption to the withheld information, given her conclusion that it is properly classified as environmental information.
13. As there is a separate statutory right of access to environmental information available to the applicant in this case, the Commissioner also accepts that 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.

## **Regulation 5(1) of the EIRs**

14. Regulation 5(1) of the EIRs (subject to the various qualifications contained in regulations 6 to 12) 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 the authority does not in fact hold.
15. Under the EIRs, a public authority may refuse to make environmental information available if one or more of the exceptions in regulation 10 apply and, in all the circumstances of the case, the public interest in maintaining the exception or exceptions outweighs the public interest in making the information available.

## **Regulation 10(4)(a) of the EIRs**

16. Regulation 10(4)(a) of the EIRs provides that a Scottish public authority may refuse to make environmental information available to the extent that it does not hold that information when an applicant's request is received. 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 apply if, in all the circumstances of the case, the public interest in maintaining the exception or exceptions outweighs the public interest in making the information available.



17. Mrs Wands believed, from Lomond Homes' reference to the letter in question in the appeal statement referred to in paragraph 3 above, that the letter in question must exist.
18. During the investigation, the Council described the searches carried out to establish what relevant information it held, in response to both the request and the request for review. These included both electronic and manual searches of the relevant hard copy and electronic filing systems, together with enquiries addressed to relevant staff, none of which revealed any information falling within the scope of the request. Copies of the communications with relevant staff were provided.
19. The Council was unable to explain why Lomond Homes' appeal statement referred to having received a letter requesting an extension of time. It confirmed that it held no information relating to such request ever being made. In the absence of such a request, no such letter would exist.
20. Having considered the Council's submissions, the Commissioner is satisfied that it carried out adequate searches with a view to identifying and locating the information requested by Mrs Wands. In this case, therefore, she is satisfied that the Council did not hold the information requested by Mrs Wands.
21. In the circumstances, the Commissioner does not consider there to be any conceivable public interest in requiring that any information be made available. She 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.
22. The Commissioner is satisfied, therefore, that the Council was entitled to refuse Mrs Wands' request under regulation 10(4)(a) of the EIRs.

## DECISION

The Commissioner finds that, in respect of the matters raised in Mrs Wands' application, Fife 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 Mrs Wands.



## Appeal

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Should either Mrs Wands or Fife 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**  
**Head of Enforcement**  
**25 January 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.

...



## 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

-

(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.

(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;

...