

# Decision Notice



Decision 019/2012 Mr Paul McGowan and Fife Council

Report on condition of road

Reference No: 201101247

Decision Date: 2 February 2012

[www.itspublicknowledge.info](http://www.itspublicknowledge.info)

**Kevin Dunion**

Scottish Information Commissioner

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## Summary

Mr McGowan requested from Fife Council (the Council) the information contained in a specific report on the condition of a road. The Council responded by withholding the information on the basis that it was subject to litigation privilege and therefore was excepted information in terms of regulation 10(5)(b) of the EIRs. Following a review, which upheld this position, Mr McGowan remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, during which some information was provided to Mr McGowan, the Commissioner found that, while the Council was correct to deal with Mr McGowan's request in terms of the EIRs, it had wrongly withheld information in terms of regulation 10(5)(b) of the EIRs. He required the Council to provide Mr McGowan with the information requested, with any names and signatures redacted.

## Relevant statutory provisions and other sources

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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) (definition (a) of "environmental information"); 5(1) and (2)(b) (Duty to make available environmental information on request); 10(1)(a), (2) and (5)(b) (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. Mr McGowan had been in correspondence with the Council in relation to road damage and on 9 June 2011 he wrote to the Council requesting "a copy of the Fife Council report mention in the attached M10 pdf (titled M10PL000838.PDF)".



2. The Council responded on 13 June 2011, informing Mr McGowan that it was dealing with his request in terms of the EIRs and that the requested report was being withheld in terms of regulation 10(5)(b) (which relates to the course of justice, the ability of a person to receive a fair trial or the ability of any public authority to conduct an inquiry of a criminal or disciplinary nature).
3. On 13 June 2011, Mr McGowan wrote to the Council requesting a review of its decision. He asked under what grounds the Council considered the information should be withheld.
4. The Council notified Mr McGowan of the outcome of its review on 8 July 2011, upholding its decision to withhold the information under regulation 10(5)(b) of the EIRs. The Council explained that as the report had been prepared following receipt of a claim, it fell within the category of litigation privilege (and therefore within the exemption cited).
5. On 9 July 2011, Mr McGowan wrote to the Commissioner, stating that he 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 Mr McGowan had 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 that request.

## Investigation

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7. On 27 July 2011, the Council was notified in writing that an application had been received from Mr McGowan and asked to provide the Commissioner with any information withheld from him. The Council responded with the information requested and the case was then allocated to an investigating officer.
8. The investigating officer subsequently contacted the Council, 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, with specific reference to the requirements of regulation 10(5)(b).
9. The Council responded on 30 September 2011, confirming that it considered the information requested to be environmental information in terms of regulation 2(1) of the EIRs. It also advised that it was relying upon the exemption in section 39(2) of FOISA and the exception in regulation 10(5)(b) of the EIRs to refuse to make the information available, with arguments in support of its position.



10. During the investigation, the Council provided Mr McGowan with some of the information held, subject to the redaction of personal data in terms of regulation 11 of the EIRs. Mr McGowan confirmed receipt of this information and accepted that personal data should be redacted from any of the requested information which was disclosed to him. Consequently, the withholding of personal data does not need to be considered further in this decision.
11. The relevant submissions obtained from Mr McGowan and the Council will be considered fully in the Commissioner's analysis and findings below.

## Commissioner's analysis and findings

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12. In coming to a decision on this matter, the Commissioner has considered the withheld information and the submissions made to him by both Mr McGowan and the Council and is satisfied that no matter of relevance has been overlooked.

### Section 39(2) of FOISA

13. The Commissioner set out his thinking on the relationship between FOISA and the EIRs in detail in *Decision 218/2007 Professor A D Hawkins and Transport Scotland*<sup>1</sup> and need not repeat it in full here.
14. In its submissions to the Commissioner, the Council submitted that Mr McGowan's request should be considered under the EIRs as the requested information fell within the definition (a) of environmental information in regulation 2(1) of the EIRs. Therefore, it wished to rely on the exemption in section 39(2) of FOISA in relation to the information requested. For this exemption to apply, any information requested would require to be environmental information as defined in regulation 2(1) of the EIRs.
15. The Commissioner, having considered the terms of the requests, the withheld information and the Council's submissions on this point, accepts in this case that the requested information falls within paragraph (a) of the definition of environmental information contained in regulation 2(1) of the EIRs, being information relating to the state of the elements of the environment.
16. In this case, therefore, the Commissioner accepts that the Council was entitled to apply the exemption in section 39(2) of FOISA to the withheld information, given his conclusion that it is properly considered to be environmental information. This exemption is subject to the public interest test in section 2(1)(b) of FOISA.

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<sup>1</sup> <http://www.itspublicknowledge.info/applicationsanddecisions/Decisions/2007/200600654.asp>



17. As there is a separate statutory right of access to environmental information available to the applicant in this case, the Commissioner accepts that the public interest in maintaining this exemption and dealing with the request in line with the requirements of the EIRs outweighs any public interest in disclosure of the information under FOISA. He has consequently proceeded to consider this case in what follows solely in terms of the EIRs.

### Regulation 10(5)(b) of the EIRs

18. In this case, the Council submitted that the withheld report had been prepared after a claim was received, for the purpose of the Council's claim handlers assessing the Council's liability to pay compensation. The Council considered the report to have been prepared in anticipation of possible legal proceedings, and therefore was subject to litigation privilege and covered by regulation 10(5)(b) of the EIRs.
19. Regulation 10(5)(b) of the EIRs provides that a Scottish public authority may refuse to make environmental information available to the extent that its disclosure would, or would be likely to, prejudice substantially the course of justice, the ability of a person to receive a fair trial or the ability of any public authority to conduct an inquiry of a criminal or disciplinary nature. As with all of the exceptions in regulation 10, this one is subject to the public interest test in regulation 10(1)(b).
20. The Council explained that the principle of litigation privilege was that no party could recover material which another party had made in preparing its own case and this principle was derived from the adversarial nature of litigation. It further argued that the course of justice required that the Council be able fully to prepare a case: releasing the report would prejudice its right to confidentiality of communications with its legal advisors and its legal protection to prepare a case. It suggested that this was a similar case to that considered by the Commissioner in *Decision 007/2010 Mrs Patricia Rowan and Fife Council*, where the Commissioner had upheld the Council's reliance on section 36(1) of FOISA (which relates specifically to information which could be the subject of a claim of confidentiality of communications in legal proceedings) in withholding a report prepared in contemplation of litigation.
21. Mr McGowan noted that in this case, the Council had withheld the requested information under regulation 10(5)(b) of the EIRs rather than section 36(1) of FOISA. While accepting that the correct regime had been applied, he suggested that the report should be factual in nature and questioned whether its content would be legally sensitive. He also referred to a passage at page 59 of *The Aarhus Convention: An Implementation Guide*<sup>2</sup>, which states (in relation to the Convention provision from which regulation 10(5)(b) is derived) that:
- "... the course of justice refers to active proceedings within the courts. The term 'in the course of' implies that an active judicial procedure capable of being prejudiced must be under way."

<sup>2</sup> <http://www.unece.org/fileadmin/DAM/env/pp/acig.pdf>



22. In this case, the Commissioner has fully considered the content of the withheld information and the context within which it was prepared. He has also considered the relevant submissions received from both parties. He notes Mr McGowan's comments in relation to the Aarhus Implementation Guide and acknowledges that neither this nor the wording of regulation 10(5)(b) explicitly excepts information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings. In this respect, it can be distinguished from the exemption in section 36(1) of FOISA.
23. On the other hand, the Commissioner would consider it unduly restrictive to interpret either the exception or the guidance as being incapable of applying to such information. In reaching this view, he has taken into account relevant decisions of the Information Rights Tribunal, for example *Decision EA/2010/0120 Stephen West v Information Commissioner*<sup>3</sup> (see in particular paragraphs 9 and 10, where it is clear that the Tribunal accepts the possibility that the disclosure of material obtained in contemplation of litigation – and therefore subject to litigation privilege – would adversely affect the course of justice).
24. The Commissioner accepts, as the Council has argued, that the exception may be of particular relevance to information covered by litigation privilege, which applies to documents created in contemplation of litigation (also known as communications *post litem motam*). The nature of this privilege is broadly as described in the Council's submissions (see paragraph 20 above): whether a particular document has been prepared in contemplation of litigation, the key question generally being whether litigation was actually in contemplation at a particular time. In this case, it would appear clear that the document containing the withheld information, produced in response to a formal claim received from Mr McGowan, was prepared in contemplation of litigation.
25. For the relevant exception in the (United Kingdom) Environmental Information Regulations 2004 to apply, the Information Rights Tribunal required to be satisfied that disclosure of the withheld information would *adversely affect* the course of justice. In this case, the Commissioner is considering the equivalent provision in the (Scottish) EIRs, where the test is one of *substantial prejudice*. Even where he accepts that the information is subject to litigation privilege, he must also be satisfied that its disclosure would, or would be likely to, prejudice the course of justice substantially. He must assess this in the circumstances of each individual case, bearing in mind that the prejudice must be of real and demonstrable significance.
26. Having considered the content of the withheld information, and also that of the information disclosed to the applicant in the course of the investigation, the Commissioner cannot accept the Council's contention that the course of justice would, or would be likely to, be prejudiced substantially by making the withheld information available. It is a factual report, containing the most basic information, and there would appear to be nothing beyond the circumstances of its preparation to support the application of the exception. As indicated above, the Commissioner is not persuaded that is enough.

<sup>3</sup> [http://www.informationtribunal.gov.uk/DBFiles/Decision/i446/West v IC \(EA-2010-0120\) Decision 25-10-2010 \(w\).pdf](http://www.informationtribunal.gov.uk/DBFiles/Decision/i446/West_v_IC_(EA-2010-0120)_Decision_25-10-2010_(w).pdf)



27. While the Council's submissions relate to the course of justice, the Commissioner has also considered the other limbs of the regulation 10(5)(b) exception. Having declined to accept that the course of justice would, or would be likely to, suffer substantial prejudice as a result of disclosure, he can identify no basis for concluding that disclosure would, or would be likely to, cause such prejudice to the ability of any person to receive a fair trial. Equally, given the nature of the information, he cannot accept that disclosure would, or would be likely to, result in substantial prejudice to the ability of any public authority to conduct an inquiry of a criminal or disciplinary nature. Consequently, he cannot agree with the Council's application of regulation 10(5)(b) in this case.
28. Having found that the exception in regulation 10(5)(b) did not apply in the circumstances of this case, the Commissioner is not required to go on to consider the public interest test in relation to the withheld information.
29. The Commissioner therefore requires the Council to provide Mr McGowan with the withheld information. Given that Mr McGowan has no objection to the redaction of personal data comprising names and signatures, then the Council may redact this information prior to release.

## DECISION

The Commissioner finds that Fife Council (the Council) complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr McGowan, in particular by applying section 39(2) of FOISA on the basis that the information requested was environmental information and therefore subject to the EIRs.

He also finds, however, that the Council failed to comply with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request. In particular, the Commissioner finds that the Council wrongly applied the exception contained in regulation 10(5)(b) of the EIRs to the withheld information and thereby failed to deal with the request in accordance with regulation 5(1) of the EIRs.

The Commissioner therefore requires the Council to provide Mr McGowan with the information in the withheld report (subject to the redaction of any names and signatures), by 18 March 2012.

Decision 019/2012  
Mr Paul McGowan  
and Fife Council



## Appeal

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Should either Mr McGowan 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**  
**2 February 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.

...



## 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

-

(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;

...

### 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

...

(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.



...

- (5) A Scottish public authority may refuse to make environmental information available to the extent that its disclosure would, or would be likely to, prejudice substantially-

...

- (b) the course of justice, the ability of a person to receive a fair trial or the ability of any public authority to conduct an inquiry of a criminal or disciplinary nature;

...