

Decision Notice



Decision 038/2012 Miss Ellen Anderson and Dundee City Council

Information relating to repair, maintenance and inspection of a walkway

Reference No: 201101548

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Scottish Information Commissioner

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Summary

Digby Brown, Solicitors, on behalf of their client, Miss Anderson, requested from Dundee City Council (the Council) various pieces of information relating to the repair, maintenance and inspection of a particular walkway. The Council responded by advising Miss Anderson that it considered all of the requested information to be exempt from release under sections 33(1)(b) and 36(1) of the Freedom of Information (Scotland) Act 2002 (FOISA). Following a review, in which the Council withdrew its reliance on the exemption in section 33(1)(b), but upheld its application of section 36(1) of FOISA to the requested information, Miss Anderson remained dissatisfied and applied to the Commissioner for a decision.

During the course of the investigation, it became clear that the Council did not hold all of the information sought by Miss Anderson. The investigator also took the view that the information that was held was environmental information, and asked the Council to consider whether this should have been dealt with under the Environmental Information (Scotland) Regulations 2004 (the EIRs). The Council did not agree that this information was environmental information, but indicated that if the Commissioner did consider the case under the EIRs, it would apply the exception in regulation 10(5)(b) of the EIRs to it.

Following the investigation, the Commissioner concluded that the requested information was environmental information and consequently considered this case under both FOISA and the EIRs. He found that the Council had failed to deal with the request in line with the EIRs, and that it had also failed to comply with Part 1 of FOISA. He found that the Council had failed to notify Miss Anderson that some of the information requested was not held, and that the information that was held by the Council had been wrongly withheld. He required the Council to disclose that information to Miss Anderson.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (4) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 17(1) (Notice that information is not held); 36(1) (Confidentiality); 39(2) (Health, Safety and the Environment).

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (Interpretation) (definition (a), (b) and (c) of environmental information); 5(1) and 2(b) (Duty to make environmental information available on request); 10(1), 4(a) 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

1. On 5 May 2011, Digby Brown, Solicitors, acting on behalf of Miss Anderson (in this decision, all references to correspondence with Miss Anderson is to correspondence with her solicitors) wrote to the Council to request the following information in relation to the repair, maintenance and inspection of the pedestrian walkway and lighting at a communal path at a specified location:
 - a. Is the communal walkway and stairway adopted by the Council in terms of the Roads (Scotland) Act 1984?
 - b. What inspection interval has the Council identified as being appropriate for a specified location and the communal walkways? What factors are used in assessing the inspection interval?
 - c. Please provide a copy of all inspection reports for this pavement from 1 January 2005 to the date of the request.
 - d. Please also confirm:-
 - i. When was the last inspection prior to 4 January 2011? What was noted in this inspection? How was this inspection carried out?
 - ii. When was the first inspection following 4 January 2011? What was noted? How was the inspection carried out?
 - iii. If any defects were noted, were these repaired? Were there defects noted with the lighting on the walkway? How were the repairs carried out to the lighting?
 - e. Please provide copies of all work and repair records for a specified location and the pedestrian walkways from 1 January 2005 to the date of the request.
 - f. Please provide copies of all call records made to the Council and written records of complaints made by third parties to the Council or telephone calls pertaining to a specified location held by the Council from 1 January 2005 to the date of the request.
2. The Council responded on 30 May 2011, advising Miss Anderson that it considered all of the information she had requested to be exempt from disclosure under sections 33(1)(b) of FOISA (on the basis that its disclosure would, or would be likely to, prejudice substantially the commercial interests of the Council) and 36(1) of FOISA (on the basis that it comprised information that was prepared in contemplation of litigation and would not be recoverable in legal proceedings).



3. On 8 June 2011, Miss Anderson wrote to the Council requesting a review of its decision. In particular, Miss Anderson commented that the inspection regime notes, details of the inspection regime, complaint records and call logs and all other documents and information requested would be recoverable in any court action, and as such could not be covered by litigation privilege. Miss Anderson indicated that it was her understanding that the Council is under specific legal duties to carry out these inspections, and that they ought to be carried out as a matter of course to protect the public. Miss Anderson submitted that the requested information could not and should not have been prepared in contemplation of litigation, but with a view to ensuring the health and safety of members of the public.
4. The Council notified Miss Anderson of the outcome of its review on 15 August 2011. In its response, the Council explained that it was no longer seeking to rely on the exemption in section 33(1)(b) of FOISA for withholding relevant information. It did, however, uphold its application of section 36(1) to the requested information. The Council maintained that as evidence of compliance with its intended inspection regime and other documents Miss Anderson requested would be the cornerstone of the Council's defence to any future litigation by her, it considered the information to be privileged.
5. On 19 August 2011, Miss Anderson 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 Miss Anderson 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

7. On 7 September 2011, the Council was notified in writing that an application had been received from Miss Anderson and was asked to provide the Commissioner with any information withheld from her. 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 on 29 September 2011, 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 it considered applicable to the information requested, with particular reference to section 36(1) of FOISA.



9. The Council was also invited to comment on Miss Anderson's view that it is obliged, and has a duty, to carry out regular inspections of public paths and roadways; therefore, any records relating to the inspection regime and repairs made by the inspecting officer could not be said to be prepared in contemplation of litigation, but in line with the Council's statutory duties.
10. The investigating officer also drew the Council's attention to the fact that the withheld information supplied to the Commissioner did not include any information falling within parts (a), (b), (c), (d) or (f) of Miss Anderson's request. The Council was asked to confirm whether it held information falling within the scope of these parts of Miss Anderson's request and, if so, whether it would be willing to disclose the information to her.
11. In its response, the Council indicated that it did not hold any recorded information which would address parts (a), (b), (c), (d) and (f) of Miss Anderson's request. The Council was, however, able to provide the Commissioner with some submissions and explanations relevant to these parts of Miss Anderson's request.
12. The Council provided submissions on its application of the exemption in section 36(1) of FOISA to the withheld information, which would address part (e) of Miss Anderson's request, and responded to Miss Anderson's comments regarding the Council's statutory duties regarding inspection and repair of public paths and roadways. The Council submitted that it is not aware of any statutory duty that it has to record the requested information, but even if it was the case that there is such a statutory obligation, the records were also created in contemplation of litigation.
13. During the course of the investigation, further submissions were sought from the Council regarding the nature of the searches that it had carried out to determine whether it held any relevant information falling within scope of parts (a), (b), (c) and (d) of Miss Anderson's request. The Council was also asked why it was able to provide explanations containing information pertinent to these parts of Miss Anderson's request, when it argued that no recorded information was held.
14. In response, the Council provided further submissions to explain why it was of the view that no recorded information was held which would address parts (a), (c) and (d) of Miss Anderson's request.
15. In response to questions concerning part (b) (frequency of inspections and factors governing that interval), the Council referred to and provided a copy of its Estates Supervision procedures. The Council indicated that it also considered that these procedures were exempt from disclosure under section 36(1) of FOISA. The Commissioner will consider below whether information within these procedures would provide information sought by part (b) of Miss Anderson's request.
16. During the course of the investigation, the investigating officer also met with relevant Council officials to gain a better understanding of the searches that were carried out to determine whether relevant, recorded information was held which would address parts (a), (b), (c) and (d) of Miss Anderson's request. This meeting also enabled the investigating officer to understand the types of information recorded by the Council pertinent to Miss Anderson's request.



17. Also during the investigation, having considered the nature of the information requested and withheld in this case, the investigating officer reached the view that at least some of the information requested by Miss Anderson was environmental information and therefore subject to the EIRs. The investigating officer advised the Council that the Commissioner was likely to reach that conclusion, and asked if it had considered whether any or all parts of Miss Anderson's information request should have been considered under the EIRs.
18. If it had not done so already, the Council was asked to consider whether the information requested by Miss Anderson constituted environmental information as defined in regulation 2 of the EIRs, and if so, whether any exceptions in the EIRs would apply to information covered by this request. The Council was also asked whether it wished to rely on the exemption in section 39(2) of FOISA, which allows Scottish public authorities to exempt information from disclosure under FOISA if it is environmental information which the authority is obliged to make available to the public in accordance with the EIRs.
19. In its response, the Council stated that it did not accept that the information requested by Miss Anderson was environmental information. However, it stated that, should the Commissioner conclude that it is, it considered the information to be excepted from disclosure in terms of regulation 10(5)(b) of the EIRs on the basis that its disclosure would, or would be likely to, prejudice substantially the course of justice. The Council indicated that it considered this exception to be applicable for the same reasons that it had provided previously in relation to the exemption in section 36(1) of FOISA. The Council did not indicate whether it wished to apply the exemption in section 39(2) of FOISA.
20. The relevant submissions received from both the Council and Miss Anderson will be considered fully in the Commissioner's analysis and findings below.

Commissioner's analysis and findings

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

FOISA v EIRs

22. Environmental information is defined in regulation 2(1) of the EIRs (parts (a), (b) and (c) of the definition are reproduced in the Appendix to this decision). Where information falls within the scope of this definition, a person has a right to access it under the EIRs, subject to various restrictions and exceptions contained in the EIRs.
23. The Commissioner set out his thinking on the relationship between FOISA and the EIRs in some detail in *Decision 218/2007: Professor A D Hawkins and Transport Scotland* and need not repeat it in full here. However, he will reiterate some of the key points which are relevant in this case:



- a. The definition of what constitutes environmental information should not be viewed narrowly, but in line with the definition of environmental information in the EIRs.
 - b. There are two separate statutory frameworks for access to environmental information and an authority is required to consider any request for environmental information under both FOISA and the EIRs.
 - c. Any request for environmental information therefore **must** be dealt with under the EIRs.
 - d. In responding to a request for environmental information under FOISA, an authority **may** claim the exemption in section 39(2).
24. The implication of *Decision 218/2007* for the Commissioner's consideration of Miss Anderson's request is that he must first determine whether the information withheld is environmental information. If it is, he must go on to consider the Council's handling of the request in terms of both the EIRs and FOISA.
25. In this case, the Council handled all parts of Miss Anderson's request for information and requirement for review in terms of FOISA.
26. As indicated above, in correspondence with the investigating officer, the Council did not accept that the information covered by Miss Anderson's request comprised environmental information. However, the Council did not provide any submissions to substantiate its position. The Council did not apply the exemption in section 39(2) of FOISA, but stated that, should the Commissioner conclude that the information under consideration was environmental information, the exception in regulation 10(5)(b) of the EIRs applied.
27. Having considered the nature of the withheld information, the Commissioner is satisfied that it comprises environmental information as defined within regulation 2(1) of the EIRs. He has found that it falls within the scope of part (c) of the definition of environmental information, since the information concerns measures (maintenance and repairs) taken by the Council which affect or are likely to affect the elements of the environment (land) detailed in part (a) or factors that can in turn affect these elements, such as substances (materials used to carry out maintenance or repairs) detailed in part (b) of the definition in regulation 2(1).
28. Having drawn this conclusion, the Commissioner must conclude that, by failing to consider and respond to Miss Anderson's information request in terms of the EIRs, the Council failed to comply with regulation 5(1) and (2)(b) of the EIRs.
29. The Commissioner also concludes that the exemption in section 39(2) of FOISA *could* have been applied to this information. If this exemption had been applied by the Council, this conclusion would have prompted the Commissioner to consider whether the information had been properly withheld only in terms of the EIRs.
30. However, as noted in the *Hawkins* decision, there is no obligation on an authority to rely upon any exemption in FOISA. In the circumstances, the Commissioner has found it appropriate to consider the Council's handling of Miss Anderson's request and to set out his conclusions in terms of both FOISA and the EIRs.



Consideration in terms of FOISA

31. The Commissioner will first of all decide whether the Council dealt with Miss Anderson's request in line with Part 1 of FOISA.

Section 17 – Information not held

32. In terms of section 1(4) of FOISA, the information to be provided in response to a request made under section 1(1) is, subject to limited provisions which are not relevant here, that held at the time the request is received.
33. Section 17(1) of FOISA requires that, where an authority receives a request for information that it does not hold, it must give the applicant notice in writing to that effect.
34. As mentioned above, the Council responded to both Miss Anderson's request and requirement for review by stating that the information requested was exempt from disclosure under FOISA. In so doing, the Council gave the impression that it held all of the requested information, and gave no indication that it did not hold the information sought by some parts of Miss Anderson's request.
35. When asked to provide the withheld information to the Commissioner, the Council did not provide copies of any information which would address parts (a), (b), (c), (d) and (f) of Miss Anderson's request. The Council later submitted that it did not actually hold any information coming within scope of these parts of Miss Anderson's request. It was, however, able to provide explanations which partially addressed these parts of the request.
36. In order to determine whether the Council dealt with parts (a), (b), (c), (d) and (f) of Miss Anderson's request correctly, the Commissioner must be satisfied as to whether, at the time it received Miss Anderson's request, the Council held any recorded information which would fall within the scope of these parts of her request.
37. As noted above, the Council was asked to explain the searches it had undertaken in order to ascertain whether (and what) relevant recorded information was held. In correspondence with the investigating officer, and as a result of the meeting between relevant staff within the Council and the investigating officer, the Council provided details of the searches undertaken, the nature of the information it records in relation to the inspection and maintenance of communal walkways, stairways and lighting, and how this information is stored.
38. The Council also provided comments on why it was able to provide explanations to the Commissioner which contained information pertinent to each part of Miss Anderson's request, while it maintained that the relevant information was not held in recorded form. The Commissioner has considered whether the Council holds any recorded information that would satisfy parts (a), (b), (c), (d) and (f) of Miss Anderson's request in turn.

Part (a)

39. In part (a) of her request, Miss Anderson asked whether a particular communal walkway and stairway had been adopted by the Council under the Roads (Scotland) Act 1984.



40. The Council submitted that it does not hold any recorded information which would answer this part of the request. However, it explained that it maintains a list of public roads, which is accessible on its website via this link www.dundee.gov.uk/forms/LOPR.php.
41. Having accessed this page on the Council's website, and taking into account the submissions made by the Council, the Commissioner finds that the answer to Miss Anderson's request can be found within the recorded information relating to the register of public roads, either by the presence or omission on that list of the relevant location.
42. The Commissioner therefore finds that recorded information is held by the Council which would confirm whether or not it has adopted the relevant footway, and so would address part (a) of Miss Anderson's request.
43. As the Council originally applied the exemption in section 36(1) of FOISA to the information requested in this part of Miss Anderson's request, the Commissioner will consider whether this exemption applies to this information below.

Part (b)

44. In part (b) of her request, Miss Anderson asked what inspection interval the Council had identified as being appropriate for the specified location and the communal walkways, and what factors were used in assessing the inspection interval?
45. In its submissions, the Council detailed the searches that it had carried out, including the personnel who had been asked to search for information, and the documents checked to determine if relevant information was held.
46. As noted above, during the investigation, the Council provided the Commissioner with a copy of its Estates Supervision procedures. The Commissioner has considered this document carefully as it appears that it is the only recorded information that the Council holds which might address this part of Miss Anderson's request.
47. Having considered the content of these procedures, the Commissioner acknowledges that these do set out, in general terms, information about inspection intervals, and factors to be considered when determining these. However, having considered that content and the specific terms of Miss Anderson's request, he notes that they do not confirm what inspection interval was adopted for the relevant footway, or which factors were considered when determining that interval in relation to the particular location. For this reason, the Commissioner has concluded that these procedures do not contain information which would address the first part of part (b) of Miss Anderson's request.
48. In the investigating officer's discussion with the Council, it became apparent that it is left to Housing Officers themselves to decide how often inspections should be carried out, and it holds no recorded information setting out the exact inspection interval which is applicable to the area concerned, or why that interval was adopted.



49. Although the Council was able to provide the Commissioner with information as to the inspection cycle for the location concerned and the likely factors that are taken cognisance of in determining the frequency of any inspection interval, the Commissioner acknowledges that the source of this information was not recorded information which is held by the Council.
50. Having taken into account the above considerations, he concludes that, on balance of probabilities, the Council did not, at the time when it received Miss Anderson's request, hold recorded information that would address part (b) of her request.

Part (c)

51. In part (c) of her request, Miss Anderson asked for a copy of all inspection reports for the pavement at the relevant location from 1 January 2005 to the date of the request (5 May 2011).
52. In response to questions about its claim that it held no such information, the Council detailed the searches that it carried out, and which personnel carried out the searches. The Council also explained that the completion of inspection reports for this area only commenced with the start of the Estates Supervision procedures in September 2008.
53. The Commissioner notes that these procedures contain a requirement on those officers who carry out inspections of the nature covered by Miss Anderson's request to complete and retain a particular pro-forma.
54. During the meeting that was held between the investigating officer and relevant officials from the Housing Department, the investigating officer was advised of the process that is gone through by Housing Officers when they carry out an inspection. They were also advised of the pro-formas and other records that may be completed following an inspection and where these are held.
55. Whilst the Council acknowledges that an inspection pro-forma should be completed after each inspection, during discussion it became apparent that, due to a change in staffing, the Council was unable to locate any of the pro-formas that should have been completed during these inspections for the specified area prior to 2010. The Council was also unaware how long these completed pro-formas should be retained for. However, thorough searches had been carried out in areas of the housing department, where these would be expected to be stored, to determine if these pro-formas were held.
56. Copies of the completed pro-formas for the area covered by Miss Anderson's request that are held for 2010 were shown to the investigating officer. Having considered these, the Commissioner finds that these come within the scope of this part of Miss Anderson's request.
57. The Commissioner therefore finds that recorded information is held by the Council as to inspection reports covering April, July, September and October 2010, which would partially address part (c) of Miss Anderson's request.



58. However, having taken into account the submissions from the Council, the Commissioner concludes that, on balance of probabilities, the Council did not, at the time when it received Miss Anderson's request, hold recorded information that would fully address this part of her request.
59. As the Council originally applied the exemption in section 36(1) of FOISA to the information requested in this part of Miss Anderson's request, the Commissioner will consider whether this exemption applies to the information contained in the inspection reports for 2010 below.

Part (d)

60. Part (d) of Miss Anderson's request was broken down into three separate sections.

Parts (di) and (dii)

61. In part (di) of her request, Miss Anderson asked the Council to confirm when the last inspection was prior to 4 January 2011, what was noted in this inspection, and how the inspection was carried out. In part (dii) of her request, Miss Anderson asked the Council to confirm when the first inspection took place following 4 January 2011, what was noted, and how the inspection was carried out.
62. The Council was able to advise the Commissioner of when it understood the last inspection prior to 4 January 2011 and the first inspection after that date had taken place. However, this information was in both cases provided as a consequence of the relevant Housing Officer recalling when they carried out that inspection, and not because of recorded information that is held by the Council.
63. The Council again demonstrated to the Commissioner that it only holds a limited number of inspection reports for 2010 for the footpath inspections in the area specified in Miss Anderson's request. None of these reports covered the date on which the Housing Officer recalled making the last inspection prior to 4 January 2011.
64. During discussions with Housing Department staff, they described the nature of the searches that were carried out, which included discussions with relevant Housing Officers to determine if recorded information was held which would address these parts of the request
65. Also during these discussions, Housing Department staff explained the actions that would be taken by Housing Officers if matters are noted during an inspection and where information of this nature would be recorded. Again, whilst the Council was able to give an indication to the Commissioner of what was noted in both of these inspections, this information came from the recollection of the Housing Officer, rather than recorded information which is held by the Council.
66. With regard to how the inspections were carried out, the Council explained that whilst there is an intention as to how these inspections should be carried out, there is no recorded information held by it which sets down how such an inspection should be carried out, or is carried out in any particular case.



67. Having considered the submissions from the Council regarding the information covered by parts (di) and (dii) of Miss Anderson's request, the Commissioner is satisfied that, on balance of probabilities, the Council does not (and did not at the time of her request) hold recorded information which would address these parts of Miss Anderson's request.

Part (diii)

68. In this part of her request, Miss Anderson asked the Council to confirm whether, if any defects were noted, they were repaired. Miss Anderson also asked whether there were defects noted with the lighting on the walkway, and how the repairs were carried out to the lighting.
69. The Council has explained that an entry would always be made in its repairs system if a defect or problem is identified during an inspection, and an order would be placed with the relevant department or service area to have the matter addressed.
70. The Council explained that it had checked with relevant staff and also carried out searches of the repairs system and no relevant records were identified which would address this part of Miss Anderson's request.
71. Having considered the submissions from the Council, the Commissioner is satisfied that, on balance of probabilities, the Council does not (and did not) at the time of her request, hold information which would address this part of Miss Anderson's request.

Part (f)

72. Miss Anderson asked the Council for copies of all call records made to the Council and written records of complaints made by third parties to the Council or telephone calls pertaining to a specific area held by the Council from 1 January 2005 to the present date (5 May 2011).
73. The Council advised that phone calls to its District Offices are not recorded, so no relevant recorded information is held which would address this part of Miss Anderson's request.
74. It also explained that it holds no records of written complaints on the matter covered by Miss Anderson's request for the time period 1 January 2005 to 5 May 2011.
75. Having considered these submissions from the Council, the Commissioner is satisfied that, on balance of probabilities, the Council does not (and did not) at the time of her request hold information which would address this part of Miss Anderson's request.

Conclusion

76. As mentioned previously, in assessing whether the Council does hold any relevant information which would address parts (a), (b), (c), (d) and (f) of Miss Anderson's request, the Commissioner must consider what was held by the Council at the date it received Miss Anderson's request.



77. Having considered the submissions from the Council, the Commissioner finds that, contrary to the response the Council made to Miss Anderson's request and requirement for review, no relevant recorded information was held by it which would address parts (b), (d) and (f) of her request when it was received.
78. As the Commissioner is satisfied, on the balance of probabilities that the Council does not (and did not at the time of Miss Anderson's request) hold recorded information which would address parts (b),(d), (f) of her request, he finds that the Council failed to give proper notice in terms of section 17(1) of FOISA that it did not hold the information.
79. However, this decision makes the position on this matter clear, and so no purpose would be served by now requiring the Council to notify Miss Anderson that the information is not held and to rectify this breach.
80. Nevertheless, the Commissioner is concerned that the Council notified Miss Anderson that it did hold relevant information that it considered exempt from disclosure under Part 2 of FOISA both in its initial response of 30 May 2011 and its review response of 15 August 2011 when, in fact, it did not hold much of the information requested. The Commissioner notes that a refusal notice properly issued under FOISA has the effect of confirming that the requested information is held, as well as indicating that it is considered exempt from disclosure.
81. The Commissioner would urge the Council to ensure that, when responding to future information requests, it takes proper steps to establish whether it actually holds information that has been requested before responding to an applicant, and that it gives appropriate notice in cases where some or all of the requested information is not held.
82. As the Commissioner has found that the Council does hold recorded information which would address part (a), and that it holds some limited information falling within the scope of part (c), of Miss Anderson's request, he must go on to consider whether the exemption in section 36(1) of FOISA is applicable to this information.

Section 36(1) – Confidentiality

83. The Council has applied the exemption in section 36(1) of FOISA to the information it holds, which, as noted above, falls within the scope of parts (a), (c) and (e) of Miss Anderson's request.
84. Section 36(1) of FOISA exempts from disclosure information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings. Among the types of communications which fall into this category are those which are subject to legal professional privilege. One aspect of legal professional privilege is litigation privilege, which covers documents created in contemplation of litigation (also known as communications *post litem motam*).



85. Communications *post litem motam* are granted confidentiality in order to ensure that any person or organisation involved in or contemplating a court action can prepare their case as fully as possible, without the risk that their opponents/or prospective opponents will gain access to the material generated by their preparations. The privilege covers communications at the stage when litigation is pending or in contemplation. Whether a particular document was prepared in contemplation of litigation will be a question of fact, the key question generally being whether litigation was actually in contemplation at a particular time.
86. For information to be covered by litigation privilege, it must have been created for the “dominant purpose” of obtaining legal advice on litigation or for lawyers to use in preparing the case. This is a question of fact in each case. Information created for another purpose before the litigation was anticipated may sometimes still be covered if brought together for the purpose of the litigation. This may be the case if pre-existing documents are relevant to the case and the lawyer has exercised skill and judgement in selecting and compiling them, particularly if the selection of documents reveals the trend of the advice on the case. However, pre-existing documents will not become privileged just by being passed to a lawyer.
87. Litigation privilege will apply to documents created by the party to the potential litigation, expert reports prepared on their behalf and legal advice given in relation to potential litigation: the communication need not involve a lawyer to qualify. The litigation contemplated need never actually happen for the privilege to apply, and it will continue to apply after any litigation has been concluded.
88. The Council has advised that, in this case, it is of the view that Miss Anderson is currently considering litigation to raise a personal injury claim against the Council and this request is in fact a “fishing expedition” to find out whether any information exists which will enable her to do this. Accordingly, the Council submits that Miss Anderson certainly contemplates litigation, and is seeking to use FOISA to recover information which she considers will assist her case, and, by definition, prejudice the Council’s case.
89. Evidence of compliance with the Council’s intended inspection regime, the actual investigation report and the other documents Miss Anderson requested would, the Council argued, be the absolute cornerstone of the Council’s defence to any future litigation by Miss Anderson.
90. It is the Council’s contention that nothing in FOISA has modified the well-established rules relating to the recovery of documentary and real evidence in Court proceedings. These rules, the Council submitted, include the well known rule that in no circumstances will the court at any stage grant a “fishing” diligence for the recovery of documents which a party hopes will disclose material for a case that he has not viewed on record.



91. As a consequence of this, the Council argued that, the terms of section 36(1) are clearly established, because an application under section 1 of the Administration of Justice (Scotland) Act 1972¹ (this being an application to the Court to order the production or recovery of documents or property which are relevant to a Court case) falls within the definition of “legal proceedings”.
92. With regard to the term “contemplation of litigation”, the Council considers that this should be construed from the point of view of a defender (in a legal action). The Council submitted that many of its documents were created with a view to avoid litigation or maximise prospects of success as a defender.
93. It is the Council’s view that the position of a pursuer is, of course, very different as a pursuer only contemplates litigation when they consider that they may have a claim. The Council contends that any view that “in contemplation of litigation” can only apply at or near the time of a response to an actual claim is too narrow an interpretation and is an error of law. This is why, the Council submits, the “no fishing” rule has been so firmly established.
94. Miss Anderson submitted that the information being sought from the Council regarding records concerning the inspection regime and repairs which are made by the inspection officer cannot be said to be prepared in contemplation of litigation. Miss Anderson is of the view that these records are prepared because the Council has a duty to carry out regular inspections of public paths and roadways, so that defects can be noted and the pathways can be properly maintained. As a consequence, Miss Anderson considers that the Council has a duty to prepare the requested records. Furthermore, Miss Anderson considers that any repairs that are carried out and the records pertaining to them can also not be said to have been recorded in contemplation of litigation.
95. Miss Anderson also argued that as she has not formally intimated any claim to the Council, there is no possible way that the Council can be aware that she is contemplating litigation.

The Commissioner’s view

96. The Commissioner notes the arguments advanced by the Council, but would stress that the rules governing the information which can be requested through the court recovery process are different to those governing requests under FOISA (although clearly there will be some overlap, particularly when determining whether information is subject to litigation privilege in terms of section 36(1)). It may well be the case that an application to the Courts made under the 1972 Act will lead to less (or, indeed, more) information being disclosed than a request under FOISA, but this does not mean that a request made under FOISA should be interpreted only in light of what a person would be entitled to by virtue of the 1972 Act.
97. The Commissioner considers that for information to be exempt under section 36(1) in this case, the information must not only have been prepared in contemplation of litigation, but must also be confidential.

¹ <http://www.legislation.gov.uk/ukpga/1972/59/introduction>



98. The Commissioner notes that when the Council responded to Miss Anderson's request and requirement for review, it indicated that information which would address part (a) was exempt in line with section 36(1) of FOISA. However, during the course of the investigation, the Council submitted to the Commissioner that it did not in fact hold any recorded information which would address this part of her request, although it did refer the Commissioner to the list of public roads which is publicly accessible on its website via this link www.dundee.gov.uk/forms/LOPR.php.
99. Having accessed this link, the Commissioner found that this does contain details of those roads, footpaths and stairwells that are adopted by the Council. The Commissioner also finds that it is possible to conclude whether a particular road, footpath or stairwell is adopted by the Council by either the presence or omission of the relevant location from the list of public roads on the website.
100. As the information sought in part (a) of Miss Anderson's request can be found on the Council's website, and therefore cannot be considered to be confidential, the Commissioner finds that this information is not exempt under section 36(1) of FOISA.
101. In response to Miss Anderson's request and requirement for review, the Council indicated that information which would address part (c) of her request was exempt in line with section 36(1) of FOISA. However, during the course of the investigation, the Council submitted to the Commissioner that it did not in fact hold any recorded information which would address this part of her request.
102. As mentioned above, during the meeting between the investigating officer and staff from the Housing Department, it became apparent that some inspection reports were held for 2010 which cover the area specified in Miss Anderson's request.
103. The Commissioner will consider this information and the withheld information covered by part (e) of Miss Anderson's request together.
104. In considering the withheld information which covers part (e) of Miss Anderson's request, the Commissioner notes that the Council identified information in two documents. Having considered these two documents, the Commissioner finds that the information in one of these documents was created after the date of Miss Anderson's request and so falls outwith the scope of her request. This information will not be considered any further.
105. In seeking to determine whether the exemption in section 36(1) of FOISA would apply to the information in the document that does fall within the scope of part (e) Miss Anderson's request, and the inspection reports from 2010 falling within scope of part (c) of the request, the Commissioner has considered the content of the information, the purpose for which the communication and reports were made and also when the documents the information is contained in were prepared. As noted above, whether the information in these documents was prepared in contemplation of litigation will depend on the circumstances of the case.



106. It is important to note here that communications made between parties before an action is raised or anticipated will not be protected from disclosure under litigation privilege, whereas once an action has been raised, such communications become privileged. As Lord Justice-Clerk Thomson commented in *Young v National Coal Board* 1957 SC 99 (at page 105);
- “The court has inherent power to compel the parties to a cause to produce documents which may have a bearing on the issues between them. The court will not, however, in the ordinary run of things order production of documents which have been prepared in anticipation or in development of a party’s case. Once the parties are at arm’s length, or are obviously going to be at arms length, the details of their preparation of weapons and ammunition are protected as confidential. Just when the parties come to be at arm’s length may often be a difficult question, especially as some potential defenders prepare well in advance against the contingency of accidents, and indeed, under modern conditions, few accidents and particularly few industrial accidents can happen without it occurring to one or other party at any early stage that questions of disputed liability may arise.”*
107. As Lord Justice-Clerk Thomson made clear, it is difficult to identify when parties come to be at arms length (and as a result, when the *post litem motam* rule will come into effect). However, a general apprehension of future litigation or possibility that someone might at some point in the future make a claim against the Council, is not, in the Commissioner’s view, sufficient, given that, according to Lord Justice-Clerk Thomson, the parties must either be at arms length, or are “obviously going to be” at arms length.
108. In this case, solicitors acting on behalf of Miss Anderson wrote to the Council, advising it that they were seeking the information set out in the request in relation to an incident that occurred on 4 January 2011. It is apparent from reading the application from Miss Anderson that she has never formally intimated any claim to the Council.
109. However, if it were to be the case that the Council considered Miss Anderson’s request of 5 May 2011 to be an indication that she may be contemplating litigation against it regarding an incident that occurred on specific date, then from the 5 May 2011 the Council may have contemplated that litigation would take place.
110. Having considered the information that has been withheld from Miss Anderson in the one document that comes within scope of part (e) of her request, and the inspection reports which the Commissioner has found to come within scope of part (c) of Miss Anderson’s request, the Commissioner cannot agree that these were prepared in contemplation of litigation. The information in the document which comes within scope of part (e) and the inspection reports were prepared some time before the incident took place, and before Miss Anderson submitted her request. There is nothing to suggest that the information was prepared in anticipation or development of the Council’s case. In fact, from discussions with relevant staff within the Housing Section, it is clear that the information relevant to part (e) of Miss Anderson’s request was prepared to alert the appropriate department of the Council to a repair that needs to be effected or a problem that needs to be addressed as part of their normal work. These discussions also revealed that the information in the inspection reports was also prepared as part of the Housing Officers’ normal, routine duties and responsibilities.



111. As a consequence, the Commissioner does not consider the information in these documents to be exempt from disclosure under section 36(1) of FOISA.
112. As the Commissioner has concluded that the information falling within the scope of parts (a), (c) and (e) of Miss Anderson's request are not exempt under section 36(1) of FOISA, he is not required to consider the application of the public interest test in section 2(1) of FOISA.
113. The Commissioner therefore finds that the Council breached Part 1, and particularly section 1(1), of FOISA by withholding the information sought by Miss Anderson in parts (a), (c) and (e) of her request.

Consideration under the EIRs

Regulation 10(4)(a)

114. 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.
115. As discussed above, the Council submitted during the investigation that it did not hold any recorded information which would fulfil parts (a), (b), (c), (d) and (f) of Miss Anderson's request.
116. For the same reasons set out above (under consideration of section 17 of FOISA) the Commissioner finds that the Council does hold recorded information falling within the scope of parts (a) and (c) of Miss Anderson's request. However, the Commissioner accepts, on the balance of probabilities, that it did not, at the time when it received Miss Anderson's request, hold recorded information which would address parts (b),(d) and (f) of that request.
117. The Commissioner is therefore satisfied that the exception in regulation 10(4)(a) of FOISA could have been applied by the Council to the information sought in parts (b), (d) and (f) of Miss Anderson's request. Since the information was not held, there could be no conceivable public interest in it being made available, and so the Commissioner would also conclude that the public interest in maintaining that exception would outweigh that in making the information available.

Regulation 10(5)(b)

118. 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.



119. Although there is no definition within the EIRs of what would constitute substantial prejudice, it is the Commissioner's view that the standard to be met in applying this test is high. The word "substantial" is important here: the harm caused, or likely to be caused, by disclosure must be of some real and demonstrable significance. The risk of harm must be real or very likely, not simply a remote or hypothetical possibility.
120. As noted above, the Council indicated that it considered this exception to be applicable, on the basis that disclosure would be likely to prejudice substantially the course of justice, for the same reasons as those set out previously in relation to section 36(1) of FOISA (see paragraphs 88 to 93 above). As noted there, the Council's position is that the withheld information is subject to litigation privilege and so is exempt from disclosure.
121. When considering the Council's handling of parts (a), (c) and (e) of Miss Anderson's request in terms of the EIRs, the Commissioner has considered these same arguments, and considered whether they demonstrate that the harm test in regulation 10(5)(b) would be met if the withheld information was disclosed.
122. The Commissioner notes that, unlike section 36(1) of FOISA, the wording of regulation 10(5)(b) does not explicitly except from disclosure information in relation to which a claim to confidentiality of communications could be maintained in legal proceedings (subject to the public interest test). However, in the Commissioner's view, this particular exception will often be applicable to information which is covered by legal professional privilege, especially litigation privilege.
123. The Commissioner recognises that the course of justice requires that parties to litigation (including public authorities) are able to prepare fully for a case. The principle, derived from the adversary nature of litigation, is that no party can recover material which another party has made in preparing its own case. Disclosure of information covered by litigation privilege will in many cases lead to substantial prejudice relevant to the exception in regulation 10(5)(b).
124. However, the Commissioner would also note that, even where information is subject to litigation privilege, an authority must still be satisfied that disclosure would, or would be likely to cause substantial prejudice to the relevant interests before applying regulation 10(5)(b). Whether relevant harm is likely to occur will depend according to the circumstances of the particular case under consideration, and the likelihood that disclosure would, or would be likely to prejudice substantially the course of justice may fade over time.

The Commissioner's view

125. As noted above, in the consideration of section 36(1) of FOISA, the Commissioner does not agree that the information covering parts (a) and (e), and some of part (c) of Miss Anderson's request was created in contemplation of litigation. Accordingly he does not consider the information to be subject to litigation privilege.



126. For the reasons set out above, the Commissioner is unable to accept the Council's contention that the information was created with a view to avoiding litigation or maximising prospects of success and were therefore created "in contemplation of litigation" as regards the Council as a defender.
127. It is the Commissioner's view that this information was created as part of the Council's usual business with a view to ensuring the maintenance and repair of its footpaths, stairways and street lighting, and to identify roads, footways and footpaths for which the responsibility for maintenance lies with the Council. Furthermore, since some of the withheld information is easily publicly available, it is not confidential, and so cannot be privileged.
128. In the circumstances, the Commissioner is unable to accept that the disclosure of such routine information would, or would be likely to, cause substantial prejudice to the course of justice as suggested by the Council.
129. Accordingly, the Council does not accept that the information is excepted from disclosure in terms of regulation 10(5)(b) of the EIRs.
130. 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 regulation 10(1)(b) in relation to the withheld information.
131. The Commissioner finds that the Council acted in breach of the EIRs, and particularly regulation 5(1) by withholding the information requested by Miss Anderson.



DECISION

The Commissioner finds that Dundee City Council (the Council) failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) and the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by Miss Anderson.

The Commissioner finds that by failing to identify and respond to Miss Anderson's information request as one seeking environmental information as defined by regulation 2(1) of the EIRs, the Council breached regulations 5(1) and (2)(b) of the EIRs.

The Commissioner also finds that the Council does not (and did not at the time of Miss Anderson's request) hold any recorded information which would fulfil parts (b),(d), (f) of her request.

The Commissioner finds that, by failing to give notice that it did not hold the requested information which would cover parts (b), (d), (f) of her request, the Council failed to comply with the requirements of section 17(1) of FOISA. For the reasons set out above, the Commissioner does not require the Council to take any action in response to this failure

The Commissioner also finds that the Council was not entitled to withhold the information falling within the terms of parts (a), (c) and (e) of Miss Anderson's request on the basis of the exception in regulation 10(5)(b) of the EIRs or the exemption in section 36(1) of FOISA. By failing to provide Miss Anderson with the requested information, the Council failed to comply with regulation 5(1) of the EIRs and section 1(1) of FOISA.

The Commissioner requires the Council to provide Miss Anderson with the information sought in parts (a), (c) and (e) of her request by 10 April 2012.

Appeal

Should either Miss Anderson or Dundee City 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
23 February 2012



Appendix

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.
- ...
- (4) The information to be given by the authority is that held by it at the time the request is received, except that, subject to subsection (5), any amendment or deletion which would have been made, regardless of the receipt of the request, between that time and the time it gives the information may be made before the information is given.
- ...
- (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.
- ...

17 Notice that information is not held

- (1) Where-
- (a) a Scottish public authority receives a request which would require it either-
- (i) to comply with section 1(1); or
- (ii) to determine any question arising by virtue of paragraph (a) or (b) of section 2(1),
- if it held the information to which the request relates; but



(b) the authority does not hold that information,

it must, within the time allowed by or by virtue of section 10 for complying with the request, give the applicant notice in writing that it does not hold it.

...

36 Confidentiality

(1) Information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings is exempt information.

....

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;

(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;

...

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;

...

- (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;

...