

# Decision Notice

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**Decision 038/2018: Mr Guy Kerry and Highland Council**

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**Road and pedestrian access at Rua Reidh Lighthouse**

Reference No: 201702100

Decision Date: 20 March 2018



Scottish Information  
Commissioner

## Summary

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The Council was asked for information concerning road and pedestrian access at Rua Reidh Lighthouse.

The Council considered the request under the EIRs and disclosed some information.

The Commissioner investigated and found that the Council had partially failed to respond to the request for information in accordance with the EIRs. While he found that the Council had correctly considered the request under the EIRs, the Commissioner found that it had interpreted the request too narrowly and so had failed to identify further information that could fall within the scope of the request. He required the Council to issue a revised review outcome, and provide appropriate advice and assistance with a view to clarifying the scope of the request.

## Relevant statutory provisions

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 21(4)(c) (Review by Scottish public authority); 39(2) (Health, safety and the environment)

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (Interpretation) (paragraphs (a), (c) and (f) of definition of “environmental information”); 5(1) and (2)(b) (Duty to make available environmental information on request); 9(1) and (3) (Duty to provide advice and assistance); 16(3) (Review by Scottish public authority)

The full text of each of the statutory provisions cited above is reproduced in Appendix 1 to this decision. The Appendix forms part of this decision.

## Background

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1. On 22 May 2017, Mr Kerry made a request for information to Highland Council (the Council). The request read as follows:
  - (i) Please let me have the information you hold about correspondence with Gairloch Community Council or its members on the subject of road and pedestrian access at and around Rua Reidh Lighthouse. Also please let me have information about meetings held with Gairloch Community Council or its members on that same subject. Please include information about your internal considerations of these.
  - (ii) The minutes of Gairloch Community Council dated 8 May say that they have sought meetings with the Highland Council to discuss “a feasible compromise on access at the lighthouse”. Please let me have information you have about those proposed compromise(s) and the reason talks broke down “almost before they had started”. Please also include information about your internal considerations of this.
  - (iii) What action has Highland Council taken to protect the public's right of access and right of passage at the lighthouse since you last sent such information to me? Please include all new internal and external information you have.

- (iv) Please let me have information about the Highland Council's proposed future action to protect the public's rights of access and passage at the lighthouse.
  - (v) Does Highland Council agree that a public right of access and/or a public right of passage can be the subject of a Community Council or Highland Council "compromise" which must inevitably interfere with and diminish those public rights? Please let me have the information you hold about correspondence and considerations, both internal and external, on this subject.
2. The Council acknowledged Mr Kerry's request on 22 May 2017, but did not provide a response.
  3. Mr Kerry subsequently wrote to the Council on 21 June 2017, requesting a review on the basis that the Council had not provided a response to his request within 20 working days.
  4. The Council acknowledged Mr Kerry's request for review on 21 June 2017, but did not provide a response.
  5. On 24 July 2017, Mr Kerry wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Commissioner subsequently issued *Decision 165/2017 Mr Guy Kerry and Highland Council*<sup>1</sup>, finding that the Council had breached Part 1 of FOISA. The Commissioner required the Council to provide Mr Kerry with a review outcome.
  6. The Council provided Mr Kerry with its review outcome on 17 November 2017, apologising for its earlier failure to respond. It considered the request under the EIRs and provided Mr Kerry with some information. The Council explained that other information had been redacted in terms of regulation 11(3) (Personal data) of the EIRs (as personal information, disclosure of which would breach the Data Protection Act 1998). The Council also applied regulation 10(5)(d) (Confidentiality of the proceedings of any public authority where such confidentiality is provided for by law) to some information, as it considered that exemption extended to the seeking and securing of legal advice.
  7. On 19 November 2017, Mr Kerry wrote to the Commissioner, applying 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 specified modifications. Mr Kerry stated he was dissatisfied with the outcome of the Council's review because he disagreed with its decision to consider his request under the EIRs. He also believed the Council had failed to respond to parts of his request and that it held more information than had been disclosed to him. Mr Kerry also raised specific queries concerning the information disclosed at review stage.

## Investigation

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8. The application was accepted as valid. The Commissioner confirmed that Mr Kerry made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to him for a decision.
9. On 11 December 2017, the Council was notified in writing that Mr Kerry had made a valid application and the case was allocated to an investigating officer.

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<sup>1</sup> <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2017/201701282.aspx>

10. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Council was invited to comment on this application and answer specific questions. These focused on:
  - (i) the Council's decision to consider the request under the EIRs
  - (ii) the searches it had undertaken in order to identify, locate and retrieve any relevant information
  - (iii) why it had not responded to each individual part of Mr Kerry's request, and
  - (iv) the specific comments raised by Mr Kerry in his application concerning the information disclosed at review stage.

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

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

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

12. The Commissioner's thinking on the relationship between FOISA and the EIRs is set out in detail in *Decision 218/2007 Professor A D Hawkins and Transport Scotland*<sup>2</sup> and need not be repeated in full here.
13. The Council dealt with Mr Kerry's request under the EIRs, having concluded that the information requested was environmental information. In its submissions to the Commissioner, the Council confirmed that it wished to rely upon section 39(2) of FOISA in relation to the information requested. For this exemption to apply, the information would require to be environmental in nature, as defined in regulation 2(1) of the EIRs.
14. Where information falls within the scope of this definition, a person has a right to access it (and the public authority has a corresponding obligation to respond) under the EIRs, subject to the various restrictions and exceptions contained in the EIRs.
15. The Council submitted that the information requested by Mr Kerry concerned the access road to Rua Reidh lighthouse and the coastline, which formed part of an important and attractive rural landscape, popular with tourists. The information related to the administrative measures and legislation being employed by the Council in connection with this access road and any obstruction thereof. As the health and safety of visitors to the area would potentially be impacted by these elements and measures, the Council considered the information would relate to paragraphs (a), (c) and (f) of the definition of environmental information.
16. Having considered the Council's submissions on this point and the nature of the information requested, the Commissioner accepts this as a reasonable description. In the circumstances, he is satisfied that the information requested by Mr Kerry falls within the definition of environmental information set out in regulation 2(1), in particular paragraphs (a), (c) and (f) of that definition.

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<sup>2</sup> <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2007/200600654.aspx>

### *Section 39(2) of FOISA - Environmental information*

17. The exemption in section 39(2) of FOISA provides, in effect, that environmental information (as defined by regulation 2(1) of the EIRs) 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 information withheld under FOISA, given his conclusion that it is properly classified as environmental information.
18. As there is a statutory right of access to environmental information available to Mr Kerry in this case, the Commissioner accepts, in all the circumstances, that the public interest in maintaining this exemption (and responding to the request under the EIRs) outweighs any public interest in disclosing the information under FOISA. Both regimes are intended to promote public access to information and there would appear to be no reason why (in this particular case) disclosure of the information should be more likely under FOISA than under the EIRs.
19. Mr Kerry's concerns about the request being considered under the EIRs arise from *Decision 165/2017*, which required the Council to issue a review outcome in terms of section 21(1) of FOISA. Mr Kerry was of the view that this requirement obliged the Council to respond solely in terms of FOISA, not the EIRs.
20. Section 21(4)(c) of FOISA requires a Scottish public authority, in a case where no decision has been issued (as was the case in *Decision 165/2017*), to reach a decision on the request. In issuing its review outcome, the Council concluded that the information falling within the scope of the request was environmental in nature and, as such, should be properly considered under the EIRs. The Commissioner accepts that the Council was entitled to reach such a decision, in line with the requirements of section 21(4)(c) of FOISA.
21. The Commissioner therefore concludes that the Council was correct to consider Mr Kerry's information request under the EIRs and, in that connection, to apply section 39(2) of FOISA to the request.
22. The Commissioner will consider the information in what follows solely in terms of the EIRs.

### **Interpretation of request and whether the Council held any further information**

23. Regulation 5(1) of the EIRs requires a Scottish public authority which holds environmental information to make it available when requested to do so by any applicant. This obligation relates to information that is held by the authority when it receives a request.
24. On receipt of a request for environmental information, therefore, the authority must ascertain what information it holds falling within the scope of the request. Having done so, regulation 5(1) requires the authority to provide that information to the requester, unless a qualification in regulations 6 to 12 applies (regulation 5(2)(b)).
25. In his application to the Commissioner, Mr Kerry believed the Council held further information, in addition to that it had disclosed to him in its review outcome.
26. In order to ascertain whether all relevant information had been identified by the Council, it was asked to provide an explanation of the searches that it had undertaken in order to identify, locate and retrieve the information it held and which fell within the scope of the request.

27. The Council submitted that, at review stage, searches were carried out by the Ward Manager for the area covering Gairloch, for information relating to the May Community Council meeting (referred to in part (ii) of Mr Kerry's request). The information identified at that time was disclosed to Mr Kerry in the Council's review outcome.
28. The Council acknowledged that it had interpreted the request too narrowly, focusing on the Community Council meeting alone. It explained that, in doing so, it had taken paragraph (i) to be the substance of the request, viewing the subsequent paragraphs as a clarification and narrowing of a general request. This, the Council submitted, was why it had not addressed each part of Mr Kerry's request separately. The Council explained that Mr Kerry had previously been provided with an "all information held" response to an earlier request, so it deemed it appropriate that this request was focused on a more specific area.
29. Recognising it had interpreted Mr Kerry's request too narrowly, the Council submitted that, during the investigation, key staff involved (namely the Ward Manager for the Gairloch area, the Principal Solicitor (Planning), the Countryside Team Leader (Access Officer) and the Roads Operations Manager for the relevant area) had been asked to conduct searches of their email inboxes, shared folders and files for information about the Rua Reidh road. The search period applied was from 1 March 2017 (when the Council had informed the Community Council it was in discussion with the lighthouse owners about a compromise) to 22 May 2017 (the date of Mr Kerry's request). The Council provided the Commissioner with a description of the searches carried out by these key members of staff, to identify, locate and retrieve any information it believed might fall within the scope of the request.
30. The Council confirmed to the Commissioner that further information had been identified as a result of these searches and provided the Commissioner with a copy of all of the information thus identified.
31. The Council explained that it considered there to be four separate themes to the information held, namely complaints from the public, complaints regarding signs, communications with third party organisations and discussions about the way forward and whether a compromise could be reached. The Council submitted that, in interpreting Mr Kerry's request, it did not believe he was seeking information on complaints from the public, information about the dispute around the signs or communications with other organisations.
32. The Council noted that internal consideration of correspondence often involved reading and discussion, and did not always result in a written record. It confirmed that where recorded information was not held, it would attempt to provide Mr Kerry with an explanation when responding to his information requests.
33. The Council informed the Commissioner it would be willing to seek further clarification from Mr Kerry as to the scope of his request, following which it would be prepared to issue a revised review outcome and disclose any relevant information to Mr Kerry, subject to any relevant provisions or exceptions in the EIRs that might be applicable to any of the information identified.
34. The Council also provided the Commissioner with submissions on the specific points raised in Mr Kerry's application.

#### *The Commissioner's views*

35. The Commissioner has considered the terms of Mr Kerry's request for information carefully and he is satisfied that it encompasses more information than was disclosed to him by the Council in its review outcome. The scope of the request is clearly much broader than simply

seeking information relating to the Community Council meeting in May, as the Council originally interpreted it. It is clearly a request in a number of separate parts, none of which it would be reasonable to regard as subsuming all the others. It does not specify a timescale for the information requested, as was applied by the Council when conducting its searches. All of this is evident from reading each part of Mr Kerry's request.

36. It is clear to the Commissioner, from examination of the information identified as a result of the further searches carried out by the Council during the investigation, that it holds more information (falling within the scope of Mr Kerry's request) than that it identified initially. He has not reached a view on whether Mr Kerry's request would encompass all of the information now identified by the Council, or indeed whether further searches are required to be satisfied that all relevant information has been identified. Further consideration of the handling of the request, in relation to the provision of advice and assistance (below), is required before the Commissioner can identify what remedial action is required.
37. In the circumstances, the Commissioner finds that the Council failed to comply fully with regulation 5(1) of the EIRs in handling Mr Kerry's request. He will now consider whether that handling was adequate in its provision of advice and assistance.

### **Regulation 9 of the EIRs – Duty to provide advice and assistance**

38. Regulation 9(1) of the EIRs provides that a Scottish public authority must, so far as it would be reasonable to expect it do so, provide advice and assistance to applicants and potential applicants. Regulation 9(3) provides that a Scottish public authority shall be taken to have complied with this duty if it conforms with the relevant Code of Practice (in relation to the provision of advice and assistance).
39. The Scottish Ministers' Code of Practice on the discharge of functions by Scottish public authorities under FOISA and the EIRs (the Section 60 Code<sup>3</sup>) states (at paragraph 5.1 in Part 2):

***Authorities should offer advice and assistance at all stages of a request***

*Authorities have a duty to provide advice and assistance at all stages of a request. It can be given either before a request is made, or to clarify what information an applicant wants after a request has been made, whilst the authority is handling the request, or after it has responded.*

40. The full text of Section 5 of the Section 60 Code gives more detailed guidance on good practice in offering advice and assistance in relation to various stages and aspects of a request, including seeking clarification from an applicant if the authority is unsure about what information the applicant wants.
41. In his application to the Commissioner, Mr Kerry was dissatisfied that the Council had failed to fully respond to certain parts of his request. The Council was asked to comment on this matter and provided submissions, as set out above.

#### *The Commissioner's views*

42. The Commissioner is of the view that it ought to have been clear to the Council, from the wording of Mr Kerry's request, that the request's scope was wider than the Council originally interpreted it to be. Where there is any doubt as to what information is being requested, a Scottish public authority has a duty to discuss with the applicant the terms and parameters of

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<sup>3</sup> <http://www.gov.scot/Resource/0051/00510851.pdf>

the request (including any time period to be applied to the information requested). Had the Council taken this course of action at an early stage, rather than making its own judgement on these terms and parameters, this may have avoided the need for Mr Kerry to make an application to the Commissioner.

43. The Commissioner also questions the adequacy of the advice and assistance it gave to Mr Kerry to aid his understanding of what information was, or was not, held. At the very least, the Council ought to have provided a full response to all parts of Mr Kerry's request explaining what information was held for each part. As indicated above, it was clearly a request in a number of separate parts. In the absence of this, Mr Kerry's consequent dissatisfaction was understandable.
44. The Commissioner considers it would have been reasonable (if not desirable) for the Council to have engaged with Mr Kerry at an early stage, to ascertain exactly what information he was seeking and the time period the request covered. Without a clear view of what is being sought, the Commissioner cannot see how any Scottish public authority could properly take a considered view of what information is covered by a request, and so fulfil its duties under the EIRs.
45. The Commissioner therefore finds that, in the respects considered above, the Council failed to comply with its duties to provide reasonable advice and assistance under regulation 9(1) of the EIRs.

### **Action required**

46. The Commissioner requires the Council to provide advice and assistance to Mr Kerry in terms of regulation 9(1) of the EIRs, with a view to reaching a clear, and mutually shared, understanding of the scope of the request and, on that basis, to carry out a fresh review outcome in terms of regulation 16(3) of the EIRs. Depending on the on the outcome of its further engagement with Mr Kerry, that review may require to include further searches.
47. The review to be carried out by the Council, and the notice given to Mr Kerry of the outcome of that review, should address each part of Mr Kerry's request separately, and address each of the specific points (relating to the information previously disclosed at review stage) raised by Mr Kerry in his application to the Commissioner.
48. The notice of the review's outcome should also explain which part(s) of the request any information being disclosed relates to, and also which part(s) of the request any information being excepted relates to (with full details of which exception is being applied, and why).
49. The Commissioner would also suggest the Council apologises to Mr Kerry for the way it handled his information request.



## Decision

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The Commissioner finds that Highland Council (the Council) partially complied 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 Mr Kerry.

The Commissioner finds that the Council was entitled to consider the request as a request for environmental information, in terms of the EIRs, and to that end it was entitled to apply section 39(2) of FOISA.

However, the Commissioner finds that the Council failed to:

- (i) comply with regulation 5(1) of the EIRs by interpreting Mr Kerry's request too narrowly and so failed to identify further information falling within scope, and
- (ii) provide reasonable advice and assistance to Mr Kerry to enable it to identify all information that he was seeking and to aid his understanding of its review outcome, and so failed to comply with regulation 9(1) of the EIRs.

The Commissioner therefore requires the Council to provide Mr Kerry with reasonable advice and assistance, in terms of regulation 9(1), and on that basis to carry out a further review and issue a new review outcome, as set out in this Decision Notice and in line with regulation 16(3) of the EIRs, by **4 May 2018**.

## Appeal

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Should either Mr Kerry or Highland Council wish to appeal against this decision, they have the right to appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days after the date of intimation of this decision.

## Enforcement

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If Highland Council (the Council) fails to comply with this decision, the Commissioner has the right to certify to the Court of Session that the Council has failed to comply. The Court has the right to inquire into the matter and may deal with the Council as if it had committed a contempt of court.

**Margaret Keyse**  
**Head of Enforcement**

**20 March 2018**

### 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.

...

#### 21 Review by Scottish public authority

...

- (4) The authority may, as respects the request for information to which the requirement relates-

...

- (c) reach a decision, where the complaint is that no decision had been reached.

#### 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

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(a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;

...

(c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in paragraphs (a) and (b) as well as measures or activities designed to protect those elements;

...

(f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in paragraph (a) or, through those elements, by any of the matters referred to in paragraphs (b) and (c);

...

## 5 Duty to make available environmental information on request

(1) Subject to paragraph (2), a Scottish public authority that holds environmental information shall make it available when requested to do so by any applicant.

(2) The duty under paragraph (1)-

...

(b) is subject to regulations 6 to 12.

...

## 9 Duty to provide advice and assistance

(1) A Scottish public authority shall provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to applicants and prospective applicants.

...

- (3) To the extent that a Scottish public authority conforms to a code of practice under regulation 18 in relation to the provision of advice and assistance in a particular case, it shall be taken to have complied with the duty imposed by paragraph (1) in relation to that case.

...

## **16 Review by Scottish public authority**

...

- (3) The Scottish public authority shall on receipt of such representations-
  - (a) consider them and any supporting evidence produced by the applicant; and
  - (b) review the matter and decide whether it has complied with these Regulations.

...

**Scottish Information Commissioner**

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