



Scottish Information  
Commissioner

**047/2008 Dr Robert Watt and Highland Council**

*Communications relating to a planning application*

**Applicant: Dr Robert Watt**  
**Authority: Highland Council**  
**Case No: 200701186**  
**Decision Date: 31 March 2008**

**Kevin Dunion**  
**Scottish Information Commissioner**

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## Decision 047/2008 Dr Robert Watt and Highland Council

***Communications relating to a planning proposal – information accessible via the planning register – no further information held – consideration under the EIRs – Highland Council breached regulation 10(4)(a) since additional information was held outwith the planning register – no action required since this information accessible online***

### Relevant Statutory Provisions and Other Sources

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Environmental Information (Scotland) Regulations 2004: (the EIRs) regulations 2(1) (Interpretation) (definition (a) and (c) of “environmental information”); 5(1) (Duty to make available environmental information on request); 6(1)(b) (Form and format of information) and 10(4)(a) (Exceptions from duty to make environmental information available).

Freedom of Information (Scotland) Act 2002 (FOISA): sections 1(1) (General entitlement); 2(1) (Effect of exemptions) and 39(2) (Health, safety and the environment)

The full text of each of these provisions is reproduced in the Appendix to this decision. The Appendix forms part of this decision.

### Facts

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Dr Robert Watt (Dr Watt) requested copies of all communications relating to a particular planning proposal from Highland Council (the Council). The Council responded under the terms of FOISA, applying the exemption in section 25 on the basis that all of the information pertaining to the request could be found and accessed in the relevant planning case file in the planning registers. Dr Watt was not satisfied with this response and requested a review, indicating that the request was intended to seek any relevant information which might be available outwith the planning case file. Following a review, the Council stated that had Dr Watt specifically requested information that was not within the relevant file, then it would have responded that such information was not held, in compliance with section 17 of FOISA. Dr Watt remained dissatisfied and applied to the Commissioner for a decision.

During the investigation, the Commissioner reached the view that the information requested by Dr Watt was environmental information. The Council accepted this view and noted that in place of section 17 of FOISA, it would have applied regulation 10(4)(a) of the EIRs on the basis that no further communications were held outside that available in the planning case file for the specified planning application. This case has been determined under the terms of the EIRs.



Following an investigation, the Commissioner concluded that not all communications relating to the specified planning application were available in the planning file as the Council had claimed. Two minutes of Council committee meetings were identified in which references to this application were made. On this basis, the Commissioner found that the Council had failed to deal with Dr Watt's request for information fully in accordance with the EIRs, and in particular that it had failed to correctly apply regulation 10(4)(a) of the EIRs.

However, the Commissioner noted that the minutes identified were both available online and through the Council's publication scheme and for the purposes of regulation 6(1)(b) of the EIRs, they were publicly available and reasonably accessible to Dr Watt. He was also satisfied that the Council did not hold any further communications concerning the specified planning application that were not publicly available through the Council's planning register. The Commissioner therefore did not require Highland Council to take any action.

## Background

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1. On 18 June 2007, Dr Watt wrote to Highland Council, requesting the content of all communications relating, however indirectly, to a specified Planning Proposal and any objections thereto, including without prejudice to the foregoing generality, minutes of meetings, copies of all letters, emails, faxes and memoranda relating to telephone calls in the calendar year 2006 between a number of named individuals.
2. The Council wrote to Dr Watt in response to his request for information on 18 July 2007. The Council stated that all the information pertaining to the specified planning application could be found in the relevant planning case file in the planning registers. The Council noted that these registers form part of the Council's Publication Scheme, and as such the information requested was exempt under section 25 of FOISA (which applies to information that is accessible to a requestor other than by making a request under section 1 of FOISA). The Council also confirmed that planning case files could be viewed in the Council's Offices during office hours.
3. On 24 July 2007, Dr Watt wrote to the Council requesting a review of its decision. At this stage, Dr Watt indicated that he had already viewed the relevant planning case file and emphasised that the request was not confined to the contents of this. Dr Watt indicated that he wished to access any relevant communications held by the Council, but not available within the planning case file.



4. The Council wrote to notify Dr Watt of the outcome of its review on 27 August 2007. The Council commented that it had not been aware at the time of responding to the request that Dr Watt had already viewed the planning case file. It stated that all information on a planning application is kept in the planning case file and that information of relevance to the case will be filed there. On this basis, the Council concluded that it had responded to Dr Watt's request appropriately. It went on to note that, had Dr Watt's request specified that he wished to access information outside the planning case file, it would have cited section 17 of FOISA, on the basis that it did not hold information which fell within the scope of Dr Watt's request.
5. On 31 August 2007, Dr Watt wrote to my Office, stating that he was dissatisfied with the outcome of the Council's review and applying to me for a decision.
6. The application was validated by establishing that Dr Watt had made a request for information to a Scottish public authority and had applied to me for a decision only after asking the authority to review its response to that request. The case was then allocated to an investigating officer.

## The Investigation

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7. On 9 October 2007, the Council was notified in writing that an application had been received from Dr Watt, inviting comments as required under section 49(3)(a) of FOISA (which, in terms of regulation 17 of the EIRs, applies for the purposes of the EIRs as it applies for the purposes of FOISA, subject to minor modification) and was asked to respond to specific questions on the application. In particular the Council was asked to consider whether the request for information should be dealt with under the EIRs. The Council was also asked to outline the steps it had taken in order to establish whether it held the information requested by Dr Watt (other than the contents of the relevant planning case file). The Council responded on 30 October 2007.
8. In its response, the Council confirmed that it agreed that matters relating to planning applications should be dealt with under the EIRs. The Council went on to confirm that on this basis, it would have responded to Dr Watt by confirming that the information sought outside of that contained in the planning case file was not held and referring to regulation 10(4)(a) of the EIRs.



9. The Council also outlined the steps it had taken to confirm whether any information regarding the planning proposal in question was held outwith the planning case file. In doing this, the Council provided copies of emails revealing steps taken to establish whether any relevant communications existed in relation to the planning proposal that were held outside the planning case file. The Council confirmed that on the basis of the responses it had received from various individuals concerned, it had no reason to believe that any additional communications existed.
10. In further communications with the Council, the investigating officer sought to gain additional information relating to the planning process in general and to clarify specific points pertinent to this case. The investigating officer sought further detail surrounding the search methodology used by the Council in coming to its conclusions that no further information relevant to Dr Watt's request was held outside the planning case file. Further responses to the additional questions asked by the investigating officer were provided by the Council, along with a schedule detailing the information contained in the planning case file in question.
11. The investigating officer also spoke with a member of staff in the Council's Planning Department, to discuss the planning application that is the subject of this case, the planning process in general, and records management practices around this process.

## **The Commissioner's Analysis and Findings**

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12. In coming to a decision on this matter, I have considered all of the information and the submissions that have been presented to me by both Dr Watt and the Council and I am satisfied, that no matter of relevance has been overlooked.

### **Scope of the investigation**

13. The investigation carried out into this application aims to determine whether the Council held any records of communications with respect to a specific planning proposal, which is not held in the relevant planning case file. Dr Watt has indicated that he believes that records of additional communications are held by the Council, which are not available via the planning case file, but which relates to the planning application in which he is interested.
14. However, before considering this matter, I will first address the question of whether this case should have been considered by the Council under the terms of the EIRs.



### **Consideration of this case under EIRs**

15. As noted above, I took the view in this case that Dr Watt's request for communications relating to a planning application sought environmental information, and as such it should have been handled under the EIRs rather than FOISA.
16. The relevant planning application concerned the erection of a new dwelling. Dr Watt's request sought information directly relating to this development and I am of the view that the construction of a new dwelling would affect the state of the land, which is one of the elements of the environment listed in paragraph (a) of the definition of environmental information in regulation 2(1) of the EIRs. Therefore, the information on this topic falls within the scope of paragraph (a) of the definition. I am also satisfied that the information requested falls within the scope of paragraph (c) of that definition. Therefore, for these reasons, I am satisfied that the information in question falls within the definition of environmental information in regulation 2(1). I am satisfied that the information available within the planning case file (which falls within the scope of Dr Watt's request, although he later indicated that this was not of interest to him) is environmental information. I am satisfied that any further communications relating to this application, should they exist, would also fall within the scope of this definition.
17. I have taken the Council's agreement that the request should have been handled under the EIRs to mean that it would wish to rely upon the exemption in section 39(2) of FOISA with respect to any information falling within the scope of Dr Watt's request. This technical exemption provides that information that is environmental information for the purposes of regulation 2 of the EIRs is exempt information under FOISA (thereby allowing the request to be considered solely in terms of the EIRs). The exemption is subject to the public interest test in section 2(1)(b) of FOISA. My view is that, in this case, as there is a separate statutory right of access to environmental information, the public interest in maintaining this exemption and allowing access in line with the requirements of the EIRs, outweighs the public interest in the disclosure of information under FOISA. Given this conclusion, I have made my decision in this case, solely under the terms of the EIRs.

### **Information identified during the course of the investigation**

18. Regulation 10(4)(a) of the EIRs states that a Scottish public authority may refuse to make environmental information available to the extent that it does not hold the information when an applicant's request is received. The Council indicated that the information within the planning case file was already available to Dr Watt, but cited regulation 10(4)(a) with respect to information sought by Dr Watt beyond that contained within the planning file.
19. My investigation sought to confirm whether any relevant communications were held by the Council that were not contained in the planning file. The investigating officer sought details of the searches conducted by the Council in response to Dr Watt's request, of the processes followed by the Council in handling planning applications, the records created in this process and the management of these records.



20. Having considered the detailed information supplied by the Council on this matter, I am satisfied that no communications relating to the planning application specified in Dr Watt's request are held by the Council excluding those which are already in the public domain. I am satisfied that the Council took reasonable steps to identify any relevant communications in response to Dr Watt's request.
21. However, I do wish to note that it became evident during the investigation, that not all the available information relating to the planning proposal in question was contained in the Council's planning case file. The investigating officer identified two documents, one of which was been provided by the Council in its submissions to this Office, which did not appear in the schedule of documents contained within the planning case file. These are the minutes of two committee meetings at which the relevant planning application was discussed:
- Skye & Lochalsh Area Committee Minute – dated 23 October 2006
  - Skye & Lochalsh Area Committee Minute – dated 4 December 2006
22. It is clear that these two minutes contain records of communications relating to the planning application of interest to Dr Watt. On further questioning, the Council confirmed that minutes from area planning meetings are not always kept in the planning case file, but are publicly available via its website. Therefore, I must conclude that although these items were available to Dr Watt at the time of his request, the Council acted in breach of the EIRs by indicating that all relevant information was available to him through the planning case file. I have therefore found that the Council misapplied regulation 10(4)(a) of the EIRs by indicating that this was the case. Further information was held that was not available within the planning file.
23. However, I do not require any action to be taken in response to this breach. It is clear that, had the Council identified these minutes, it would have been able to rely upon the provisions of regulation 6(1)(b) of the EIRs, on the basis that minutes of committee meetings are available on its website and through the Council's publication scheme. Regulation 6(1)(b) states that a Scottish public authority shall comply with the request [for information], unless "*the information is already publicly available and easily accessible to the applicant in another form or format*". In this case, the documents concerned are and were easily accessible to Dr Watt through the following links:
- <http://www.highland.gov.uk/yourcouncil/committees/archivepremay2007/skyeandlochals/sh/skyeandlochals/area/2006-10-23-sla-min.htm> (Minute of 23 October 2006)
- <http://www.highland.gov.uk/yourcouncil/committees/archivepremay2007/skyeandlochals/sh/skyeandlochals/area/2006-12-04-sla-min.htm> (Minute of 4 December 2006)
24. As noted above, having considered the submissions made and the information provided by both the Council and Dr Watt, I am satisfied that apart from the documents identified above, no additional information exists, which falls within the scope of Dr Watt's request.



## **Decision**

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I find that Highland Council (the Council) failed to deal with Dr Watt's request fully in accordance with the Environmental Information (Scotland) Regulations 2004 (the EIRs). I have found that the Council misapplied the exception in regulation 10(4)(a) by failing to identify the Committee minutes identified in paragraph 21, which were not available within the relevant planning case file. However, having noted that these two documents are easily accessible other than through the planning case file, I do not require the Council to take any action in response to this decision.

## **Appeal**

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Should either Dr Watt or the 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.

Signed on behalf of Kevin Dunion, Scottish Information Commissioner, under delegated authority granted on 14 November 2007.

**Margaret Keyse**  
**Head of Investigations**  
**31 March 2008**





## Appendix

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### Relevant statutory provisions

#### Environmental Information (Scotland) Regulations 2004

##### 2 Interpretation

(1) In these Regulations –

[...]

"environmental information" has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on -

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

[...]

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

[...] ...

##### 5 Duty to make available environmental information on request

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

[...]



## **6 Form and format of information**

- (1) Where an applicant requests that environmental information be made available in a particular form or format, a Scottish public authority shall comply with that request unless-

[...]

- (b) the information is already publicly available and easily accessible to the applicant in another form or format.

[...]

## **10 Exceptions from duty to make environmental information available—**

...

- (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;



## **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.

### **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 –
  - (a) the provision does not confer absolute exemption; and
  - (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.