

# Decision Notice

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**Decision 069/2018: Ms A and West Dunbartonshire Council**

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**Knowle Burn Flood Prevention Scheme – scouring issues**

Reference No: 201702238

Decision Date: 23 May 2018



## Summary

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The Council was asked for details of the Knowle Burn Flood Prevention Scheme, including scouring issues. The Council stated there were no scouring issues and responded that the information was not held.

The Commissioner investigated and was not satisfied that the Council had undertaken proper searches before concluding that no information was held. The Council is required to comply with the requirements of the EIRs, by (i) by ensuring that adequate searches are now carried out and (ii) issuing a fresh review outcome, based on these searches.

## Relevant statutory provisions

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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); 10(1), (2) and (4)(a) (Exceptions from duty to make environmental information available); 16(5) (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 2 October 2017, Ms A made a request for information to West Dunbartonshire Council (the Council). The request comprised eight questions in total, only three of which are relevant to the present application to the Commissioner. For clarity, parts 2 and 7 were not raised by Ms A in her application and so cannot be investigated here. To the extent that the remaining points were raised by Ms A in her requirement for review, the Commissioner is not satisfied that her comments can be regarded as challenging a lack of recorded information.

### Part 1

All information relating to the scouring issues which had affected her property as a result of the Knowle Burn FPS (flood prevention scheme) since Autumn 2014. She also asked that a site visit in January 2015 be included and gave details of a person in attendance.

### Part 3

Information regarding work carried out in March 2016 by a contractor.

### Part 4

Information regarding work carried out by a contractor in November 2016. It involved installing Gabion mattresses and required a "CAR" application from SEPA.

2. The Council responded on 27 October 2017. In respect of most of the request, it stated there were no scouring issues and did not believe it held information capable of addressing parts 1 and 3. The Council did not explicitly mention part 4 in its response.

3. On 1 November 2017, Ms A wrote to the Council, requesting a review of its decision. She gave reasons why she believed the information she sought should be held. She highlighted the absence of a response to part 4.
4. The Council notified Ms A of the outcome of its review on 29 November 2017, upholding its original response but again omitting to address part 4.
5. On 8 December 2017, Ms A wrote to the Commissioner. She applied to the Commissioner for a decision in terms of section 47(1) of the Freedom of Information (Scotland) Act 2002 (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. Ms A stated she was dissatisfied with the outcome of the Council's review because the statements made by the Council, in her view, contradicted historical evidence and dates when contractors were working to resolve scouring issues (parts 1 and 3). She reiterated that part 4 had not been responded to.

## **Investigation**

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6. The application was accepted as valid. The Commissioner confirmed that Ms A 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.
7. On 15 January 2018, the Council was notified in writing that Ms A had made a valid application. The Council was asked to send the Commissioner the information withheld from Ms A. The Council provided the information and the case was allocated to an investigating officer.
8. 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 applicable to the information requested.

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

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

### **FOISA or EIRs?**

10. During the investigation, the Council noted that this request "could have been handled under the EIRs", whilst recognising that it had not done so earlier.
11. It is apparent from the Council's correspondence with both Ms A and the Commissioner that any information falling within the scope of this request would be environmental information, as defined in regulation 2(1) of the EIRs. Ms A has asked for information pertaining to flood prevention at the Knowle Burn. Any information would relate to human health and safety, which is likely to be affected in this context by the state of the elements of the environment (for example, the interaction of the water in the Burn and any weather or geographical conditions pertaining to that area). In the circumstances, the Commissioner is satisfied that Ms A's request would fall within paragraphs (a), (c) and (f) of the definition of environmental information (reproduced in Appendix 1). Ms A has not disputed that this request ought to be handled under the EIRs.

12. The Commissioner's views on what constitutes environmental information – and on how requests for such information should be handled – should have been apparent to the Council. These have been set out by the Commissioner, in a very largely consistent manner, in decisions from *Decision 218/2007 Professor A D Hawkins and Transport Scotland*<sup>1</sup> onwards. Where a request is for environmental information, a Scottish public authority is obliged to deal with it under the EIRs. The Council should have done so in this case. In failing to, the Council failed to comply with regulation 5(1) of the EIRs (see below).

### **Information falling within scope of the request**

13. 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, subject to the qualifications in regulations 6 to 12 (see regulation 5(2)(b)). It is important to bear in mind that this obligation relates to information actually held by an authority when it receives the request, as opposed to information an applicant believes the authority should hold but which it does not.
14. On receipt of a request for environmental information, the authority must establish 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.

#### *Part 4 of Ms A's request*

15. Ms A submitted that the Council had not, as yet, addressed part 4 of her request.
16. In its submissions, the Council recognised that it did not respond to this part of the request until the investigating officer wrote to it seeking submissions, on 8 February 2018. The Council then provided Ms A with a response (on 16 February 2018) and informed the Commissioner that it had done so. It also provided the investigating officer with further emails in this regard, which it stated it intended to disclose to Ms A. It is not clear, at this time, whether this information has since been disclosed to Ms A.
17. The Commissioner finds that by respond to part 4 of Ms A's request (either initially or on review), the Council failed to comply with regulation 5(1) of the EIRs. He now requires the Council, if it has not already done so, to disclose to Ms A any remaining emails which it has identified as falling within the scope of this part of the request, with an apology for not having done so at the time of asking. He will consider below whether he is satisfied as to the adequacy of the Council's searches for this information.

#### *Adequacy of searches*

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 that information when the applicant's request is received.
19. The standard of proof in considering whether a Scottish public authority holds information is the civil standard of the balance of probabilities. In determining this, the Commissioner will consider the scope, quality, thoroughness and results of the searches carried out by the public authority. He will also consider, where appropriate, any reason offered by the public authority to explain why the information is not held. While it may be relevant as part of this exercise to explore what information *should be* held, ultimately the Commissioner's role is to

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<sup>1</sup> <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2007/200600654.aspx>

determine what relevant information *is* (or was, at the time the request was received) held by the public authority.

20. In her application, Ms A submitted that there was historical evidence and correspondence from 2015 which led her to believe relevant information was held. She also referred to previous site visits and works which she considered relevant.
21. For part 1 of the request, the Council submitted that it remained of the view that there were no scouring issues which had affected Ms A's property (which it qualified as the "structural integrity of the owner's house") and, accordingly, there was no recorded information in that regard. The Council stated that the flood prevention scheme was the subject of wide public knowledge, and there was a history of correspondence between Ms A, her solicitor and the Scottish Public Services Ombudsman ("the Ombudsman") related to this matter.
22. For part 3 of her request, Ms A referred to two mornings in March 2016 when contractors who, she believed, must have been acting on behalf of the Council spent two mornings in the burn within her property to resolve scouring. Ms A was convinced that public money had been spent in connection with this work and so there would be records of any work carried out.
23. The Council named the contractor in question and stated that it had carried out a search against their name between 1 March 2015 and the date of the request, resulting in no information being identified. The Council indicated that to the best of its knowledge, no such recorded information existed.
24. The Council gave details of the searches it had thus far conducted, which included searching electronic records for the terms:
  - 1) Knowle Burn Flood Prevention Scheme
  - 2) Newmac Asphalt Services Limited
  - 3) Jacobs
  - 4) [Name] of Jacobs
  - 5) Scouring issues Knowle Burn
  - 6) SEPA Knowle Burn
  - 7) [Name] March 2015 to March 2017
  - 8) [Specified Name and address]
25. The Council also referenced seven searches, "from 1 August 2014 until the present", which it had conducted. It confirmed in its submissions that it did not believe there had been information destroyed previously, in terms of its records management and retention policy.
26. The Council also indicated during this investigation that if any such information was identified as a result of ongoing enquiries, then it "intended to release same to Ms A".
27. It is not clear from the Council's submissions whether any of its searches were considered applicable to part 4 of the request.
28. The Council provided other background information, including information on a related complaint to the Ombudsman.

*Has all the relevant information been identified?*

29. The Commissioner's remit is to investigate and reach a determination on information, if held. The Commissioner cannot comment on what a public authority ought to hold, but he can consider whether the Council took adequate, proportionate steps to establish whether it held any information falling within the scope of Ms A's request.
30. The Council's stated position is that its enquiries are ongoing regarding what information, if any, it held falling within the scope of Ms A's request. It has indicated it also will release further information, if identified. Despite these statements, the Council appears also to maintain its position that it holds no information falling within the scope of Ms A's request (in so far as she has raised matters of dissatisfaction in her application).
31. Having considered carefully the circumstances here, the Commissioner is concerned at the contradictory nature of the Council's statements and its failure to complete its searches at the time of the review, or for that matter subsequently. In the absence of adequate searches, all the Council can do logically is make assumptions or informed guesses, until such time as all relevant and proportionate steps have been taken to identify and locate the information.
32. In the circumstances, the Commissioner is not satisfied that the Council has taken adequate steps to identify and locate any relevant information it holds, or to satisfy itself (and the Commissioner) that it does not hold any such information. By its own admission, the Council's enquiries are continuing, certainly in relation to parts 1 and 3, and possibly in relation to part 4 also. The Commissioner must, therefore, find that the Council was not entitled to inform Ms A that it did not hold the information she requested. In addition, it failed to respond to part 4 of the request at all. In both respects, it failed to comply with regulation 5(2) of the EIRs.
33. The Commissioner requires the Council to now complete its searches, in respect of parts 1, 3 and 4 of the request, and issue a fresh review decision, remedying its earlier failures in terms of regulation 16(5) of the EIRs.

## **Decision**

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The Commissioner finds that, in respect of the matters specified in her application, West Dunbartonshire Council (the Council) failed to comply with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by Ms A.

The Commissioner finds that the Council failed to comply with regulation 5(1) of the EIRs, in failing to respond to parts 1, 3 and 4 of the request under the EIRs (or, in the case of part 4, to respond at all) and in failing to carry out adequate searches for any information covered by those parts.

The Commissioner therefore requires the Council to complete adequate searches and issue a fresh review decision, in terms of regulation 16(5) of the EIRs, by 16 July 2018.

## **Appeal**

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Should either Ms A or the 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 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**

**23 May 2018**

## Appendix 1: Relevant statutory provisions

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### 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.

...

#### 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;

...

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

...

- (5) Where the Scottish public authority decides that it has not complied with its duty under these Regulations, it shall immediately take steps to remedy the breach of duty.

**Scottish Information Commissioner**

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