

# Decision Notice

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**Decision 095/2019: Mr A and Glasgow City Council**

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**Records relating to a café**

Reference Nos: 201801248 and 201801250

Decision Date: 21 June 2019



Scottish Information  
Commissioner

## Summary

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The Council received two information requests for records relating to a named café. It did not respond. Following requests for review, the Council provided some information and stated that it held nothing further. During the Commissioner's investigation, the Council located and supplied further information.

The Commissioner found that the Council failed to comply with the EIRs by not, when asked, providing all the information it held falling within the scope of the requests. However, he was satisfied that, by the end of his investigation, the Council had identified and disclosed all the information it held and which fell within the scope of the requests.

The Commissioner commented on some unnecessary confusion caused by the Council in its handling of the requests.

## 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); 39(2) (Health, safety and the environment)

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

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 24 November 2017 (request 1) and on 31 January 2018 (request 2), Mr A requested information from Glasgow City Council (the Council). These requests sought all Council records held in relation to a specified café, which had been the subject of complaints made by Mr A.
2. As Mr A received responses to neither of his requests within 20 working days of making them, he wrote to the Council requesting reviews of its failures to respond. The review for request 1 was sought on 28 December 2017 and that for request 2 on 2 March 2018.
3. The Council notified Mr A of the outcomes of its reviews on 25 January 2018 for request 1 and on 29 March 2018 for request 2.
4. For request 1, Building Warrant information was provided under the EIRs and other information under FOISA. Information relating to staff below Grade 9 was withheld under section 38(1)(b) of FOISA. The Council stated that it did not hold inspection records from 2017 onwards.
5. For request 2, the Council supplied information under the EIRs, having applied section 39(2) of FOISA.

6. In an email of 29 January 2018, Mr A informed the Council that he believed it held further information falling within the scope of his request, in addition to that supplied to him. He provided examples. The Council responded on 26 February 2018, advising that it did not hold any information relevant to some of the examples identified by Mr A. It referred to other information available in the public domain and provided Mr A with further copies of information supplied earlier.
7. On 23 July 2018, Mr A wrote to the Commissioner in respect of both information requests. He applied 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 specified modifications. Mr A submitted that further information should be held which had not been disclosed to him. He accepted that the personal data of Council staff below Grade 9 could be redacted from any information provided (although he wished to be sure any redactions were confined to personal data).

## **Investigation**

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8. The applications were accepted as valid. The Commissioner confirmed that Mr A had made requests for information to a Scottish public authority and asked the authority to review its responses to those requests before applying to him for a decision.
9. On 26 September 2018, the Council was notified in writing that Mr A had made valid applications to the Commissioner. The two applications were conjoined into a single investigation.
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 these applications and to answer specific questions. These included addressing the areas where Mr A believed further information might be held.
11. Mr A was also asked for any comments he wished to make and he provided the investigating officer with examples of the kinds of additional information he believed should still be held. He also believed his requests should have been dealt with under FOISA rather than the EIRs.
12. During the investigation the Council located further information and disclosed it to Mr A.
13. The investigating officer ascertained from Mr A the areas with which he was still dissatisfied. He identified meetings for which he believed records should be held, along with records of the investigation of his complaints and other correspondence. He remained of the view that the request should not have been handled under the EIRs.

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

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

## **FOISA or the EIRs?**

15. In its review outcomes (or, in the case of request 1, its subsequent communication to Mr A of 26 February 2018), the Council identified all of the requested information as environmental information, as defined in regulation 2(1) of the EIRs. Having reached this conclusion, it applied section 39(2) of FOISA.
16. The Council stated that it was of the view that dealing with whole of the requests under the EIRs, rather than an FOISA, made no difference to the information disclosed. It noted that it did not charge a fee for its responses, and did not rely on any of the EIRs exceptions to withhold any information.
17. Having considered the nature of the information sought, the Commissioner is satisfied that it comprises environmental information, as defined within regulation 2(1) of the EIRs. As the requested information concerns planning and building control issues relating to a café, including questions of ventilation and associated emissions, the Commissioner finds that it relates to measures and activities affecting or likely to affect the elements referred to in part (a) of the definition of environmental information, or the factors referred to in paragraph (b). As such, the Commissioner is satisfied that the information in question is environmental information as defined in parts (a), (b) and (c) of the definition.
18. 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 these cases, the Commissioner accepts that the Council was entitled to apply the exemption to the information under consideration, given his conclusion that it is properly classified as environmental information.
19. As there is a statutory right of access to environmental information available to the Council in these cases, the Commissioner accepts, in all the circumstances, that the public interest in maintaining this exemption (and responding to the requests under the EIRs) outweighs any public interest in disclosing the information under FOISA.
20. The Commissioner therefore concludes that the Council was correct to apply section 39(2) of FOISA and consider Mr A's information requests under the EIRs. In what follows, he will consider the requests solely in terms of the EIRs.

## **Regulation 5(1) of the EIRs - information falling within scope of the request**

21. 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. 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.
22. As noted above, the Council located and disclosed to Mr A additional information during the investigation. This was all information which should have been disclosed at the time the Council dealt with Mr A's requests. The Commissioner therefore finds that, in failing to do so, the Council failed to comply with regulation 5(1) of the EIRs.

## **Was all relevant information identified, located and provided to Mr A by the end of the investigation?**

### *Searches conducted by the Council*

23. The Council provided an overview of the searches carried out to locate any information falling within the scope of Mr A's requests. The Council searched for all relevant Council records up to and including 31 January 2018, that being the period covering both of Mr A's requests.
24. In response to the initial requests, the FOI team identified relevant individuals and asked them to undertake searches of their records and to provide any records which were related.
25. The majority of the searches were carried out by the relevant officer in Planning and Building Standards, who maintained a folder of correspondence relating to Mr A. The contents of his inbox were sorted on the basis of the date ranges provided by Mr A. This officer also searched his email inbox through sorting by the "Subject" and "From" fields, allowing him to distinguish correspondence relating to the café, or received from Mr A. The officer in question had historically been Mr A's initial point of contact, so any correspondence received from Mr A was sent to him to process.
26. Further searches were carried out by staff in Land and Environmental Services and the Customer Contact Team. Records relating to the café were searched through the Council's EDRMS (Electronic Documents and Records Management System) and specialist complaint handling system, using search terms relating to the address of the café. The results were then sifted by officers to eliminate results unconnected with the request. The remaining results were further filtered using the provided date ranges: as the Council's system does not allow for advanced searches based on a date range, this had to be undertaken by individual staff members.
27. Following the application to the Commissioner, further searches were carried out. These involved additional officers in Planning and Building Standards and included the Planning Portal.
28. The Council identified the staff members involved at all stages and provided the Commissioner with evidence of the searches carried out.

### *Specific points raised by Mr A*

29. The Council responded to the specific points raised by Mr A, referring to its searches and consultation with the staff concerned. Members of staff present confirmed that no minutes had been taken of the meetings identified by Mr A. It acknowledged that one of the meetings (24 October 2017) was internal and that this might have been made clearer to Mr A.
30. Referring to its searches, the Council was satisfied that, by the end of the investigation, it had provided Mr A with any correspondence it held relating to his complaints. With regard to a visit to the property arising out of a complaint, the Council confirmed, following consultation with the officer concerned, that matters were discussed verbally during the visit: however, no records were held in relation to this meeting which had not been provided to Mr A already. From records held, it could not confirm whether a particular letter was saved electronically.
31. The Council reiterated that, by the end of the Commissioner's investigation, it had carried out thorough searches and had provided to Mr A all information held it held that fell within the scope of his requests.

### *The Commissioner's findings*

32. On the balance of probabilities, the Commissioner accepts that the Council does not (and did not, on receiving the requests) hold any other relevant information. In reaching this view, he has considered the information disclosed by the Council prior to and during the investigation, the searches undertaken by the Council and the submissions provided to him by Mr A.
33. Taking into account all of the above, the Commissioner is satisfied that, by the end of the investigation, the Council had identified and disclosed all the information falling within the scope of Mr A's requests. In reaching this conclusion he has taken account of the fact that he can only consider what information is actually held, not what information the Council might be expected to hold.

### **Handling of the request**

34. The Commissioner must comment that the Council's handling of Mr A's requests left a lot to be desired, in particular in the following areas:
- The Council did not clarify to Mr A that the withheld information in both cases had been redacted because it was all considered to be the personal data of individuals (regulation 11(2) of the EIRs), which Mr A confirmed he did not require. During the investigation, the Council had to be asked by the investigating officer to explain this to Mr A.
  - The fact that the Council redacted information as a duplicate of information that had already appeared elsewhere. The Council redacted it because it had already been disclosed to Mr A, but this was not explained and Mr A was given the impression that this was additional information being withheld from him. Again, the Council had to be asked to provide an explanation of this to Mr A.

## **Decision**

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The Commissioner finds that Glasgow City Council (the Council) partially complied with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information requests made by Mr A.

The Commissioner finds that by handling the requests under the correct regime, the Council complied with the EIRs. However, the Council failed to comply with regulation 5(1) of the EIRs, by failing to identify, locate and make available all relevant information it held until after the Commissioner investigation had begun.

While noting that the Council's overall handling of the cases was disappointing, given that all relevant information held by the Council has now been supplied to Mr A, the Commissioner does not require the Council to take any action regarding this failure, in response to Mr A's application.

## **Appeal**

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Should either Mr 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.

**Margaret Keyse  
Head of Enforcement**

**21 June 2019**

### Freedom of Information (Scotland) Act 2002

#### 1 General entitlement

- (1) A person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority.

...

- (6) This section is subject to sections 2, 9, 12 and 14.

#### 2 Effect of exemptions

- (1) To information which is exempt information by virtue of any provision of Part 2, section 1 applies only to the extent that –

...

- (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

...

#### 39 Health, safety and the environment

...

- (2) Information is exempt information if a Scottish public authority-
- (a) is obliged by regulations under section 62 to make it available to the public in accordance with the regulations; or
  - (b) would be so obliged but for any exemption contained in the regulations.

...



## The Environmental Information (Scotland) Regulations 2004

### 2 Interpretation

(1) In these Regulations –

...

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

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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;
- (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.

...

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