

# Decision Notice

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**Decision 114/2018: Mr David Telford and North Ayrshire Council**

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## **Minutes of meetings**

Reference No: 201702145

Decision Date: 25 July 2018



Scottish Information  
Commissioner

## Summary

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The Council was asked for the minutes of the meetings of the Kelburn Castle Restoration Works Trust. The Council disclosed two sets of minutes from which personal data had been redacted.

During the investigation, the Council disclosed further information from the minutes, and also identified and disclosed another set of redacted minutes. The Council then modified its position and submitted that it did not hold the minutes in its own right.

The Commissioner found that, for the purposes of the EIRs, the Council did not hold the minutes. Consequently, the Commissioner does not require the Council to take any action.

## Relevant statutory provisions

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The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (paragraphs (a) and (c) of definition of “environmental information) and (2) (Interpretation); 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)

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 August 2017, Mr Telford made a request for information to North Ayrshire Council (the Council). He asked for full details of the information contained in the minutes of the meetings of “the North Ayrshire Council Policy RES2B / RES3 Trust” (the Kelburn Castle Restoration Works Trust).
2. The Council responded on 22 September 2017. It disclosed two sets of redacted minutes (15 March 2012 and draft minutes from 20 July 2012), and withheld the redacted information under regulation 11(2), the exception for personal data. The Council stated that these were the only minutes that it held.
3. On 25 September 2017, Mr Telford emailed the Council requesting a review of its decision. He did not accept all relevant information had been identified, given that the last minutes were from 2012. He also questioned the redaction of financial information.
4. The Council notified Mr Telford of the outcome of its review on 23 October 2017. It disclosed some of the information it had previously withheld, but otherwise upheld its previous response.
5. On 6 November 2017, the Council disclosed a budget forecast to which reference was made in the minute of 15 March 2012 and another version of the redacted minutes from 20 July 2012.
6. On 26 November 2017, Mr Telford 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 Telford stated that he was dissatisfied with the outcome of the Council’s

review because financial information had been redacted from the minutes. He commented that the terms of North Ayrshire Policy RES3 are that this policy is subject to full open book accounting.

## **Investigation**

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7. The application was accepted as valid. The Commissioner confirmed that Mr Telford 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.
8. On 21 December 2017, the Council was notified in writing that Mr Telford had made a valid application. The Council was asked to send the Commissioner the information withheld from Mr Telford. The Council provided the information and the case was allocated to an investigating officer.
9. 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 on any exceptions in the EIRs it considered applicable to the information requested, and on the searches conducted in relation to the requested information.
10. On 19 February 2018, the Council responded to the investigating officer's questions. The Council identified an additional meeting minute that fell within scope of the request (25 July 2014). It stated that it was now relying upon the exception in regulation 10(5)(f) to withhold information (the exception for information which, if disclosed, would harm the interests of the person who provided it). The Council provided the Commissioner with an annotated copy of the withheld information showing where the exceptions had been applied.
11. On 9 March 2018, the Council disclosed further information from the minutes of 15 March 2012 and 20 July 2012 to Mr Telford. On 3 April 2018, the Council disclosed a redacted version of the minutes of 25 July 2014.
12. During the investigation, Mr Telford was invited to explain why he believed the information should be disclosed, both in terms of his own interests and in the public interest. He provided comments for the Commissioner to consider.
13. During April and May 2018, the Council provided more submissions to support its position that the remaining information should be withheld. After considering these submissions, which highlighted that the Council may not actually hold the information for the purposes of the EIRs, the investigating officer asked the Council for its comments in relation to regulation 2(2) and regulation 10(4)(a) of the EIRs (information not held). These are addressed in more detail below.

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

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

## **Background to request**

15. As explained in *Decision 003/2017 Mr David Telford and North Ayrshire Council*<sup>1</sup>, Policy RES3 forms part of the Council's Local Development Plan. It is a site-specific policy for Kelburn Castle, Fairlie, providing for a housing development and subsequent programme of restoration and maintenance for Kelburn Castle and improvements to the Country Centre there.
16. Criterion 6 of Policy RES3 requires open book accounting on both land and development sales which would allow for a reasonable developer's profit only (indicatively 12% as advised by Historic Scotland) with all other proceeds being channelled to the development to be enabled (i.e. the works outlined in the previous paragraph).
17. Policy RES3 also provides that any permitted development is subject to an appropriate Section 75 Agreement, to ensure that monies are only used for the works to Kelburn Castle and the Country Centre described above.

## **Application of the EIRs**

18. It is clear from the Council's correspondence with both Mr Telford 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. Mr Telford has asked for information which relates to plans and activities for the development of Kelburn Castle. As such, the Commissioner is satisfied that it would fall within paragraphs (a) and (c) of the definition of environmental information (reproduced in Appendix 1).
19. Mr Telford has not disputed the Council's decision to handle the request under the EIRs and the Commissioner will consider the information in what follows solely in terms of the EIRs.

## **Whether the minutes are held by the Council**

20. As noted above, during the investigation, the Council altered its position and argued that the information was excepted from disclosure in terms of regulation 10(4)(a) of the EIRs.
21. Regulation 10(4)(a) of the EIRs allows a public authority to refuse to make environmental information available to the extent that it does not hold the information when the request is received.
22. For the purposes of the EIRs, "held" is defined in regulation 2(2). Environmental information is held by a Scottish public authority if it is –
  - (a) in its possession and it has been produced or received by that authority; or
  - (b) held by another person on that authority's behalf.
23. The exception in regulation 10(4)(a) is subject to the public interest test in regulation 10(1)(b) of the EIRs and so can only apply if, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in making the information available.

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<sup>1</sup> <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2017/201601710.aspx>

### *The Council's submissions*

24. The Council submitted that the minutes of the Kelburn Castle Restoration Works Trust had not been given formally to the Council and that it had the minutes in its possession as a consequence of it being the employer of two former trustees. The Council had put forward these individuals for appointment to the Trust but, once appointed, their duties were to the Trust as trustees and not to the Council. The trustees were therefore acting in a capacity separate from that of their role within the Council, and were not holding the minutes on the Council's behalf. The Council concluded, therefore, that the information in the minutes did not belong to the Council.
25. Given the above, the Council submitted that it does not hold the information in terms of regulation 2(2) on the basis that it was not produced or received by the Council in its own right.

### *The Commissioner's conclusion*

26. Paragraph 11 of the Commissioner's briefing on regulation 10(4)(a)<sup>2</sup> states:
- "Scottish public authorities may have information on their premises or in their systems which they do not hold in their own right, but on behalf of another person. When information is present within an authority's premises and systems only because it is held on behalf of another person, the information is not held by the authority for the purposes of the EIRs."
27. The Commissioner's briefing identifies a number of factors which may be relevant when considering whether an authority actually holds the information requested. Some of these are considered below.

### *Evidence of separate identity*

28. In its submissions, the Council stated that it was not responsible for forming the Kelburn Castle Restoration Works Trust. It is a private trust. One of the Council's Elected Members and one Council officer had served as trustees on the board. The Council commented that it was not for the Council either to allow or refuse a request for a person to become a trustee: as it is a private trust, the trustees themselves decided who was going to be represented.
29. The Commissioner notes that section 5.16 (page 34) of the Council's local development plan<sup>3</sup> relates to Kelburn Castle, Fairlie. This section of the document specifies the criteria (RES 3) for the housing development on the Kelburn Castle estate. Criterion 9 of RES3 requires "Evidence of a trust or other legal arrangement ensuring that all monies from the development will be used for the restoration and subsequent maintenance of Kelburn Castle and improvements to the Country Centre and for no other purpose."
30. The Commissioner is satisfied that the Trust is a completely separate entity from the Council.

### *Control*

31. The Commissioner's briefing states (paragraphs 19 and 20):

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<sup>2</sup> [http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/EIRsexceptionbriefings/Regulation10\(4\)\(a\)Informationnotheld.aspx](http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/EIRsexceptionbriefings/Regulation10(4)(a)Informationnotheld.aspx)

<sup>3</sup> <https://www.north-ayrshire.gov.uk/Documents/CorporateServices/LegalProtective/LocalDevelopmentPlan/post-examination/adopted-LDP-policy.pdf>

“If an authority holds information on behalf of another person or organisation, it will not control that information in the same way as it would if it held the information in its own right. The authority may not have power to delete or amend the information without the owner's consent, or to apply its own policies and procedures to the information. It might have restricted access to the information.

Although control of the information is a factor, it is not a conclusive test. There may be situations in which an authority cannot amend or process information, or is limited (e.g. by contract) in what it can do with information, but still holds it in its own right. This may include information obtained from a third party.”

32. The Council submitted that it was not formally given the minutes and only had copies because two of its employees served on the Board of the Trust.
33. Having considered how the Trust was set up, the Commissioner notes that the Council is responsible for overseeing the Trust, but he can find no evidence that the Trust has to obtain permission or approval from the Council for any of its actions.
34. The Commissioner is satisfied that the Council has no control over the content of the minutes: the Council itself is not responsible for their creation, and is not formally represented on the Trust.

#### *Core functions*

35. The Commissioner's briefing states (paragraph 21):

“A more important question is whether the information relates to the functions and core business activities of the authority: if it does, then it is likely that the information is held by the public authority in its own right.”

36. The Commissioner notes that the Council must ensure that the Trust meets the requirements of RES 3. However, having considered the core functions of a local authority<sup>4</sup>, the Commissioner is satisfied that the matters in the minutes relate to activities and purposes for which the Trust was set up, not the functions or core business activities of the Council.

#### *Connection between the information and the authority*

37. The Commissioner accepts that there was no requirement or regular arrangement for the Trust to provide the Council with copies of its minutes for the Council's own purposes.
38. The Commissioner notes that the Council has found only a few of the minutes from the Trust meetings. Within these minutes, there are references to other meetings of the Trust, but minutes for other meetings have not been found in the Council's records. After considering the searches carried out by the Council, the Commissioner is satisfied that it does not hold any other minutes of Trust meetings.

#### *Conclusion*

39. The Commissioner is satisfied that the Council does not hold the minutes in its own right, and that the existence of the minutes among its records relates to the fact that two Council officials served as trustees, in a capacity separate from their roles within the Council.
40. It is, of course, disappointing that the Council did not recognise this until the Commissioner was investigating Mr Telford's application for a decision. This required a complete change of

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<sup>4</sup> <http://www.cosla.gov.uk/scottish-local-government>

position from the Council from the decision Mr Telford received in its review response. However, the Commissioner accepts that the Council was entitled to change its position, after reconsidering the circumstances in which the minutes were provided and stored.

41. In this case, in all the circumstances, the Commissioner has concluded that, by virtue of regulation 2(2) of the EIRs, the requested information is not held by the Council for the purposes of the EIRs. Accordingly, the Commissioner is satisfied that the exception in regulation 10(4)(a) of the EIRs was engaged, in relation to the information requested by Mr Telford.

#### Public interest test

42. The exception in regulation 10(4)(a) is subject to the public interest test in regulation 10(2) of the EIRs.
43. The Commissioner acknowledges that the information requested by Mr Telford is accessible by the Council. The Commissioner can order disclosure of information only when this is required for compliance with the EIRs; compliance is required only in relation to information which is *held* by a Scottish public authority for the purposes of the EIRs.
44. Given that the information is not held for the purposes of the EIRs, there is no conceivable public interest in requiring that the information be made available in the public interest.
45. He therefore concludes, in all the circumstances of this case, that the public interest in making the requested information available is outweighed by that in maintaining the exception in regulation 10(4)(a) of the EIRs.
46. The Commissioner is satisfied, therefore, that the Council was entitled to rely on regulation 10(4)(a) of the EIRs in relation to Mr Telford's request for the minutes of the Kelburn Castle Restoration Works Trust.

## **Decision**

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The Commissioner finds that North Ayrshire Council complied with the Environmental Information (Scotland) Regulations 2004 in responding to the information request made by Mr Telford.

## **Appeal**

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Should either Mr Telford 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**

**25 July 2018**

### 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;

...

(2) For the purposes of these Regulations, environmental information is held by a Scottish public authority if it is-

(i) in its possession and it has been produced or received by that authority; or

(ii) held by another person on that authority's behalf.

and, in either case it has not been supplied by a Minister of the Crown or department of the Government of the United Kingdom and held in confidence.

...

#### 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;

...

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