

# Decision Notice 127/2020

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## Date of pothole repair

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**Applicant: The Applicant**

**Public authority: Glasgow City Council**

**Case Ref: 202000377**



Scottish Information  
Commissioner

## Summary

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The Council was asked to confirm the date of a repair to a pothole reported through the MyGlasgow App.

Following an investigation, the Commissioner was satisfied that the Council did not hold the information requested.

## 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 “) (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 11 October 2019, the Applicant made a request for information to Glasgow City Council (the Council). The request read:  
*Can you confirm on what date the pothole reported to the Council as #4109855 (via the MyGlasgow app), on the southbound carriageway of Harmony Row, Govan, (outside the offices of John Fulton Plumbers) was repaired, please?*
2. The Council responded on 30 October 2019. The Council responded under the EIRs and told the Applicant its system showed the works were completed on 24 July 2019.
3. Later that day, the Applicant wrote to the Council requesting a review of its decision on the basis that the information was not accurate. He said he had driven past that point many times and the pothole was not repaired until the end of September.
4. The Council notified the Applicant of the outcome of its review on 27 November 2019. The Council explained that, after further investigation, it did not hold the information requested and therefore regulation 10(4)(a) of the EIRs applied. The Council explained that the system had recorded the wrong street when registering his complaint, told the Applicant that it was investigating why this had happened and provided an apology.
5. On 18 March 2020, the Applicant wrote to the Commissioner, applying 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.

## Investigation

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6. The application was accepted as valid. The Commissioner confirmed that the Applicant 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 1 July 2020, the Council was notified in writing that the Applicant had made a valid application 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 to answer specific questions focusing on the steps taken to identify and locate any relevant information held and whether a response could be provided through collation from other sources.

## Commissioner's analysis and findings

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9. 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 the Applicant and the Council. He is satisfied that no matter of relevance has been overlooked.

### Application of the EIRs

10. It is clear from the Council's correspondence with the Applicant and the Commissioner that the information sought by the Applicant is properly considered to be environmental information, as defined in regulation 2(1) of the EIRs as it is with regard to road repairs. As such, the Commissioner is satisfied that it would fall within paragraphs (a) and (c) of the definition in regulation 2(1) of the EIRs and will consider that handling solely in terms of the EIRs.

### Information held by the Council

11. 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.
12. Under the EIRs, a public authority may refuse to make environmental information available if one or more of the exceptions in regulation 10 apply and, in all the circumstances of the case, the public interest in maintaining the exception or exceptions outweighs the public interest in making the information available. If no such information is held by the authority, regulation 10(4)(a) of the EIRs permits the authority to give the applicant notice to that effect.
13. As with all of the exceptions in regulation 10, the exception in regulation 10(4)(a) must be interpreted in a restrictive way (regulation 10(2)(a)) and a presumption in favour of disclosure must be applied (regulation 10(2)(b)).
14. The standard of proof to determine whether a Scottish public authority holds information is the civil standard of the balance of probabilities. In determining where the balance of probabilities lies, the Commissioner considers the scope, quality, thoroughness and results of the searches carried out by the public authority. He also considers, where appropriate, any reason offered by the public authority to explain why it does not hold the information. While it

may be relevant as part of this exercise to explore expectations about what information the authority should hold, ultimately the Commissioner's role is to determine what relevant recorded information is (or was at the time the request was received) actually held by the public authority.

15. The Council provided full submissions on the steps taken to identify and locate the information requested by the Applicant. The Council explained that the initial response it had provided had referred to the wrong street, as that is the street that had been erroneously registered by the system when the complaint was received. It was not until the request for review was received that it was identified that a mistake had occurred.
16. The Council provided details of the searches undertaken, including the dates undertaken, systems checked and the level of staff tasked with the job. The Council confirmed that it held the Applicant's pothole report on the system, but, as the Council had advised the Applicant in its review response, the information recorded on the system referred to the wrong street and as such there is no record specifying when the pothole was repaired. The Council also confirmed that there was no other way for it to determine when the repair was undertaken as there was no work order referring to the fault report. The Council, therefore, considered its reliance on regulation 10(4)(a) to be appropriate.
17. Having considered the submissions from the Council and the Applicant, the Commissioner accepts that the Council took adequate, proportionate steps to establish whether it held any information that would enable it to provide a response to the Applicant.

#### *Commissioners conclusions*

18. In all the circumstances, the Commissioner is satisfied that the Council does not (and did not at the time of the request) hold any information that would allow it to provide a response to the Applicant. If the Council did hold any information, the Commissioner is satisfied that it would have been identified in the searches undertaken.
19. The exception in regulation 10(4)(a) is subject to the public interest test in regulation 10(1)(b) of the EIRs. Given that the Commissioner is satisfied the information requested was not held by the Council, he does not consider there to be any conceivable public interest in requiring that the information be made available. The Commissioner therefore concludes that the public interest in making the requested information available is outweighed by that in maintaining the exception in regulation 10(4)(a).

## **Decision**

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The Commissioner finds that Glasgow City Council complied with the Environmental Information (Scotland) Regulations 2004 in responding to the information request made by the Applicant.

## **Appeal**

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Should either the Applicant 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**

**8 October 2020**

### 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 –
- (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.
- (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-
- ...
- (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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