

# Decision Notice

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## **Decision 134/2018: Mr D and Fife Council**

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### **Correspondence concerning building a boatshed / leasing land on Lochore Meadows Country Park**

Reference No: 201800197

Decision Date: 28 August 2018



## Summary

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The Council was asked for information in email exchanges with the University of St Andrews concerning building a boatshed and leasing land at Lochore Meadows Country Park.

The Council responded under FOISA, refusing to provide the information as it considered disclosure would prejudice the commercial interests of both parties and would constitute an actionable breach of confidence. In its review, the Council considered the request under the EIRs, again refusing to provide the information as it considered it to be commercially confidential, and because it believed disclosure would prejudice the interests of the person who provided the information.

The Commissioner investigated and found that the Council had partially failed to respond to the request for information in accordance with the EIRs. As the Council disclosed the information found to have been incorrectly withheld during the investigation, he did not require it to take any further action.

## 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) (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), (5)(e) and (f) (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 December 2017, Mr D made a request for information to Fife Council (the Council). The request read as follows:

*“I would like to request all emails between Fife Council and University of St Andrews in relation to building a boatshed and leasing land on Lochore Meadows Country Park, from first emails until now (December 2017).*

*I can appreciate you believe these to be confidential business wise but I draw your attention to the following from an email dated 6 March from David Campbell of Fife Council sent to Benarty Community Council: ‘The lease will be registered in The Registers of Scotland and will therefore be in the public domain’. There is no business confidentiality in a document that will be placed in the public domain.*

*Please also note that the price paid by the University of St Andrews will also be made public when it is put before Cowdenbeath Area Committee by Officers under Delegated Authority as happens on a regular basis.”*

2. The Council responded on 10 January 2018. It considered the request under FOISA and refused to provide the information requested. The Council considered the information to be exempt under section 33(1)(b) (Commercial interests and the economy) of FOISA as disclosure of the information, at a time when negotiations were still ongoing, would (or would be likely to) substantially prejudice the commercial interests of both parties. The Council also considered the information to be exempt from disclosure under section 36(2) (Confidentiality) of FOISA, as it believed disclosure of the emails from the University of St Andrews (the University) and boat club members would constitute an actionable breach of confidence.
3. That day, Mr D wrote to the Council, requesting a review of its decision on the basis that he disagreed with the exemptions applied. He did not consider there were any commercial interests that required to be protected, as any commercial information was to be made public. Neither did he believe there was any real argument for confidentiality as the land was public land within a public park. As such, Mr D believed the public interest lay in openness and transparency, and that the public had a greater right to information about public areas.
4. The Council notified Mr D of the outcome of its review on 26 January 2018, upholding its original decision with modifications. The Council applied section 39(2) of FOISA and considered the request under the EIRs, as the request sought information relating to the proposed changes to land (i.e. the creation of a boat shed) which fell within the definition of environmental information as contained in regulation 2 of the EIRs. The Council informed Mr D that it considered the information to be excepted from disclosure under the exceptions in regulations 10(5)(e) and (f) of the EIRs. This was because the Council considered the information to be commercially confidential, and believed disclosure would prejudice the interests of the person who provided the information.
5. On 29 January 2018, Mr D wrote to the Commissioner, applying 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 D stated he was dissatisfied with the outcome of the Council's review because he disagreed that the public interest in disclosure outweighed that of commercial confidentiality. As the land in question was public land (i.e. a public park), Mr D believed the public had a greater right to access the information.

## Investigation

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6. The application was accepted as valid. The Commissioner confirmed that Mr D had made a request for information to a Scottish public authority and had asked the authority to review its response to that request before applying to him for a decision.
7. On 27 February 2018, the Council was notified in writing that Mr D had made a valid application. The Council was asked to send the Commissioner the information withheld from Mr D. 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. These focussed on the Council's justification for withholding the information under the exceptions in regulations 10(5)(e) and (f) of the EIRs.

9. The Council informed the investigating officer that it had reconsidered the information originally withheld and found that:
  - Some of this information did not fall within the scope of Mr D's request, as it did not comprise emails between the Council and the University.
  - Some information could now be disclosed. The Council disclosed this information to Mr D on 29 May 2018.
  - It no longer wished to rely on regulation 10(5)(f) for some of the remaining withheld information.
10. On 14 June 2018 and on 1 August 2018, the Council disclosed further information, which it had originally withheld, to Mr D.

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

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

### **Handling in terms of the EIRs**

12. At review stage, the Council changed its position and considered Mr D's request under the EIRs, having concluded that the information requested was environmental information as defined in regulation 2(1) of the EIRs.
13. Where information falls within the scope of this definition, a person has a right to access it (and the public authority has a corresponding obligation to respond) under the EIRs, subject to the various restrictions and exceptions contained in the EIRs.
14. The Council submitted that the information requested by Mr D related to the development of land (specifically the building of a boat shed). The Commissioner accepts this as a reasonable description and, in the circumstances, is satisfied that the information requested by Mr D falls within the definition of environmental information set out in regulation 2(1), in particular paragraphs (a), (c) and (f) of that definition.

### *Section 39(2) of FOISA – Environmental information*

15. 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 this case, the Commissioner accepts that the Council was entitled to apply the exemption to the information withheld under FOISA, given his conclusion that it is properly classified as environmental information.
16. As there is a statutory right of access to environmental information available to Mr D in this case, the Commissioner accepts, in all the circumstances, that the public interest in maintaining this exemption (and responding to the request under the EIRs) outweighs any public interest in disclosing the information under FOISA. Both regimes are intended to promote public access to information and there would appear to be no reason why (in this particular case) disclosure of the information should be more likely under FOISA than under the EIRs.

17. The Commissioner therefore concludes that the Council was correct to apply section 39(2) of FOISA, and consider Mr D's information request under the EIRs.

### **Information held**

18. In order to ascertain whether all relevant information had been identified, the Council was asked to explain the steps it took to establish what information it held and which fell within the terms of Mr D's request. The Council explained that the information had been gathered by the Council officer who was in charge of the project and corresponding discussions during the relevant period. Other Council officers involved in the negotiations were also asked to carry out searches for any information held within their network drives and email accounts.
19. During the investigation, Mr D queried why the information now disclosed contained no emails dated June 2016 or earlier. The Council was asked to comment on this matter.
20. In response, the Council confirmed that, having carried out further enquiries, it held no further information falling within the scope of Mr D's request. It did, however, acknowledge that some information referred to by Mr D (and previously withheld) was in fact publicly accessible.
21. Having considered the relevant submissions, the Commissioner accepts that the Council took adequate, proportionate steps in the circumstances to identify and locate any information it held which was relevant to the request. He accepts that any such information would have been identified using the searches described by the Council. He is therefore satisfied, on the balance of probabilities, that the Council does not (and did not, on receiving the request) hold any further information falling within the scope of Mr D's request.

### *The Council's change of position during the investigation*

22. As explained above, during the investigation, the Council provided submissions to the effect that some information, originally withheld, could now be disclosed. It disclosed this information to Mr D at various stages during the investigation (on 29 May 2018, 14 June 2018 and 1 August 2018).
23. The Council confirmed it was no longer relying on any exception to withhold the information now disclosed. It provided no submissions, however, explaining why this information was correctly withheld at the time it dealt with Mr D's request or requirement for review, so the Commissioner can only conclude that the Council was not entitled to withhold that information at that time. In doing so, it failed to comply with regulation 5(1) of the EIRs.
24. The Commissioner will now consider whether or not the Council was entitled to rely on any exceptions claimed by the Council to withhold the remaining withheld information.

### **Regulation 5(1) of the EIRs – Duty to make environmental information available**

25. 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. This obligation relates to information that is held by the authority when it receives a request.
26. On receipt of a request for environmental information, therefore, the authority must ascertain 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 (regulation 5(2)(b)).
27. Under the EIRs, a public authority may refuse to make environmental information available if one or more of the exceptions in regulation 10 apply, but only if (in all the circumstances) the

public interest in maintaining the exception or exceptions outweighs the public interest in making the information available.

### **Regulation 10(5)(e) of the EIRs**

28. The Council submitted that the information withheld was excepted from disclosure by virtue of regulation 10(5)(e) of the EIRs.
29. Regulation 10(5)(e) provides that a Scottish public authority may refuse to make environmental information available to the extent that its disclosure would, or would be likely to, prejudice substantially the confidentiality of commercial or industrial information where such confidentiality is provided for by law to protect a legitimate economic interest.
30. As with all of the exceptions contained within regulation 10, a Scottish public authority applying this exception must interpret the exception in a restrictive way (regulation 10(2)(a)) and apply a presumption in favour of disclosure (regulation 10(2)(b)). As noted above, even where the exception applies, the information must be disclosed unless, in all the circumstances, the public interest in making the information available is outweighed by that in maintaining the exception (regulation 10(1)(b)).
31. The Aarhus Convention: an Implementation Guide<sup>1</sup> (which offers guidance on the interpretation of the Aarhus Convention, from which the EIRs are derived) notes (page 88) that the first test for considering this exception is whether national law expressly protects the confidentiality of the withheld information. The law must explicitly protect that type of information as commercial or industrial secrets. Secondly, the confidentiality must protect a "legitimate economic interest": this term is not defined in the Convention, but its meaning is considered further below.
32. Having taken this guidance into consideration, the Commissioner's view is that before regulation 10(5)(e) can be engaged, authorities must consider the following matters:
  - Is the information commercial or industrial in nature?
  - Does a legally binding duty of confidence exist in relation to the information?
  - Is the information publicly available?
  - Would disclosure of the information cause, or be likely to cause, substantial harm to a legitimate economic interest?

*Is the information commercial or industrial in nature?*

33. Relying on the arguments set out in its review outcome, the Council submitted that the information was commercial as it related to the University's proposals for the site and ongoing negotiations between the two parties in relation to the lease.
34. Having considered the withheld information, which records specific considerations relating to the lease and heads of terms, the Commissioner accepts that the information is commercial in nature, for the reasons claimed by the Council.

*Does a legally binding duty of confidence exist in relation to the information?*

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<sup>1</sup> [http://www.unece.org/fileadmin/DAM/env/pp/Publications/Aarhus\\_Implementation\\_Guide\\_interactive\\_eng.pdf](http://www.unece.org/fileadmin/DAM/env/pp/Publications/Aarhus_Implementation_Guide_interactive_eng.pdf)

35. In the Commissioner's view, confidentiality "provided for by law" will include confidentiality imposed on any person under the common law of confidence, under a contractual obligation or by statute.
36. As set out its review outcome, the Council maintained that the information under consideration here was exchanged with the University as part of commercial negotiations between the parties, to which an implicit obligation of confidentiality applied. The Council argued that such an expectation of confidentiality is normal practice in a transaction of this nature, as had been accepted by the Commissioner in previous decisions.
37. The Council provided the Commissioner with a copy of an email exchange with the University from January 2018, in which the University had expressed its concern about disclosure of the draft heads of terms before the lease had been formally agreed. The Council submitted that this evidenced the University's position of non-consent to disclosure.
38. The Commissioner has considered the withheld information in the context of the request, with the Council's submissions and supporting documentation. While there is nothing which evidences an explicit obligation of confidentiality, the Commissioner is satisfied, in the circumstances, that the information was exchanged under an implied obligation to maintain confidentiality. He acknowledges that such an expectation is normal practice in transactions of this nature. Accordingly, the Commissioner is satisfied that an implied duty of confidence existed and applied to the withheld information, at the time the Council responded to Mr D's request and his requirement for review.

*Is the information publicly available?*

39. Relying on the arguments in its review outcome, the Council submitted that, while the general intentions and proposals for the site were in the public domain, details of the agreement and corresponding discussions between both parties were not. The Council concluded that the remaining withheld information was not publicly available.
40. The Commissioner acknowledges that, while some general information relating to the proposal is in the public domain, detailed information pertaining to the proposed agreement and related discussions between the parties is not. Therefore, the Commissioner accepts the Council's position that the remaining withheld information is not publicly available.

*Would disclosure of the information cause, or be likely to cause, substantial harm to a legitimate economic interest?*

41. The term "legitimate economic interest" is not defined in the EIRs. In the Commissioner's view, the interest in question should be financial, commercial or otherwise "economic" in nature. The prejudice to that interest must be substantial: in other words, it must be of real and demonstrable significance.
42. The Council believed disclosure of the withheld information would inhibit the parties' ability to conclude the lease, prejudice the project and – in addition – cause substantial harm in terms of other ongoing and future dealings between the two parties. It explained that the University was major partner with the Council on projects such as the Madras College project. It argued that it was essential to maintain a relationship of trust with third parties, so they were not deterred from interacting with the Council to the detriment of the wider public.
43. The Council submitted that the legitimate interests of both parties lay in concluding the lease negotiations. It believed that disclosure of the information would substantially harm those interests by removing the private space needed to negotiate, and would lead to undue public

scrutiny of terms which had not yet been agreed. This, the Council argued, would inhibit the Council's ability to obtain best value in negotiating the terms of the lease.

44. Having considered these submissions, and the information itself, the Commissioner is not persuaded by the Council's arguments that the University has a legitimate economic interest in securing a site for the boathouse, although he accepts that the Council has such an interest in ensuring that the lease is concluded effectively (it is functioning, to all intents and purposes, as a commercial landlord in this regard, while the University is a prospective tenant with no evident commercial character to the activities it intends to conduct there). He also considers the Council's wider claims that disclosure would lead to a breakdown in its relationship with the University, thus putting other joint projects at risk, to be speculative and without substance, bearing in mind the character of the information under consideration and a relationship which appears to be long-standing and secure: to a large extent, it is a relationship derived from a geographical location the University appears unlikely to review.
45. In the case of this particular information, however, the Commissioner recognises that parties negotiating commercial agreements (such as this lease) must be able to do so in private. He accepts that disclosure of the remaining withheld information in this case would hamper the Council's ability to conclude the negotiations on the lease, and to obtain best value in those negotiations. He acknowledges that this would, in turn, cause substantial prejudice to the Council's economic interests.
46. The Commissioner is satisfied, therefore, that the Council was entitled to apply the exception in regulation 10(5)(e) to the information requested.

*The public interest test – regulation 10(5)(e)*

47. Having accepted that the exception in regulation 10(5)(e) applies to the information withheld from Mr D, the Commissioner is required to consider the public interest test in regulation 10(1)(b) of the EIRs. This states that a Scottish public authority may only withhold information to which an exception applies where, in all the circumstances, the public interest in making the information available is outweighed by the public interest in maintaining the exception.
48. The Council confirmed it wished to rely on the public interest arguments set out in its review outcome. It acknowledged there was a public interest in transparency and scrutiny of the decisions taken by the Council. However, the Council considered these factors were outweighed by the public interest in maintaining the general duty of confidentiality and preventing commercial damage to the Council, or to the University, by inhibiting their ability to conclude the lease.
49. In his application to the Commissioner, Mr D submitted that the public interest in disclosure outweighed the Council's claims of business confidentiality. Mr D noted that the land in question was public land, in a public park, and accessed all year round by the public. Consequently, in his view, the public's right to know about what was happening to that land was greater than the Council's right to withhold the information.
50. Mr D referred to contradictory information being "drip-fed" to the area's Community Council. He submitted that disclosure of the information would disclose the Council's honest intentions for use of the park and the requirement for the boatshed, going back to early 2016, and this should be made publicly available prior to the signing of any lease.

*The Commissioner's view*



51. The Commissioner has already concluded that disclosure of this information would be likely to cause substantial harm to a legitimate economic interest, and has also found an implied duty of confidence in relation to the remaining withheld information. As he has recognised in previous cases, there is a strong public interest in maintaining confidentiality where confidentiality is provided for by law.
52. The Commissioner also recognises there is a considerable public interest in transparency and public scrutiny in relation to how public authorities make decisions, particularly those involving the use of public land (particularly land within an area otherwise available for public recreation) and public funds. In this case, this would contribute to the public's understanding of the issue in question, and whether the Council was making informed decisions, taking account of the interests of the community, and obtaining best value in its negotiations with the University. To a reasonable extent, however, this is addressed by the information disclosed by the Council during the investigation: the Council's failure to disclose this earlier is addressed above, and here the Commissioner is only considering the public interest in disclosing what remains withheld.
53. Bearing in mind the substantial harm he has identified, the Commissioner accepts that there is no public interest in disclosing information that would impede parties involved in negotiations from being able to conclude those negotiations in a confidential setting. The Commissioner considers it is in the public interest that the Council is not treated unfairly, simply as a result of being a public body entering into a commercial agreement with another party, where disclosure of the information may have a consequential impact on its commercial interests, or prevent it from obtaining best value in negotiating the terms of the agreement.
54. The Commissioner has considered carefully all the public interest arguments he has received. He must consider the actual circumstances of the case, and whether the Council was correct in its decision, at the time it responded to the request and subsequent requirement for review. That position may change in time, but the issue here is whether the Council responded to this particular request correctly at the relevant time.
55. In all of the circumstances of the case, therefore, the Commissioner finds that the public interest in maintaining the exception outweighed that in making the information available, at the time the Council responded to Mr D's request and requirement for review. He therefore concludes that the Council was entitled to withhold the remaining information under regulation 10(5)(e) of the EIRs.
56. As the Commissioner has determined that the remaining withheld information was correctly withheld under regulation 10(5)(e), he is not required to go on to consider the application of regulation 10(5)(f).

## Decision

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The Commissioner finds that Fife Council (the Council) partially complied with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by Mr D.

The Commissioner finds that the Council correctly withheld some information under regulation 10(5)(e) of the EIRs, and so complied with the EIRs.

However, the Commissioner finds that the Council wrongly withheld other information under regulations 10(5)(e) and (f) of the EIRs.

Given that, during the investigation, the Council disclosed to Mr D all of the information found to have been wrongly withheld, the Commissioner does not require the Council to take any action in respect of this failure, in response to Mr D's application.

## Appeal

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Should either Mr D or Fife 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**

**28 August 2018**

### 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 –

(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.

...

- (5) A Scottish public authority may refuse to make environmental information available to the extent that its disclosure would, or would be likely to, prejudice substantially-

...

- (e) the confidentiality of commercial or industrial information where such confidentiality is provided for by law to protect a legitimate economic interest;
- (f) the interests of the person who provided the information where that person-
  - (i) was not under, and could not have been put under, any legal obligation to supply the information;
  - (ii) did not supply it in circumstances such that it could, apart from these Regulations, be made available; and
  - (iii) has not consented to its disclosure; or

...

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