

# Decision Notice 157/2021

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## Road humps in Hamilton

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**Applicant: The Applicant**

**Public authority: South Lanarkshire Council**

**Case Ref: 202100136**



Scottish Information  
Commissioner

## Summary

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The Council was asked about the installation and maintenance of road humps in Hamilton, with details of any claims or complaints made about them. The Council disclosed some information and explained that it held no recorded information which would fulfil parts of the request. The Council also argued that parts (a) and (b) of the request were not valid requests for information.

Following an investigation, the Commissioner found that parts (a) and (b) of the Applicant's request were valid requests for information. He also found that the Council had been entitled to inform the Applicant that it did not hold information which would fulfil certain parts of his request.

## 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 available environmental information on request); 10(1) 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 2 August 2020, the Applicant made a request for information to South Lanarkshire Council (the Council). The information requested was:
  - a) What is the scientific or evidence base for installing road humps as a traffic calming measure, and what is its date?
  - b) Has that base been authoritatively challenged, and if so, by whom?
  - c) How many streets in Hamilton have road humps?
  - d) What is the total number of road humps in Hamilton?
  - e) What is the initial cost of installing a road hump?
  - f) What time is allocated to the installation of a road hump?
  - g) What is the projected annual cost of maintaining each road hump?
  - h) What is the actual annualised cost of maintenance of these humps?
  - i) What was the cause of the disintegration of the road humps in Auchingramont Road, Hamilton?
  - j) How many claims for damage to vehicles by road humps in Hamilton are submitted annually?
  - k) How many claims for damage to heritable property by road humps in Hamilton are submitted annually?
  - l) How many complaints about road humps in Hamilton are submitted annually?

2. The Council responded on 19 October 2020. It apologised for the delay in providing a response and explained it had processed and responded to the request in line with the EIRs. Information was disclosed to the Applicant in response to part (a) of his request. The Council informed the Applicant that no claims were recorded by it during the last three financial years which would fulfil part (k) of his request. The Council notified the Applicant that it was relying on the exception in regulation 10(4)(a) of the EIRs as it held no recorded information which would fulfil the remaining parts of his request (other than part (j), for which it was relying on the exception in regulation 11(2) of the EIRs).
3. On 11 November 2020, the Applicant wrote to the Council, requesting a review of its decision on the basis that he considered the Council's response to be obfuscatory, evasive and disingenuous. The Applicant queried the Council's decision to install a further seven road humps on one street without having knowledge of their efficacy, the proven consequences of those already installed in other locations, their cost of installation, longevity and maintenance, and the number of complaints generated by them. The Applicant also expressed dissatisfaction with the Council's refusal to disclose information in response to part (j) of his request on the basis of the General Data Protection Regulation.
4. The Council notified the Applicant of the outcome of its review on 11 December 2020. The Council explained that it did not consider parts (a) and (b) of the Applicant's request to be valid information requests and so did not cover these in its review.
5. In its review outcome, the Council upheld its decision (with reasons) to rely on the exception in regulation 10(4)(a) of the EIRs, as it did not hold any recorded information which would fulfil parts (c) to (i) (inclusive) and (l) of the Applicant's request. The Council explained that it was no longer relying on the exception in regulation 11(2) of the EIRs for information which would fulfil part (j) and information was disclosed to the Applicant for this part.
6. On 29 January 2021, the Applicant 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. The Applicant stated he was dissatisfied with the outcome of the Council's review because he believed the Council did hold information which would fulfil his request. He disagreed with the Council's conclusion that parts (a) and (b) were not valid requests for information.

## Investigation

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7. 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.
8. On 17 February 2021, the Council was notified in writing that the Applicant had made a valid application. 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 to answer specific questions. These related to the reasons why the Council did not consider parts (a) and (b) of the Applicant's request to be valid requests for information, and sought details of the searches carried out by the Council to establish that it held no recorded information which would fulfil parts (c) to (i) (inclusive) and (l) of the request.

## Commissioner's analysis and findings

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10. In coming to a decision on this matter, the Commissioner considered all 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.

### Handling in terms of the EIRs

11. The Council processed and responded to the Applicant's request and requirement for review in accordance with the EIRs.
12. Where information falls within the scope of the definition of "environmental information" in regulation 2(1) of the EIRs, a person has a right to access it (and the public authority a corresponding obligation to respond) under the EIRs, subject to various restrictions and exceptions contained in the EIRs.
13. The Applicant has not challenged the Council's decision to deal with the information as environmental information. The Commissioner is satisfied that the information does comprise environmental information (see in particular paragraphs (a), (b) and (c) of the definition in regulation 2(1) of the EIRs) and will consider the handling of the request in what follows solely in terms of the EIRs.

### Parts (a) and (b) – validity

14. As mentioned above, in response to the Applicant's requirement for review, the Council argued that parts (a) and (b) were not valid requests for information.
15. In his application to the Commissioner, the Applicant commented that, since the Council had installed numerous road humps over several years, it would seem only logical to infer that they had some sensible basis for doing so as opposed to merely acting on impulse.
16. Unlike under FOISA, there is no prescribed format that an information request should take for it to be deemed to be valid under the EIRs. Therefore, a request in any form (verbal, written or recorded) will be a valid request under the EIRs.
17. The Commissioner makes it clear, in his guidance document "Handling requests for environmental information (bodies subject to FOISA)"<sup>1</sup> that "the EIRs apply to environmental information held by a Scottish public authority". A Scottish public authority "holds" environmental information for the purposes of the EIRs if the information is:
  - (i) in its possession and has been produced or received by that authority; or
  - (ii) held by another person on that authority's behalf (e.g. by consultants, private companies or in archives)."
18. In justification of its position that part (a) of the Applicant's request was not a valid information request, the Council stated that it considered that to interpret it as being a request to ascertain the Council's decision-making processes in relation to when it installs speed bumps was to give it a meaning that could not be supported in that way.
19. The Council contended that the Applicant was asking about the basis for installing speed bumps in general, not in practice. The Council considered the Applicant to be asking about research into the efficacy of speed bumps as a traffic-calming measure, upon which the

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<sup>1</sup> [Handling requests under the EIRs \(itspublicknowledge.info\)](https://www.itspublicknowledge.info)

Council would reach its decision about where road bumps should be placed. The Council explained that it would not be the author of such research, which would have been undertaken by others and was likely to be available online with minor searching. The Council believed it was reasonable to have concluded that the Applicant was seeking this research and, therefore, was not looking for information held by it. As a consequence, the Council concluded that part (a) of the request referred to third party research rather than information held by it so the Applicant was seeking advice upon where to locate this research.

20. With regard to part (b) of the Applicant's request, the Council submitted that it followed that this part related to any challenges made to the research referred to above, and again it considered that this was not a request for information but for advice on the topic of speed bumps in general.
21. Having considered the submissions from the Applicant and the Council, along with the terms of the request, the Commissioner is unable to accept the Council's position that parts (a) and (b) of the Applicant's request are not valid requests for information.
22. The Applicant is clearly of the view that he is seeking recorded information in parts (a) and (b). The Commissioner is of the view that it would be reasonable for the Applicant to believe the Council would hold information of the nature covered by parts (a) and (b), which it had referred to/consulted as part of its decision-making as to whether the use of speed bumps/road humps is appropriate and likely to be effective in achieving the desired result.
23. Bearing in mind the guidance referred to above, there appears to be no basis under the EIRs for limiting the definition of environmental information to information the public authority has produced itself. It can also be information the authority has obtained from elsewhere to assist it in performing its functions. It may be of general application to the subject matter, rather than specific to the circumstances of the request. It may be easily accessible to the applicant elsewhere – in which case, the authority may be entitled to refuse to provide it – but it does not follow, by definition, that the public authority does not hold it.
24. Therefore, for the reasons given above, the Commissioner finds that the Applicant's requests in parts (a) and (b) were valid requests for recorded information which might well be held by the Council for the purposes of its decision-making processes around the use (or not) of road humps/speed bumps. The Commissioner therefore requires the Council to provide a response to these parts of the Applicant's request.

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

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 an 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.
26. 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.

*Regulation 10(4)(a) of the EIRs*

27. As mentioned previously, the Council is relying on the exception in regulation 10(4)(a) of the EIRs for information which would fulfil parts (c) to (i) (inclusive) and (l) of the Applicant's request.
28. The Commissioner has taken account of the submissions provided by the Applicant in which he explains why he believes the Council should hold information which would fulfil parts (c) to (i) (inclusive) and (l) of his request. While the Applicant clearly has genuine reasons for believing the Council should hold information of the nature covered by these parts of his request, the Commissioner can only consider whether or not the Council identified and located the information it actually held.
29. 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 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 as to what information the authority should hold, ultimately the Commissioner's role (as indicated above) is to determine what relevant information is actually held by the public authority (or was, at the time it received the request).
30. The Council informed the Commissioner of the nature of the information it held in relation to the subject matter of the request, together with how this was categorised and recorded on the IT systems used by the service areas responsible for work of the nature covered by the request.
31. Work concerning speed humps is not, the Council submitted, recorded specifically on its systems. Any defect or enquiry relating to a speed hump would, the Council explained, be recorded under the activity code of carriageway maintenance, under which there are 41 defect types to choose from. Depending on what defect existed on the speed hump, then an appropriate defect type would be selected. The Council explained that a speed hump is part of the carriageway.
32. As part of its submission to the Commissioner, the Council provided the list of 41 defects that can be selected from.
33. The Council also explained why it did not hold any information regarding the cost and time to install a speed hump, or the projected maintenance cost and annual maintenance cost for any specific speed hump. This was, the Council submitted, because there were many variable factors impacting on these exercises and costs and so it held no generic information of the type covered by these parts of the request. Furthermore, as mentioned previously, any repair to a speed hump would be categorised under carriageway maintenance and sub-categorised under the 41 defect types referred to above, rather than any categorisation more specific to speed humps.
34. The Council provided the Commissioner with an example of the information it did hold regarding costs associated with carriageway maintenance, with an example of the nature or the information it held relating to carriageway complaints.
35. The Council also explained that it held no record listing all streets in Hamilton with road humps and the total number of road humps in Hamilton was, therefore, not known. The Council stated that no searches were carried out for this information, as it was known that no

record of this nature existed. The Council noted that officers involved in responding to the request would be expected to know if the information was held, and if such a record existed it would be held in the electronic systems used by the relevant service areas.

36. The Council confirmed that it was under no legal duty to hold this information, and there was no internal or external guidance creating an expectation that it be held.
37. The Commissioner acknowledges that the Council has not carried out specific searches for all parts of the Applicant's request. However, having fully considered all of the submissions from the Council, he is satisfied, from the explanations and evidence provided, that the Council does not hold recorded information which would fulfil parts (c) to (i) (inclusive) and (l) of the Applicant's request. The systems employed are not designed to record information of this particular type, categorised as the Applicant expects, and there would appear to be no expectation that it be recorded in the form and level of detail sought by the Applicant. Given what is recorded, the Commissioner accepts that the Council could not extract what the Applicant is looking for.
38. In all the circumstances, therefore, the Commissioner is satisfied, on the balance of probabilities, that the Council does not (and did not, at the time the request was received from the Applicant) hold recorded information which would fulfil parts (c) to (i) (inclusive) and (l) of the Applicant's request. The Council was entitled to rely on the exception in regulation 10(4)(a) of the EIRs, on the basis that it did not hold the information requested. This exception is subject to the public interest test in regulation 10(1)(b) of the EIRs, but the Commissioner can identify no conceivable public interest in requiring the disclosure of information which the public authority does not hold: on balance, therefore, the Commissioner is satisfied that the public interest in maintaining the exception should prevail.

## Decision

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

The Commissioner finds that, by relying on the exception in regulation 10(4)(a) of the EIRs for information covered by parts (c) to (i) (inclusive) and (l) of the Applicant's information request, the Council complied with the EIRs.

However, by deeming parts (a) and (b) of the Applicant's request to be invalid requests for information, the Commissioner finds that the Council failed to comply with section 5(1) of the EIRs.

The Commissioner therefore requires the Council to provide a response to parts (a) and (b) of the Applicant's request, by **22 November 2021**.

## **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.

## **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**

**7 October 2021**



## Appendix 1: Relevant statutory provisions

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### 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.

...

## **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.

...

- (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;

...

**Scottish Information Commissioner**

Kinburn Castle  
Doubledykes Road  
St Andrews, Fife  
KY16 9DS

t 01334 464610

f 01334 464611

[enquiries@itspublicknowledge.info](mailto:enquiries@itspublicknowledge.info)

**[www.itspublicknowledge.info](http://www.itspublicknowledge.info)**