

# Decision Notice



Decision 036/2011 Mr Alistair Tuach and West Dunbartonshire Council

Communications regarding a specific planning application

Reference No: 201001296

Decision Date: 2 March 2011

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**Kevin Dunion**

Scottish Information Commissioner

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## Summary

Mr Tuach requested from West Dunbartonshire Council (the Council) correspondence relating to a specific planning application. The Council responded by relying on section 25(1) of the Freedom of Information (Scotland) Act 2002 (FOISA), indicating that the requested information was otherwise accessible. Following a review, in which the Council responded to Mr Tuach's request in line with the Environmental Information (Scotland) Regulations 2004 (the EIRs), the Council disclosed some information to Mr Tuach and indicated that it did not hold some of the information he had requested. Mr Tuach remained dissatisfied and applied to the Commissioner for a decision.

During the investigation, the Council advised that it was of the view that all of the information covered by Mr Tuach's request was environmental information, and would therefore be covered by the EIRs. The Council therefore applied the exemption in section 39(2) of FOISA to this information.

Following an investigation, the Commissioner found that the Council had partially failed to deal with Mr Tuach's request for information in accordance with the EIRs. The Commissioner was satisfied that the Council was entitled to rely on regulation 10(4)(a) for information relevant to point ii) of Mr Tuach's information request, as no relevant information was held. However, the Commissioner concluded that the Council incorrectly advised Mr Tuach that it held no communications between Councillors with respect to the planning application, and so regulation 10(4)(a) of the EIRs was not applicable in relation to that information.

The Commissioner found that the Council failed to identify and supply all relevant (and non-exempt) information that it held in response to parts i) and iii) of Mr Tuach's information request, and so breached regulation 5(1) of the EIRs.

However, as the Commissioner was satisfied that all further relevant information was located and provided to Mr Tuach during the investigation, he did not require the Council to take any action.

## Relevant statutory provisions and other sources

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions) and 39(2) (Health, safety and the environment)

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (Interpretation) (definitions (a) to (c) of "environmental information"); 5(1) and (2)(b) (Duty to make environmental information available on request) and 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 the Appendix to this decision. The Appendix forms part of this decision.

## Background

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1. On 29 April 2010, Mr Tuach wrote to the Council, requesting information relating to planning application DC09/160/FUL, which was made by Dunbritton Housing Association, and sought permission to build 30 houses on the site at Leven Street, Alexandria. Mr Tuach noted that this application had been refused at the November 2009 meeting of the Council's Planning Committee.
2. Mr Tuach requested:
  - i) Any and all correspondence, emails, letters, notes between Councillors and any Council staff involved in this matter, both in the Planning Department and any other departments of the Council.
  - ii) Copies of any meetings between a named Councillor with officers and the dates of any meetings a named Councillor, or any other Councillors had with officers where this matter was raised, including the officers' recollections.
  - iii) Copies of any and all emails, letters, notes that Councillors sent to each other or to anyone else on the Leven Street application, and copies of agendas and minutes of the SNP Group where this matter was discussed.
  - iv) A record of any assistance given by Council staff to a named Councillor in preparation of a motion put by that Councillor to the November Planning Committee, and a copy of the motion paper presented at the meeting.
3. The Council responded to Mr Tuach on 28 May 2010. The Council provided a refusal notice, explaining that as some of the requested information was otherwise accessible to Mr Tuach it was exempt from disclosure in terms of section 25(1) of FOISA.
4. The Council indicated that all information relating to the planning application was available through the on-line planning register on the Council's website. It also indicated that the minutes of Council committees were available online and it provided Mr Tuach with a link to enable him to access this information. The Council indicated that notes that Councillors sent to each other was not information covered by FOISA.



5. On 29 May 2010, Mr Tuach wrote to the Council requesting a review of its decision. In particular, Mr Tuach indicated that he believed that the information he requested under each of points i) – iv) above was information covered by FOISA. Mr Tuach rejected the view of the Council that certain of the information he had requested was otherwise accessible to him and stated that he had already accessed all of the relevant information available on the Council's website.
6. The Council notified Mr Tuach of the outcome of its review on 28 June 2010. The Council explained that it now considered that the EIRs would also apply to his request, and indicated that all of the information sought by Mr Tuach's request would be covered by the EIRs.
7. The Council disclosed correspondence covered by Mr Tuach's information request, in pursuit of its obligations under the EIRs. This comprised a series of email exchanges between a Councillor and the planning officer dealing with the application DC09/160/FUL, and so it fell within the scope of parts i) and iii) of Mr Tuach's information request.
8. In respect of part iii), the Council noted that this overlapped with part i), but referred also to communications between Councillors. The Council advised Mr Tuach that it did not hold any such correspondence.
9. In respect of the information covered by point ii), the Council informed Mr Tuach it held no records relating to meetings between the named Councillor and Planning Officers. (At one point in its letter the Council indicated that there were such meetings, but it was confirmed during the investigation that this was a typographical error, and the Council had intended to indicate that it believed there were **no** such meetings.)
10. The Council also advised that no pre-meeting took place before the Planning Committee and there was no discussion regarding the named Councillor's motion outwith the Planning Committee. The Council provided Mr Tuach with a link to enable him to access the motion presented to the Council, as requested in part iv).
11. On 12 July 2010, Mr Tuach wrote to the Commissioner, stating that he was dissatisfied with the outcome of the Council's review and applying 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 certain specified modifications.
12. The application was validated by establishing that Mr Tuach had made a request for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its response to that request. The case was then allocated to an investigating officer.



## Investigation

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13. In his application, Mr Tuach indicated that he did not consider that the Council had identified and provided all relevant information to him. He indicated that he had been provided with copies of certain emails by a Councillor which suggested that the Council had failed to identify a number of items relevant to his request.
14. Mr Tuach later provided copies of these emails, which included communications between a Councillor and Council staff, and between Councillors (in some cases copied to Council staff). Some of these emails post-dated the determination of the planning application referred to in Mr Tuach's information request, or referred to other matters. However, a number of these emails, if held, would all fall within part iii) of Mr Tuach's request, and in some cases also within the scope of part i).
15. Mr Tuach also challenged the Council's claim that there had been no meetings between the named Councillor and planning officials. He indicated that he understood that relevant meetings had taken place.
16. The investigating officer contacted the Council on 12 August 2010, giving it an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking it to respond to specific questions.
17. In particular, having noted that the Council had concluded that the information sought by Mr Tuach was environmental information (and so properly dealt with under the EIRs), the investigating officer asked whether the Council wished to apply the exemption in section 39(2) of FOISA. The Council was also asked to justify its reliance on any provisions of FOISA/the EIRs it considered applicable to the information requested.
18. The Council was also asked to explain what searches were undertaken to locate information relevant to Mr Tuach's request, and to indicate whether further searches had been undertaken in the light of the points raised in Mr Tuach's application to the Commissioner.
19. The Council responded on 2 September 2010. The Council advised that it considered that all of the information falling within the ambit of Mr Tuach's request would be environmental information and so would be covered by the EIRs. It stated that it would be sensible to apply the exemption in section 39(2) of FOISA. The Council did add, however, that if, on review, it would be considered that FOISA would provide Mr Tuach with additional information or further remedy, then the Council would be happy to meet the greater obligation.
20. At that stage, the Council indicated that it considered the exception in regulation 10(4)(a) of the EIRs (which applies where the requested information is not held) to apply to the information sought by part ii) of Mr Tuach's information request, and the communications between Councillors sought by part iii).



21. The Council provided details of the searches undertaken to establish what information was held which fell within the scope of Mr Tuach's request. It accepted that the information supplied by Mr Tuach suggested that it had failed to identify all relevant information, and it undertook to investigate why this information had not been identified, and to carry out further searches.
22. The further searches carried out by the Council during the investigation resulted in additional relevant information falling within the scope of points i) and iii) of Mr Tuach's request being identified and disclosed to him, subject to the redaction of personal data.
23. Mr Tuach has confirmed to the Commissioner that he accepts the redaction of personal data and therefore this will not be considered further in this decision. However, Mr Tuach confirmed that he was still not satisfied that the Council had provided him with all information falling within the scope of his request.
24. As Mr Tuach has a copy of the motion covered by part iv) of his request, and the reasons for dissatisfaction that he raised in his application for decision focussed only on parts i) – iii) of his request, this decision will focus only on the Council's handling of those parts.

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

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25. In coming to a decision on this matter, the Commissioner has considered all of the submissions made to him by both Mr Tuach and the Council and is satisfied that no matter of relevance has been overlooked.

### **FOISA or EIRs?**

26. The Commissioner set out his thinking on the relationship between FOISA and the EIRs in some detail in *Decision 218/2007 Professor A D Hawkins and Transport Scotland* and need not repeat it in full here. However, the central point set out therein is that when a person requests information which would fall within the definition of environmental information set out in regulation 2(1) of the EIRs, that request should be considered and responded to in line with the EIRs.
27. In this case, the Council initially handled Mr Tuach's request for information in terms of FOISA. Following its review, however, the Council advised Mr Tuach that having considered the subject matter of the request, it believed that the EIRs would also apply to the request. During the investigation, the Council indicated that it considered the exemption in section 39(2) of FOISA to be applicable to the information, although the Council indicated its willingness to continue to deal with the request in terms of FOISA if this would be beneficial to Mr Tuach.





28. Having considered the subject of the information request and the content of the information that has been disclosed to Mr Tuach, the Commissioner has concluded that the information requested by Mr Tuach would meet the definition of environmental information within paragraph (c) of regulation 2(1) of the EIRs, being information on measures (the consideration of a planning application) affecting or likely to affect the elements of the environment referred to in paragraph (a) of regulation 2(1) or the factors affecting or likely to affect the elements of the environment referred to in paragraph (b).
29. The exemption in section 39(2) of FOISA provides that environmental information as defined by regulation 2(1) of the EIRs is exempt from disclosure under FOISA, thereby allowing such information to be considered solely in terms of the EIRs. This exemption is subject to the public interest test in section 2(1)(b) of FOISA. In this case the Commissioner accepts that the Council was entitled to apply the exemption to the withheld information, given his conclusion that is properly considered to be environmental information.
30. As there is a separate statutory right of access to environmental information available to the applicant in this case, the Commissioner also accepts that the public interest in maintaining this exemption and dealing with the request in line with the requirements of the EIRs outweighs any public interest in disclosure of the information under FOISA. The Commissioner has consequently proceeded to consider this case in what follows solely in terms of the EIRs.

#### **Parts i) and iii) of the request**

31. These parts of Mr Tuach's information request overlapped to a significant extent, seeking communications between Councillors and Council staff (part i)), other councillors (part iii)) or any other person (part iii)) on the specified planning application.
32. The Council's initial response to Mr Tuach suggested that all relevant information was either available online, or was not subject to FOISA. Having reconsidered the request at review, the Council supplied some additional information to Mr Tuach which fell within the scope of both of parts i) and iii), but it indicated that no relevant communications just between Councillors were held. During the investigation, it indicated that it therefore considered the exception in regulation 10(4)(a) to apply to the part of part iii) seeking communications between Councillors.
33. Regulation 10(4)(a) of the EIRs states that a Scottish public authority may refuse to make environmental information available to the extent that it does not hold that information when the applicant's request is received. In the EIRs, this exception is subject to the public interest test contained in regulation 10(1)(b).
34. In the first instance the key issue to be addressed in relation to these parts of Mr Tuach's information request is whether the Council had, by the time of its review, identified all relevant information and supplied it to Mr Tuach. In its submissions (made in response to questions from the investigating officer at various stages in the investigation), the Council provided details of the searches that were undertaken when reviewing its handling of Mr Tuach's information request.



35. The Council provided evidence of the communications with staff within the Planning section and Members Services to establish during the Council's review whether any relevant information was held which would address Mr Tuach's requests. With respect to its searches for communications falling within the scope of parts i) and iii) of the request, the Council confirmed that Planning staff involved in the relevant planning application and Members Services staff were asked to confirm whether there had been any relevant correspondence.
36. The Council's Records Manager, the manager for Legal Services and the Freedom of Information Representative from the Department of Housing, Economic and Environmental Services were also involved in carrying out searches for relevant information. Correspondence held in both paper and electronic records was checked as part of these searches.
37. The Council also carried out a search of its email system using an archive and search tool which enables searches to be carried out of all email messages sent to or from email addresses which include @west-dunbarton.gov.uk. The Council explained that this includes all email messages from the current year plus three years, including deleted emails. The Council provided details to the Commissioner of the parameters used in these searches.
38. The Council accepted, however, that having failed to identify the email exchanges provided by Mr Tuach, these searches were flawed. The Council undertook further searches during the investigation and widened the parameters of its search to include a wider range of dates and the search term "Dunbritton".
39. A number of emails falling within the terms of Mr Tuach's information request were identified as a result of these additional searches, and were disclosed to Mr Tuach during the investigation, subject to the redaction of personal data. The communications disclosed at this point included communications between Councillors and Council staff, which would fall within the scope of parts i) and iii) of Mr Tuach's request as set out above. They also included communications between Councillors, and between Councillors and other individuals, which would fall within the scope of just part iii).
40. After receiving this additional information, Mr Tuach indicated that he remained dissatisfied and he questioned whether the Council had identified all relevant communications.
41. Having considered in detail the steps taken by the Council to identify relevant information, the Commissioner is satisfied, on the balance of probabilities, that the Council's searches had, by the end of the investigation, identified all relevant information falling within the scope of points i) and iii) of Mr Tuach's request. He is also satisfied that all relevant information has now been disclosed to Mr Tuach (subject to the redaction of personal data, which Mr Tuach has accepted).
42. However, it is clear from the above that when first responding to Mr Tuach's information request, and then reviewing its handling of that request, the Council failed to identify all information that it held and which fell within the scope of parts i) and iii) of that request.





43. Since the information identified during the investigation included communications between Councillors, falling within the scope of part iii) of Mr Tuach's information request, the Commissioner has concluded that the Council incorrectly informed him that no such information was held, and that regulation 10(4)(a) of the EIRs was not applicable to that information.
44. Regulation 5(1) of the EIRs provides that a Scottish public authority that holds environmental information shall make it available when requested to do so by any applicant. This right is subject to certain exceptions and restrictions set out in regulations 6 – 12.
45. By failing to identify and provide all of the information it held at the time of Mr Tuach's request or review, which would address points i) and iii) of Mr Tuach's information request, the Commissioner finds that the Council breached regulation 5(1) of the EIRs.
46. The Commissioner is satisfied that the Council took steps to rectify this breach during the investigation, and so he does not require it to take any further action in relation to this breach.

#### **Part ii) of the request**

47. At the time of its review of Mr Tuach's information request, the Council maintained that no information was held which would fall within the scope of part ii) of Mr Tuach's information request. This sought information relating to any meetings between a named Councillor and officers and the dates of any meetings that Councillor or any other Councillors had with officers where the planning application was raised.
48. As noted above, regulation 10(4)(a) states that a Scottish public authority may refuse to make environmental information available to the extent that it does not hold that information when the applicant's request is received.
49. The Council did not refer explicitly to the exception in regulation 10(4)(a) when notifying Mr Tuach of the outcome of its review, but it indicated during the investigation that it was applying the exception in regulation 10(4)(a) to this information.
50. Within its submissions to the Commissioner, the Council explained that it had consulted with Planning staff to establish whether any information was held which would fall within the scope of this part of Mr Tuach's information request. The Council stated that its professional staff had indicated that no such meetings had taken place, and it noted that its policy is to take at face value the word of an officer on such definitive matters where there is nothing to indicate the contrary.
51. The Commissioner recognises that the knowledge of public authority staff will be a valuable source of information about the nature and extent of information that is held. However, it is also advisable to undertake searches of potential sources of information to ensure that the recollections of staff are well founded. This point is illustrated clearly in this case where the initial responses provided by the Planning staff when asked to identify communications falling within the terms of parts i) and iii) of Mr Tuach's request failed to consider all relevant information.



52. The searches undertaken by the Council, as described above, however, were thorough and would have allowed identification of information relating to meetings that would be relevant to Mr Tuach's information request. None of the communications identified by the Council either referred to meetings of the type raised by Mr Tuach or suggested that such meetings had taken place.
53. Having considered all of the submissions received from the Council, the Commissioner has found that it carried out appropriate searches to determine if it held any information relevant to point ii of Mr Tuach's request, and concludes, on the balance of probabilities, that it correctly advised Mr Tuach that no relevant information was (and indeed is) held by the Council .
54. The Commissioner therefore agrees with the Council that regulation 10(4)(a) of the EIRs is applicable to this information.
55. The exception set out in regulation 10(4)(a) is subject to the public interest test in regulation 10(1)(b) of the EIRs. Therefore, a public authority may only withhold information to which this 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.
56. In this case, the Commissioner is satisfied that the information in question was not held by the Council at the relevant time. Consequently, he does not consider there to be any conceivable public interest in requiring that the information be made available.
57. The Commissioner is therefore satisfied that the Council was entitled to apply the exception in regulation 10(4)(a), and it acted in accordance with the EIRs when it advised Mr Tuach that it held no information falling within the scope of the second part of his request.

#### **Other matters of dissatisfaction**

58. In his application, Mr Tuach has expressed dissatisfaction that a member of Council staff who was involved in the matter of the planning application concerned responded to his request for information. Mr Tuach was concerned that a particular member of staff was asked to investigate a process that they had been involved in.
59. The Council has commented on Mr Tuach's dissatisfaction and has indicated that it knows of no reason why an officer involved in any aspect of a planning application, or indeed any other matter, should not be involved in responding to a Freedom of Information or EIR enquiry at the first stage. The Council considers that it seems only sensible and sound for officers with the best knowledge of the subject matter to respond to initial queries.
60. The Commissioner concurs with this view of the Council. The Commissioner considers it to be good practice for an authority covered by FOISA and the EIRs to involve staff with specialist knowledge of the subject matter of the request when seeking to determine whether relevant information is held and how best to respond to a request. The Commissioner therefore considers the action taken by the Council here to be appropriate.



## DECISION

The Commissioner finds that West Dunbartonshire Council (the Council) partially failed to comply with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by Mr Tuach.

The Commissioner finds that by indicating that it held no information which fell within the scope of part ii) of Mr Tuach's information request, the Council complied with the EIRs.

However, the Commissioner found that the Council was wrong to advise Mr Tuach that it held no relevant communications between Councillors as sought within part iii) of his request, and regulation 10(4)(a) of the EIRs was not applicable to that information.

The Commissioner has found that the Council failed to identify and supply all relevant (and non-exempt) information in response to parts i) and iii) of Mr Tuach's information request. By failing to provide the additional information that was identified and supplied to Mr Tuach during the investigation, the Council failed to comply with regulation 5(1) of the EIRs.

Given that he is satisfied that all relevant information has now been located and provided to Mr Tuach, the Commissioner does not require the Council to take any action in response to this failure.

## Appeal

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Should either Mr Tuach or the Council wish to appeal against this decision, there is an 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 notice.

**Margaret Keyse**  
**Head of Enforcement**  
**2 March 2011**



## Appendix

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### Relevant statutory provisions

#### 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;
- (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.



- (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; ...