

# Decision Notice

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**Decision 276/2016: Mr Dave Sutton and the City of Edinburgh Council**

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## **Housing scheme adoptions**

Reference No: 201601241

Decision Date: 19 December 2016



Scottish Information  
Commissioner

## Summary

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The Council was asked for information about the adoption of roads in housing schemes. The Council responded by informing the applicant that it considered the request to be manifestly unreasonable due to the burden it created for the Council, explaining why when it responded to the review request.

The Commissioner accepted this and that the Council was entitled to refuse to make the information available.

## Relevant statutory provisions

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The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (definitions (a), (c) and (f) of "environmental information"); 5(1) and (2)(b) (Duty to make available environmental information on request); 9(1) and (3) (Duty to provide advice and assistance); 10(1), (2) and (4)(b) (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 8 March 2016, Mr Sutton made a request for information to the City of Edinburgh Council (the Council). He asked (amongst other requests not the subject of this decision) for the following information:
  - (i) Please list a) the "occupied & virtually completed" but non-adopted schemes by known name (e.g. "The Hawthorne's and if possible a postcode) and indicate b) the developer (if known) and c) approximately the number of houses built under each scheme (e.g. 90).
  - (ii) For each scheme please indicate (where known) the reason for non-adoption:- (e.g. A: Road Surface or Kerbing; B: Street Lighting; C: Drainage or Sewers; D: Open Space incomplete; E: Other works).
2. The Council responded on 7 April 2016. The Council considered these parts of the request were manifestly unreasonable in line with regulation 10(4)(b) of the EIRs. The Council stated that complying with the request would cause a disproportionate burden in terms of workload, as it would take over 78 hours to provide the requested information.
3. On 7 April 2016, Mr Sutton emailed the Council requesting a review of its decision. He was dissatisfied with the Council's response because other authorities had disclosed the same kind of information. He complained that the Council was not actively disseminating information in accordance with the EIRs, and that it should be able to substantiate the figures specified in its City Housing Strategy about the building of affordable homes.
4. The Council notified Mr Sutton of the outcome of its review on 9 May 2016. The Council answered the questions raised by Mr Sutton in his request for review. The Council also explained in more detail why it would take 78 hours to complete the work required to respond

in full to his request. It confirmed that the cost of this work would be £699.66, and provided advice on how to frame the request so that it would not incur such high costs.

5. On 8 July 2016, Mr Sutton applied to the Commissioner for a decision in terms of section 47(1) of FOISA. By virtue of regulation 17 of the EIRs, Part 4 of FOISA applies to the enforcement of the EIRs as it applies to the enforcement of FOISA, subject to specified modifications. Mr Sutton did not consider that his request was manifestly unreasonable.

## **Investigation**

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6. The application was accepted as valid. The Commissioner confirmed that Mr Sutton made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to her for a decision.
7. On 22 July 2016, the Council was notified in writing that Mr Sutton 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. On 17 August 2016, the Council was invited to comment on this application and answer specific questions, including justifying its reliance on any provisions of the EIRs it considered applicable to the information requested.
9. The Council provided submissions to the investigating officer. Clarification of some points was sought and obtained during the investigation. The Council was provided with copies of information disclosed by other authorities in response to the same request from Mr Sutton and was asked if it could provide similar information. The Council reiterated its previous submission.
10. Mr Sutton was invited to say why the public interest favoured disclosure of the requested information, and gave his reasons.

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

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

### **Application of the EIRs**

12. The Commissioner is satisfied that the information covered by this request is environmental information, as defined in regulation 2(1) of the EIRs (see paragraphs (a), (c) and (f) of the definition of "environmental information"). Mr Sutton asked for the reasons for non-adoption, under headings (e.g. Road Surface or Kerbing; Street Lighting; Drainage or Sewers) which relate to the state of the land, or to the state of built structures inasmuch as they are or may be affected by the state of the elements of the environment.
13. Mr Sutton has not disputed the Council's decision to handle the request under the EIRs and so the Commissioner will consider the information solely in terms of the EIRs in what follows.

### **Was the request manifestly unreasonable?**

14. Under the exception in regulation 10(4)(b) of the EIRs, a Scottish public authority may refuse to make environmental information available to the extent that the request for information is manifestly unreasonable. In considering whether the exception applies, the authority must

interpret it in a restrictive way and apply a presumption in favour of disclosure. Even if it finds that the request is manifestly unreasonable, it is still required to make the information available unless, in all the circumstances, the public interest in doing so is outweighed by that in maintaining the exception.

15. The Commissioner's general approach is that the following factors are relevant when considering whether a request is vexatious or manifestly unreasonable. These are that the request:
  - (i) would impose a significant burden on the public body
  - (ii) does not have a serious purpose or value
  - (iii) is designed to cause disruption or annoyance to the public authority
  - (iv) has the effect of harassing the public authority
  - (v) would otherwise, in the opinion of a reasonable person, be considered to be manifestly unreasonable or disproportionate.
16. This is not an exhaustive list. Depending on the circumstances, other factors may be relevant, provided the impact on the authority can be supported by evidence. The Commissioner recognises that each case must be considered on its merits, taking all the circumstances into account.

#### *The Council's submissions*

17. As part of the investigation the Council was asked to explain what legislation it must comply with in relation to the adoption of housing schemes. The Council explained that it does not adopt housing schemes, as such, but it does adopt roads. It is required to comply with the Roads (Scotland) Act 1984<sup>1</sup>; the Security for Private Road Works (Scotland) Regulations 1985<sup>2</sup>; and the Security for Private Road Works (Scotland) Amendment Regulations 1998<sup>3</sup>.
18. The Council submitted that the above legislation does not require it to record or hold information showing why roads for housing schemes are not adopted; there are no specific statutory duties relating to housing scheme adoptions. The Council explained that, as a Roads Authority, it is required to maintain a list of public roads (section 1 of the Roads (Scotland) Act 1984). The Council also maintains a list of all Road Construction Consent (RCC) applications.
19. The Council stated that the information Mr Sutton requested is not of interest to it as a Roads Authority in relation to RCCs or the listing of public roads, as there is no statutory obligation requiring it to hold this information. As housing developments are an ongoing process, the Council does not actively seek explanations if the development does not progress or if the road is not adopted.
20. The Council provided details of the RCC process. It holds details of the RCCs in electronic folders in a network drive. To respond to Mr Sutton's request, each RCC record would have to be searched to find out which development it related to, whether it was an industrial or domestic development, and why consent had not completed or been granted. By way of example, the Council provided a screen shot of two RCC folders.

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<sup>1</sup> <http://www.legislation.gov.uk/ukpga/1984/54/contents>

<sup>2</sup> <http://www.legislation.gov.uk/uksi/1985/2080/made>

<sup>3</sup> <http://www.legislation.gov.uk/uksi/1998/3220/contents/made>

21. The Council stated that it conducts an annual housing land audit. Each year, planning officials visit each development and record the number of housing units completed. A physical count is conducted as it is an audit of land rather than buildings. The Council provided the Commissioner with a copy of its 2015 housing land audit.

#### Significant burden

22. The Council explained that, due to recent and significant restructuring of its Planning and Transport services, staff with sufficient knowledge of the records to be scrutinised no longer have responsibility for that area of work and in several cases have left the Council.
23. The Council submitted that a Council Officer would be required to locate, retrieve and collate the information. It noted that the records are held in a variety of formats, and not within an electronic management system that would allow the swift identification of the information falling within scope of Mr Sutton's request. It considered that this work could be undertaken by the administrative officer for the relevant department, as they would have enough knowledge of the systems and records.
24. The Council provided a detailed breakdown of the administrative officer's normal duties. It submitted that this officer provides significant and essential administrative support to senior managers and Development Control officers within the Council. Redirecting this staff member away from their ongoing duties to deal with Mr Sutton's request would have direct consequences for the delivery of major developments in Edinburgh.
25. The Council considered that completing the work required to comply with Mr Sutton's request would also place an unreasonable burden on the management team and on Development Control officers by removing their administration support.
26. The Council submitted that, as a consequence of the ongoing Council transformation process, this would at the time of the request place an unreasonable increase on the workload being dealt with by the service. The Council determined that there were no other junior officers (apart from the administrative officer identified) with sufficient knowledge to locate, retrieve and produce the requested information. The Council stated that if a more senior officer was allocated the work, this would result in "a greater disproportionate allocation of Council resources".

#### Costs

27. The Council explained that, in calculating a cost for the provision of the requested information, it had categorised the RCC records within its electronic system as "easy", "average" or "complex". The Council also provided an estimate of the mix of these types of files, and the average time to search each type of file. The Council confirmed that 143 project files would have to be searched for the information covered by Mr Sutton's request.
28. Based on the sampling exercise, the Council determined that it would take the following time:
  - 10 minutes to locate and retrieve the information from each of the easy files
  - 30 minutes to locate and retrieve the information from each of the average files
  - 60 minutes to locate and retrieve the information from each of the complex files.
29. The staff time required to complete the work was as follows:
  - one quarter of the files at 10 minutes per record = 6 hours

- half of the files at 30 minutes per record = 36 hours
  - one quarter of the files at 60 minutes per record = 36 hours.
30. The Council calculated that it would require at least 78 hours of Council staff time to comply with the request. This would require at least two full weeks of the administrative officer's work to be focussed on this request, which it considered would be significantly disproportionate. Based on an hourly rate of £8.97, the cost of providing the requested information would be £699.66.
31. In his application, Mr Sutton stated that the Council was the only authority in Scotland which could not provide the requested information. The Council was provided with a copy of information disclosed by two other authorities in response to Mr Sutton's request, and was asked if it could disclose similar information. In response, the Council stated that its submissions remained unchanged: it was not legally obliged to report the information which Mr Sutton asked for, and the only way to provide the information was to undertake the work previously described.

*The Commissioner's findings*

32. There is no definition of "manifestly unreasonable" in the EIRs, or in Directive 2003/4/EC<sup>4</sup> from which the EIRs are derived. The Commissioner's view is that "manifestly" implies that a request should be obviously or clearly unreasonable and she notes the opinion of the Information Tribunal in *Dr Kaye Little v Information Commissioner and Welsh Assembly Government (EA/2010/0072)*<sup>5</sup>, which considers the equivalent regulation to 10(4)(b) of the Environmental Information Regulations 2004, and states:
- "From the ordinary meaning of the words "manifestly unreasonable", it is clear that the expression means something more than just "unreasonable". The word "manifestly" imports a quality of obviousness. What is in issue, therefore, is a request that is plainly or clearly unreasonable. It is a more stringent test than simply "unreasonable".*
33. This view was confirmed in the Appeal Court decision *Dransfield & Anor v The Information Commissioner & Anor* [2015] EWCA Civ 454<sup>6</sup> (Dransfield) which comments:
- "The word "manifestly...means of course the unreasonableness must be clearly shown. This saves the authority from having to make any detailed investigation into matters which it does not know or are not in the public domain."*
34. Whether a request is manifestly unreasonable will depend on the facts of each case. It may apply where it can be demonstrated that a request is vexatious, or where compliance would incur unreasonable costs for the public authority or an unreasonable diversion of public resources.
35. *Decision 024/2010 Mr N and the Scottish Ministers*<sup>7</sup> established that the Commissioner was likely to take into account the same kinds of considerations in deciding whether a request was manifestly unreasonable under the EIRs as in reaching a decision as to whether a

<sup>4</sup> <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32003L0004:EN:HTML>

<sup>5</sup>

[http://www.informationtribunal.gov.uk/DBFiles/Decision/i475/%5b2010%5dUKFTT\\_EA20100072\\_\(GRC\)\\_20101230.pdf](http://www.informationtribunal.gov.uk/DBFiles/Decision/i475/%5b2010%5dUKFTT_EA20100072_(GRC)_20101230.pdf)

<sup>6</sup> <http://www.bailii.org/ew/cases/EWCA/Civ/2015/454.html>

<sup>7</sup> <http://www.itspublicknowledge.info/applicationsanddecisions/Decisions/2010/200900461.asp>

request was vexatious in terms of section 14(1) of FOISA. In *Dransfield*, Lady Justice Arden commented that while “manifestly unreasonable” differs on its face from “vexatious” (section 14(1) of FOISA), the difference between the two phrases is “vanishingly small”.

36. In this case, the Council’s submissions focussed on the significant burden of compliance and the effect on the staff involved.
37. The Council also referred to the cost of compliance, in terms of staff time. The Commissioner noted that in *Dransfield*, Lady Justice Arden commented that, while there was no provision in the (UK) Environmental Information Regulations 2004 which would prevent an authority from taking the costs of compliance into account, in considering whether the request was manifestly unreasonable, those costs would have to be balanced against the benefits of disclosure in terms of the public interest test (equivalent to the public interest test in regulation 10(1)(b) of the EIRs).
38. The Commissioner considers that there may be circumstances where the burden of responding (in terms of its impact on the public authority’s core functions) is sufficient justification for deeming a request to be manifestly unreasonable.
39. There is no cost ceiling as to what is deemed to be an excessive cost for compliance under the EIRs as there is in the Freedom of Information (Scotland) Act 2002 (FOISA) (under FOISA, public authorities do not have to comply with a request if the cost of compliance exceeds £600). Even so, the Commissioner recognises that there may be cases where the time and expense involved in complying with a request for environmental information means that any reasonable person would regard them as excessive. The Council has argued that such a case can be made in relation to Mr Sutton’s request. In this case, the Council has also argued that the burden of responding to Mr Sutton’s request would fall on a single member of staff member, who is the only administrative support for the department concerned, and that the burden would be disproportionate, in terms of the effect it would have on the other work responsibilities of this member of staff.
40. Responding to information requests is a statutory duty for the Council, and one which must be properly resourced. The Commissioner acknowledges that, in common with all other Scottish public authorities, the Council has many demands on its time and resources, in addition to complying with requests for information under FOISA and the EIRs. Compliance with such requests should, however, be considered as an element of the authority’s core business, being a statutory requirement. The Commissioner will not accept lightly arguments that compliance, in any given case, represents an unreasonable diversion from compliance with other statutory responsibilities.
41. However, the Commissioner accepts that some information requests (such as the one currently under consideration) require specialist knowledge or expertise which only staff in the department concerned are likely to have. In such situations, the burden of the request must be assessed by considering the impact on that department rather than on the Council as a whole.
42. The Council has explained what would be involved if it was to provide the information requested by Mr Sutton. The Commissioner accepts that this explanation is based on a reasonable assessment of the process. On the basis of the detailed submissions provided by the Council, she accepts that all of the RCC’s folders would have to be searched for the requested information. The Council has provided a reasonable estimate of the time it would take to complete the searches and prepare the information for disclosure, after carrying out a sampling exercise. On this evidence, the Commissioner accepts that the cost of complying

with the request would be significant, incurring staff time costs above the £600 limit at which a request considered under FOISA could be refused.

43. The Commissioner also accepts that the work involved in providing the information would fall on a single member of staff, and that complying with the request would involve this member of staff being diverted from their normal duties for a substantial period of time. She considers that the potential disruption caused by this diversion is likely to have a significant impact on the department (Planning and Transport services) and on its ability to carry out its functions.
44. In all the circumstances, the Commissioner accepts that Mr Sutton's request was manifestly unreasonable. As such, she finds that the Council correctly applied the exception in regulation 10(4)(b) in this case.

#### *Consideration of the public interest test*

45. In common with all the other exceptions in the EIRs, regulation 10(4)(b) is subject to the public interest test set out in regulation 10(1)(b). Consequently, information can be withheld under the exception only where, in all the circumstances, the public interest in making the information available is outweighed by that in maintaining the exception.

#### Mr Sutton's submissions

46. Mr Sutton explained that he had been made aware of the problems faced by residents when the roads in a housing development they have moved into have not been adopted by the Council. He noted that non-adoption can result in roads, drains and street lights not being maintained by the local Council.
47. Mr Sutton explained that he was working with Resident Adoption Action Group (RAAG)<sup>8</sup> which has been campaigning on the issue regarding the un-adopted roads in England. He wanted to undertake a similar project in Scotland.
48. Mr Sutton submitted that the problem of un-adopted properties is widespread issue, and over 15,000 homes are likely to be affected. He commented that even if some 50% of these non-adopted properties are in the process of being adopted, there will still be over 10,000 completed new houses that do not have roads, drainage and street lighting adopted.
49. Mr Sutton considered that there is an urgent need for a wider debate on the non-adoption of roads; on whether the existing planning and housing delivery system is failing new home purchasers; and on the growing extent to which the RCC and adoption procedures are being flouted. He took the view that it was in the interest of developers and local authorities to fail to adopt, leaving the home purchasers unaware of this and having to foot the bill for future repairs and maintenance. He considered that if the Council was not collecting and monitoring RCCs and adoption data, its City Housing Strategy 2012-17, 2014-15 Housing Review and Databook 18 was likely to be based on inaccurate and misleading data.
50. Mr Sutton referred to the Commissioner's briefing on the public interest test<sup>9</sup> and submitted that the non-adoption of roads would make streets more dangerous.
51. Mr Sutton referred to the Scottish Government's commitment of "50,000 houses to be completed in Scotland over the 5 year parliament"<sup>10</sup>. He considered that the fact that there

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<sup>8</sup> <http://raag-online.org.uk/>

<sup>9</sup> <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/ThePublicInterestTest/ThePublicInterestTestEIRs.aspx>

<sup>10</sup> <http://www.gov.scot/Topics/Built-Environment/Housing/investment/ahsp>



could be over 20,000 "completed but not adopted" houses, or over 10,000 "completed and unlikely to be adopted" houses, illustrates the importance of the Council providing the information he requested. He stated that if the Council failed to provide such information it would be difficult to draw any "Scottish wide" conclusions from the data and the findings of his survey would be less robust.

### The Council's submissions

52. The Council referred to comments made in its review response. It accepted that there is a clear public interest in the Council promoting transparency and accountability through the disclosure of information it holds about un-adopted RCCs. The Council considered that disclosing the requested information would demonstrate that it was seeking to be accountable and transparent in the actions of its services, and supportive of the public's concerns regarding how housing developments were being noted as completed.
53. However, the Council considered that there was a greater public interest in maintaining the exception. Providing the information would require an unreasonable diversion of staff effort from normal duties. This diversion of staff time would result in the disproportionate diversion of public resources required "for the benefit of all citizens in Edinburgh" to the disclosure of information relating to a single issue.
54. The Council was provided with a summary of Mr Sutton's arguments for disclosure in the public interest, specifically his argument that there is an urgent need for a wider debate about whether the existing planning and housing delivery system is failing new home purchasers, and whether poorly managed streets will make the streets more dangerous.
55. The Council submitted that any person who constructs a road without a RCC from the roads authority commits an offence (section 22 of the Roads (Scotland) Act 1984). The Council expects all roads built under RCC to be put forward for adoption; however, there is no requirement for a developer to submit such roads for adoption. It is not aware of the RCC and adoption procedures being flouted but is continuing to seek the adoption of roads constructed.
56. In relation to roads that could be unsafe or dangerous, the Council submitted it has powers under the Security for Private Road Works (Scotland) Regulations 1985 to require developers to complete roads to an acceptable standard. The Council also actively seeks notification regarding such issues from members of the public and provided the Commissioner with the relevant links on its website.
57. The Council considered that, on balance, while there are certainly strong public interest arguments in favour of disclosure of the information requested, in the circumstances of this case these are outweighed by the public interest in preventing disproportionate levels of disruption to the Council's core functions by diverting resources to provide the information.

### The Commissioner's conclusion

58. Mr Sutton has presented detailed arguments to support his view that it is essential to understand the extent of the non-adoption across Scotland. The Commissioner accepts that non-adoption can lead to genuine difficulties for residents. If disclosure of the information requested by Mr Sutton would make residents more aware of this problem, she accepts that this would be in the public interest.

59. In the Commissioner's view, there is an inherent public interest in disclosure of information that would ensure that an authority is transparent about the nature and extent of the information that it holds and would permit adequate public scrutiny of its actions.
60. The Commissioner accepts that there is a public interest in disclosure of information which would enable individual householders to pursue issues relating to the status of specific roads, or assist them in doing this. However, she notes that householders can already use the Council's website to check whether a road has been adopted and to raise issues or make enquiries.
61. The Commissioner is aware that other Scottish local authorities have provided the same type of information to Mr Sutton, and that Mr Sutton intends to publish the findings from his research. The Commissioner accepts that it would be in the public interest for this research to be complete, and to include data from the Council.
62. Against this, the Commissioner has considered the strong public interest in a Scottish public authority being able to carry out its statutory functions without unreasonable or disproportionate disruption. Even taking into consideration the overall size of the Council as an organisation, and the resources available within it, the Commissioner accepts that providing the information requested by Mr Sutton would, to a disproportionate extent, divert resources currently deployed and required by the Roads and Planning department for its core functions.
63. The Commissioner considers there is a public interest in protecting the integrity of the EIRs and ensuring that they are used responsibly. While public authorities are encouraged to act in a transparent and accountable way, which benefits the public as a whole, it is not the intention of the legislation to require public authorities to devote excessive or disproportionate amounts of time to one particular request at the expense of other areas of work. The Council has a responsibility to respond to other requests it receives, as well as carrying out its other statutory functions, and there is a public interest in ensuring resources are not diverted away from this.
64. The Commissioner accepts the Council's explanation about why it manages its information in the way it does, and the impact of that on the handling of Mr Sutton's request. However, she finds it disappointing that the Council does not manage its information in a way which allows it to retrieve the information which Mr Sutton asked for with the same ease as other Scottish public authorities.
65. On balance, therefore, while there are certainly public interest arguments in favour of disclosing the information covered by Mr Sutton's request, the Commissioner accepts that, in the circumstances of this case, these are outweighed by the public interest in maintaining the exception in regulation 10(4)(b) of the EIRs, and that the Council was entitled to withhold the requested information under this exception.

### **Regulation 9(1) – advice and assistance**

66. Regulation 9(1) of the EIRs provides that a Scottish public authority must, so far as it would be reasonable to expect it to do so, provide advice and assistance to applicants and potential applicants. Regulation 9(3) provides that a Scottish public authority which conforms to the relevant Code of Practice is to be taken to have complied with this duty.

67. The Scottish Ministers' Code of Practice on the discharge of functions by Scottish public authorities under FOISA and the EIRs (the Section 60 Code<sup>11</sup>) states (at paragraph 5.1 in Part 2), that authorities have a duty to provide advice and assistance at all stages of a request. This can be given before a request is made, whilst the authority is handling the request, or after it has responded.

#### *The Council's submissions*

68. In its review response, the Council stated that it did not charge for a request that would incur less than two hours of staff time, and suggested that it may be possible to provide a portion of the information which Mr Sutton asked for.
69. The Council suggested to Mr Sutton that it could review some of the files that fell within scope of his request: for example, 12 of the easy files, or four average files, or two complex files. Alternatively, a combination of files not exceeding two hours of work could be provided. The Council suggested to Mr Sutton that he contact them to discuss these options. Mr Sutton did not take up this offer.
70. During the investigation, the Council was asked if it could identify any other ways that the scope of the request could be reduced. The Council was unable to do so. It regretted that it did not hold the information in the way Mr Sutton expected, but reiterated that it met its statutory obligations through its records management systems. The Council was happy to discuss with Mr Sutton how it could aid him in his research.

#### *Mr Sutton's comments*

71. In a telephone call with Mr Sutton, the investigating officer asked if he was willing to consider any of the suggestions proposed by the Council as a way of reducing the scope of his request. Mr Sutton declined. He stated that as the majority of other authorities had provided the requested information, he did not accept that the Council could not do so.

#### *The Commissioner's view*

72. The Commissioner is aware that requesters often question why an authority holds information in a certain way and why it would cost so much to provide the information they have asked for. In this instance, other authorities were able to provide Mr Sutton with the information he had asked for. The Commissioner is not surprised that Mr Sutton questioned why the Council could not easily provide the information.
73. The Commissioner notes that the Council has offered some suggestions about how the scope of the request could be reduced. Mr Sutton has not explained why he has not taken up any of these suggestions. The Commissioner accepts that he was entitled to choose not to do so; equally, she accepts that the Council attempted to provide advice and assistance.
74. The Commissioner has concluded that, given the volume of the information held by the Council and the lack of any easy way of retrieving the information covered by Mr Sutton's request, the Council could not reasonably have provided any further guidance, or offered any more suggestions, as to how the request could be narrowed. She accepts that the Council provided Mr Sutton with reasonable advice and assistance and complied with regulation 9(1) of the EIRs in this regard.

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<sup>11</sup> <http://www.gov.scot/About/Information/FOI/Section60Code/s60codeofpractice>

## **Decision**

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

## **Appeal**

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Should either Mr Sutton 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.

**Rosemary Agnew**  
**Scottish Information Commissioner**

**19 December 2016**

### 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.

...

#### 9 Duty to provide advice and assistance

(1) A Scottish public authority shall provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to applicants and prospective applicants.

...

- (3) To the extent that a Scottish public authority conforms to a code of practice under regulation 18 in relation to the provision of advice and assistance in a particular case, it shall be taken to have complied with the duty imposed by paragraph (1) in relation to that case.

...

## **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

...

- (b) the request for information is manifestly unreasonable;

...

**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)**