

# Decision Notice

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**Decision 039/2017: Mr William Walton and the Scottish Ministers**

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**Transcripts of oral evidence to planning review**

Reference No: 201700058

Decision Date: 20 March 2017



Scottish Information  
Commissioner

## Summary

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On 3 June 2016, the Scottish Ministers (the Ministers) were asked for transcripts of oral evidence presented by named individuals and organisations during the independent review of the Scottish planning system. The Ministers responded that as no transcripts of oral evidence were taken, they did not hold any information. They provided a “non-attributable summary of oral evidence”.

The Commissioner accepted that the Ministers had conducted adequate searches and did hold not any information falling within the scope of the request.

## Relevant statutory provisions

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (4) 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) (definitions (a), (b) and (c) of definition of “environmental information”); 5(1) and (2)(b) (Duty to make environmental information available on request); 10(1), (2) and (4)(a) (Exceptions from duty to make environmental information available)

The full text of each of the statutory provisions cited above is reproduced in Appendix 1 to this decision. The Appendix forms part of this decision.

## Background

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1. In September 2015, an independent panel was appointed by the Ministers to review the Scottish planning system. The report of the panel, “Empowering Planning to Deliver Great Places”<sup>1</sup>, was published on 31 May 2016. The Ministers’ response<sup>2</sup> to the report was published on 11 July 2016. On the Ministers’ website is also published “The Planning Review: Analysis of Written Evidence”.<sup>3</sup>
2. On 3 June 2016, Mr Walton made a request for information to the Ministers. He asked for transcripts of oral evidence presented by named individuals and organisations to the authors of the Scottish Government commissioned report on Scottish planning. On 5 June 2016, Mr Walton supplemented his request by asking for the transcript of the evidence presented to the report’s authors by another named person.
3. The Ministers responded on 27 June 2016. They provided some information, but when Mr Walton questioned whether that information was the transcripts he had asked for, the Ministers responded that they did not hold transcripts. The Ministers gave notice that they did not hold the information covered by his request, applying the exception in regulation 10(4)(a) of the EIRs. The Ministers explained that transcripts were not taken of oral evidence sessions held by the independent panel, and instead they had provided a non-attributable summary of the oral evidence.

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<sup>1</sup> <http://www.gov.scot/Resource/0050/00500946.pdf>

<sup>2</sup> <http://www.gov.scot/Topics/Built-Environment/planning/Review-of-Planning/documents>

<sup>3</sup> <http://www.gov.scot/Resource/0049/00497228.pdf>

4. On 28 June 2016, Mr Walton wrote to the Ministers requesting a review of their decision. He questioned why a committee charged with receiving evidence on the Scottish planning system, and making findings and recommendations on the future of the Scottish planning system, did not keep a close record of evidence and of the questions and answers put to individual witnesses. Mr Walton stated that the non-attributable summary of evidence which was provided to him was not adequate, as he wished to know who said what to the committee.
5. The Ministers notified Mr Walton of the outcome of their review on 12 July 2016, which confirmed their original decision that they did not hold the information he had asked for. They explained that oral evidence to the panel was requested on the basis that it would be non-attributable to encourage full and frank discussion. As such, there were no transcripts of the oral evidence session in Scottish Government records, either in handwritten or typed form. The Ministers advised Mr Walton that written evidence presented to the panel has been made publicly available, where permission was granted, including written submissions from some of the organisations named in his original request. The Ministers provided a link to that information.<sup>4</sup>
6. On 11 January 2017, Mr Walton 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 Walton stated he was dissatisfied with the outcome of the Ministers' review because he expected to find a transcript of the evidence presented to the review Panel just as he would for a Parliamentary select committee report. However, no such information had been provided to him.

## Investigation

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7. The application was accepted as valid. The Commissioner confirmed that Mr Walton 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.
8. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Ministers were invited to comment on this application and answer specific questions, including justifying their reliance on any provisions of FOISA or the EIRs they considered applicable to the information requested.

## Commissioner's analysis and findings

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

### FOISA or the EIRs?

10. "Environmental information" is defined in regulation 2(1) of the EIRs (paragraphs (a), (b) and (c) of the definition are reproduced in full in Appendix 1 to this decision). Where information

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<sup>4</sup> <http://www.gov.scot/Topics/Built-Environment/planning/Review-of-Planning/Call-for-Evidence-Responses/A-Z>

falls within the scope of this definition, a person has a right to access the information under the EIRs, subject to qualifications and exceptions in the EIRs.

11. The Ministers responded to Mr Walton's request under the EIRs. Mr Walton did not challenge this in his application.
12. The Ministers submitted that the information requested related to 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 as stated in 2(c) of the EIRs. They submitted that the requested information related to a review of the Scottish Planning system, which had implications for the built environment, man-made structures and the ongoing work likely to impact upon the environment.
13. The Commissioner has considered the information requested by Mr Walton and is satisfied that the information requested is environmental information as defined in regulation 2(1) of the EIRs. The purpose of the Panel was "to provide a strategic perspective on the planning system and draw out ideas that could improve it."<sup>5</sup> The review was structured around six themes: Development planning; Housing delivery; Planning for infrastructure; Further improvements to development management; Leadership, resourcing and skills; and Community engagement. Evidence given would therefore comprise views on the present planning system and potential changes to that system. The Commissioner agrees that such evidence would fall within definitions (a), (b) and (c) of "environmental information" contained in regulation 2(1) of the EIRs, in being information on measures such as policies and plans likely to affect the elements of the environment and/or factors likely to affect those elements.
14. The Ministers submitted that the requested information was environmental information and, accordingly, they had applied the exemption in section 39(2) of FOISA. Section 39(2) provides, in effect, that environmental information is exempt from disclosure under FOISA, thereby allowing any such information to be considered solely in terms of the EIRs.
15. The exemption in section 39(2) is subject to the public interest test in section 2(1)(b) of FOISA. As there is a separate statutory right of access to environmental information available to Mr Walton in this case, the Commissioner has concluded that the public interest in maintaining this exemption, and dealing with the request in line with the EIRs, outweighs the public interest in disclosure under FOISA. Therefore, the Commissioner will consider the information in what follows solely in terms of the EIRs.

#### **Regulation 10(4)(a) – Information not held**

16. Regulation 5(1) of the EIRs requires a Scottish public authority which holds environmental information to make it available when requested to do so by any applicant. This obligation relates to the information held by an authority when it receives a request. The Ministers applied the exception in regulation 10(4)(a) of the EIRs to Mr Walton's request. The exception in regulation 10(4)(a) of the EIRs applies to information which is requested but which is not held by the Scottish public authority.
17. The Ministers explained that the Panel appointed to undertake the review of the planning system was independent of the Scottish Government and reported their findings in May 2016. During the independent review, the Panel was supported by a small team of civil servants working as a secretariat. They took informal notes during the sessions which were

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<sup>5</sup> <http://www.gov.scot/Resource/0049/00497228.pdf>

then converted into a summary for the full report of evidence reported to the Panel (and provided to Mr Walton). The Ministers stated that the informal notes were not retained after being used to create the summary for incorporation into the report. Following publication of the independent report in May 2016, the Panel was officially wound up and any remaining information held by the Panel was passed to the Scottish Government.

18. The Ministers stated that their searches were restricted to the information held by the Scottish Government, and were conducted by staff who had assisted the Panel. All information stored with regard to the independent Panel was restricted to one specific file. When considering Mr Walton's request, the Ministers had identified what information was held with regard to the oral evidence sessions. They confirmed that this included searching for both verbatim transcripts and any notes taken at the sessions. During this process, the Ministers prepared a summary of the evidence presented to the independent Panel for release to Mr Walton. They also provided him with a link to the written evidence presented to the Panel.
19. Mr Walton assumed that if relevant information had been retained by the Panel appointed to conduct the review, the information would fall within the terms of his request.
20. The Ministers stated that the Panel was an independent body and was not subject to FOISA (or the EIRs); any information it obtained from the sessions was not held by the Scottish Government until after the Panel was wound up. Therefore, the Ministers held only the information that was passed to the Scottish Government on the winding up of the Panel. The Ministers commented that they could not request information from the Panel, which has been officially disbanded.
21. The Ministers also explained that letters and emails sent to those invited to give oral evidence advised that notes would be taken by the Panel, but these would be non-attributable. The Ministers commented that the Panel wanted the sessions to be held in private to encourage as frank an exchange of views as possible.
22. The standard of proof to determine whether a Scottish public authority holds information is the civil standard of the balance of probabilities. In determining this, the Commissioner will consider the scope, quality, thoroughness and results of the searches carried out by the public authority. She will also consider, where appropriate, any reason offered by the public authority to explain why the information is not held.
23. The Commissioner accepts that the Ministers have searched their systems and hard copy files for the information and that the searches appear adequate and proportionate, and capable of identifying any information they held which fell within the scope of Mr Walton's request.
24. The Commissioner notes that the officials involved in searching for the information had experience and knowledge of the subject matter of the request and, accordingly, there was less likelihood of error and misunderstanding in locating the information requested. The Ministers have also provided a reasonable explanation why they do not hold transcripts of the oral evidence given to the Panel. The Panel was not covered by the EIRs in its own right.
25. The Commissioner accepts that the Ministers were not required to approach Panel members to obtain information covered by Mr Walton's request. Only information held by the Ministers at the time of Mr Walton's request requires to be considered here. This includes any information transferred to the Ministers when the Panel was disbanded.

26. The Commissioner is satisfied, on the balance of probabilities, that the Ministers do not hold information falling within Mr Walton's request.

*The public interest test*

27. The exception in regulation 10(4)(a) is subject to the public interest test in regulation 10(1)(b) of the EIRs and can only be upheld if, in all the circumstances, the public interest in maintaining the exception outweighs the public interest in making the information available.

28. The Ministers submitted that there was no public interest in pursuing this case as they cannot provide information when no information is held.

29. The Commissioner is satisfied that the Ministers do not hold the information in question. Consequently, she does not consider there to be any public interest in requiring that the information be made available. Mr Walton only has rights relating to information held by the Ministers at the time of his request, and there is no requirement on the Ministers to obtain information from another party to provide in response to his request. The Ministers' submissions make it clear that transcripts of oral evidence were not taken, so the Commissioner regards it as doubtful whether the panel could have provided any information, even if asked.

30. The Commissioner therefore concludes that the public interest in making the requested information available is outweighed by that in maintaining the exception in regulation 10(4)(a) of the EIRs.

31. The Commissioner is satisfied that the Ministers were entitled to rely on the exception in regulation 10(4)(a), on the basis that they did not hold the requested information.

32. As stated in many previous decisions, the Commissioner's remit here extends only to the consideration of whether a Scottish public authority actually holds the requested information and whether it has complied with Part 1 of FOISA or the EIRs in responding to a request. The Commissioner cannot comment on whether a public authority should have recorded any, or more, information about a particular event or process.

## **Decision**

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The Commissioner finds that the Scottish Ministers (the Ministers) complied with Part 1 of the Freedom of Information (Scotland) Act 2002 and with the Environmental Information (Scotland) Regulations 2004 in responding to the information request made by Mr Walton.

## **Appeal**

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Should either Mr Walton or the Ministers wish to appeal against this decision, they have the right to appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days after the date of intimation of this decision.

**Margaret Keyse**  
**Head of Enforcement**

**20 March 2017**

### 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.

...

(4) The information to be given by the authority is that held by it at the time the request is received, except that, subject to subsection (5), any amendment or deletion which would have been made, regardless of the receipt of the request, between that time and the time it gives the information may be made before the information is given.

..

(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;

...

**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)**