

# Decision Notice

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**Decision 091/2019: Mr S and Dundee City Council**

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**Fire strategy for the V&A Museum in Dundee**

Reference No: 201900015

Decision Date: 5 June 2019



Scottish Information  
Commissioner

## Summary

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The Council was asked for the Fire Strategy for the V&A Museum in Dundee. The Council withheld the information on the basis that disclosure would prejudice substantially public safety.

The Commissioner investigated. He found that the Council partially complied in responding to the request by withholding most of the Fire Strategy, but he also found that the Executive Summary should have been disclosed at the time of the request.

## Relevant statutory provisions

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The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (Interpretation) (definitions (b), (c) and (f) of "environmental information"); 5(1) and (2)(b) (Duty to make environmental information available on request); 10(1), (2), (5)(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 22 June 2018, Mr S made a request for information to Dundee City Council (the Council). Mr S requested the Fire Strategy for the new V&A Museum in Dundee (V&A Dundee).
2. The Council responded on 16 July 2018. It refused to provide the Fire Strategy on the basis that disclosure would or, would be likely to, prejudice substantially "international relations, defence or public safety" as provided in regulation 10(5)(a) of the EIRs. The Council said it was not in the public interest to disclose the information.
3. On 17 July 2018, Mr S wrote to the Council requesting a review of its decision. Mr S was dissatisfied that the information was withheld, commenting that he had downloaded plans from the Council's website a number of years ago. Mr S asked the Council to confirm that a fire strategy, approved by the Scottish Fire and Rescue Service (SFRS) was in place.
4. The Council notified Mr S of the outcome of its review on 10 August 2018. The Council upheld its refusal to supply the information. The Council stated that disclosure of the information would, or would be likely to, prejudice substantially public safety.
5. In response to Mr S's query regarding the existence of the fire strategy, the Council told Mr S that fire engineer specialists were employed throughout the design and construction and developed the appropriate fire strategy, which was subject to thorough review with the SFRS and peer review by independent engineers over several months, including simulated computer modelling, before being approved by the Council.
6. On 27 December 2018, Mr S wrote to the Commissioner. Mr S applied to the Commissioner for a decision in terms of section 47(1) of the Freedom of Information (Scotland) Act 2002 (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 S was dissatisfied with the outcome of the Council's review as he believed the Fire Strategy should be disclosed. He argued that he had not been provided with sufficient explanation as

to why public safety would be prejudiced by disclosure of the information; he also had concerns that building regulations had been breached.

## **Investigation**

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7. The application was accepted as valid. The Commissioner confirmed that Mr S 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 16 January 2019, the Council was notified in writing that Mr S had made a valid application. The Council was asked to send the Commissioner the information withheld from Mr S. The Council provided the information and 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, with particular reference to its use of the exception relied on and how it had balanced the public interest.
10. During the investigation, the Council provided the Executive Summary of the Fire Strategy to Mr S.
11. Mr S asked that the Commissioner consider whether the Council correctly withheld the full strategy and provided arguments to assist his case.

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

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

### **Application of the EIRs**

13. It is clear from the Council's correspondence with both Mr S and the Commissioner, and from the information itself, that the information sought by Mr S is properly considered to be environmental information, as defined in regulation 2(1) of the EIRs. It relates to the Fire Strategy for building warrant approval, which engages paragraphs (b), (c) and (f) of the definition. Mr S has not disputed this and the Commissioner will consider the information in what follows solely in terms of the EIRs.

### **Regulation 5(1) of the EIRs**

14. Regulation 5(1) of the EIRs (subject to the various qualifications contained in regulations 6 to 12) requires a Scottish public authority which holds environmental information to make it available when requested to do so by any applicant.
15. 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. The Council submitted that the information was excepted from disclosure in terms of regulation 10(5)(a) of the EIRs.

## **Regulation 10(5)(a) of the EIRs (public safety)**

16. In terms of regulation 10(5)(a) of the EIRs, a Scottish public authority may refuse to make information available to the extent that its disclosure would, or would be likely to, prejudice substantially international relations, defence, national security or public safety. Here, the Council has argued that disclosing the Fire Strategy for the V&A Dundee would prejudice substantially public safety. As noted above, the Council disclosed the Executive Summary of the Fire Strategy to Mr S during the investigation. Any references to the Fire Strategy in what follows do not include references to the Executive Summary unless otherwise stated.
17. This exception must be interpreted in a restrictive way (regulation 10(2)(a)) and the public authority must apply a presumption in favour of disclosure (regulation 10(2)(b)).

### *Mr S's submissions*

18. Mr S argued that the Council had not explained what aspect of public safety would be prejudiced by disclosure. The only thing he thought possible was the use of a fire alarm to distract in a theft, and that knowledge of how a security system would operate in a fire may be of use to someone planning such theft.
19. Mr S also argued that this information was normally available for public inspection. Mr S explained his professional qualifications and expertise in fire safety and architecture. He said that he had written at least six fire strategies, and security strategies, for important buildings. He said that he had looked at the architect's drawings for the V&A Dundee when submitted for a building warrant and, having reviewed the drawings, had asked for access to the Fire Strategy to check the building's compliance.

### *The Council's submissions*

20. The Council's submissions focused on the public safety aspect of regulation 10(5)(a). The V&A Dundee is, the Council commented, a building of national importance and holds many rare and expensive items. It explained that the Fire Strategy sets out the access and egress points of the building, its layout, and the location of the various artefacts. It explained that the sensitivity of the Fire Strategy lay in the provision of technical intricacies of the building and how it is expected to function and perform, particularly in an evacuation scenario. Given the level of detail contained in the Fire Strategy, and the uncertainty as to who would access this information if it was made available, the Council concluded that the safety of the building would be substantially prejudiced by disclosure. In particular, the Council said there was "a heightened risk of robbery or a terrorist threat" and it was not in the public interest to disclose the information.
21. The Council submitted that the Building (Scotland) Act 2003 (the 2003 Act) provides an additional basis upon which to withhold the information. Section 24 of the 2003 Act requires a local authority to keep a building standards register, containing information pertaining to applications for building warrants, completion certificates, etc.
22. Section 58 of the Building (Procedure) (Scotland) Regulations 2004 requires Parts I and II of the Building Standards Register to be available for inspection by the public. Basic information and decisions are recorded on Part I of the Register – in electronic format, accessible by the internet – whilst more detailed information (such as plans, specifications, etc.) are in Part II of the Register. Documents in Part II are not required to be made available on the electronic Register, and are subject to certain restrictions. For example, a local authority can remove documents from Part II of the Register if it believes there are security concerns over the disclosure or copying of such documents.

23. The Council explained that a decision had been made to remove plans, etc. about the V&A Dundee from Part II of the Register and these documents were therefore not available to the public. Disclosure of the information, the Council said, would or would be likely to prejudice substantially public safety. The Council acknowledged that the Fire Strategy for the V&A Dundee would normally be located in Part II of the Register, but was not available for public inspection due to the risks that Council had specified.
24. The Council stated that the approved Building Warrant plans for the V&A Dundee have never been made available to the public. The Council highlighted that plans lodged as part of the planning permission process under the Town and Country Planning (Scotland) Act 1997 would not be the same as plans submitted for Building Warrant approval, as the plans for the latter served a different purpose and contain far more technical detail. Therefore, information which had been seen by the public would be different in content and detail from that in the Fire Strategy.

*The Commissioner's view*

25. The V&A Dundee is a building of national importance. It has been visited by in excess of half a million members of the public since it opened in September 2018. It is a significant location, featured in the media and houses rare and valuable items. On this basis, and in the current climate, the Commissioner finds it is reasonable for the Council to assume that it is a place that may be targeted by criminals, terrorists or others intent on a criminal purpose. Clearly, such an attack or criminal action (were it to occur) would threaten public safety.
26. The information in the Fire Strategy is not in the public domain, and it is not information that a visitor to the V&A Dundee could obtain by observation.
27. The Commissioner has considered whether the information in the Fire Strategy could be exploited by those planning an attack or a criminal action that the Council describes: for the exception to apply, the prejudice to public safety must be both real and significant, as opposed to hypothetical or marginal. There must also be a genuine link between disclosure and the harm: it cannot simply be a remote or hypothetical possibility.
28. The Commissioner recognises that disclosure of the Fire Strategy under the EIRs would negate the Council's decision to remove it from Part II of the Building Standards Register. The fact that the Strategy is not available via the Register indicates that the Council views it as of a type that would raise security concern were it in the public domain. The decision to remove it from the Register is not, of itself, evidence of that harm would follow disclosure. However, it does demonstrate a coherent treatment of the information in terms of publication and public disclosure, and that another administrative decision taken by the Council has restricted access to the information.
29. It is the Commissioner's view, having reviewed the information in detail, that the knowledge that would be gained through the Fire Strategy is considerable. The document includes in-depth detail on all escape routes and fire safety systems. This intelligence would assist those who would seek to damage (for whatever reason) the V&A Dundee or those intent on theft or other criminal purpose in respect of the V&A Dundee. Such damage or criminal purpose would have a serious impact on public safety. The Commissioner accepts that the likelihood of this happening is not unduly remote, and that, in the circumstances, the disclosure would, or would be likely to, prejudice substantially public safety. He is, therefore, satisfied that the exception applies.

### *The public interest test*

30. Having agreed that the exception in regulation 10(5)(a) applies, the Commissioner is required to consider the public interest test required by regulation 10(1)(b) of the EIRs. The test specifies that a public authority may only withhold information to which an exception applies where, in all the circumstances, the public interest in making the information available is outweighed by the public interest in maintaining the exception.
31. In every case, the public interest factors favouring disclosure will include both general and specific arguments relating to transparency, accountability, participation in the democratic process and decision-making on environmental issues. Generally, there will always be a public interest in the disclosure of information which will promote transparency and accountability of public authorities, greater public awareness and understanding of environmental matters, a free exchange of views, and more effective public participation in environmental decision making; all of which ultimately contribute to a better environment. The Commissioner must also consider the public interest factors relating more specifically to the information in question, and the likely effects of its disclosure. He must balance the factors favouring disclosure against those weighing against it.
32. Mr S has suggested that building regulations may have been breached in a number of areas relating to fire safety. He indicated that this would be acceptable if an alternative level of safety has been achieved by the fire engineering proposal, which access to the Fire Strategy would determine.
33. Mr S submitted that if it were now possible to withhold that information from the public it raised serious questions about the public's right to scrutinise a building warrant. He also indicated that there were "wider issues at stake here as there has been recent discussion on fire engineering problems within the Scottish Government's Building Division and how they will be dealt with in future building warrants."
34. In response to Mr S request and in its submissions to the Commissioner, the Council explained that the Fire Strategy has been subject to thorough review by competent professionals, including the SFRS, to ensure compliance with the relevant regulations, and therefore the public interest in releasing the information to ensure compliance with the regulations was not relevant.

### *The Commissioner's view*

35. The Commissioner recognises that there is a weighty public interest in ensuring the safety of all buildings and, in particular, those to which the public has access. Equally, there is a strong public interest in transparency of the building warrant process, as evidenced by the requirements of access set out in the 2003 Act.
36. In the present case, both Mr S and the Council are relying on the same public interest (i.e. public safety): Mr S to ensure the V&A Dundee is safe (for the public) by having an effective fire strategy, and the Council in ensuring that no information is disclosed that may assist or enable a criminal purpose that would endanger the public with respect to the V&A Dundee.
37. The Commissioner notes that fire engineer specialists were employed throughout the design and construction and developed the appropriate fire strategy, which was subject to thorough review with SFRS and peer review by independent engineers over several months, including simulated computer modelling, before being approved by the Council. There has therefore been an assessment, conducted by persons with expert knowledge, of the Fire Strategy. The

Council has also now disclosed the Fire Strategy's Executive Summary to Mr S which goes some way towards addressing the issue of transparency.

38. The Commissioner also acknowledges that there are exceptions from the requirement to make information available on Part II of the Council's Building Standards Register; security concern is one exception. He acknowledges that disclosure of the report under the EIRs would negate the Council's decision to remove the V&A Dundee's Fire Strategy from Part II of the Building Standards Register.
39. The Commissioner recognises that there is a significant public interest in ensuring that the safety of the building and those within is not compromised by disclosure of information which could be used by those with malevolent intent, thus endangering visitors, the building and the wider environment.
40. On balance, having balanced the competing public interests in all the circumstances of this case, the Commissioner finds that the public interest in making the information available is outweighed by that in maintaining the exception in regulation 10(5)(a) of the EIRs. The Council was therefore justified in withholding the information under that exception.
41. In reaching this conclusion, the Commissioner notes that the Council disclosed to Mr S the Fire Strategy's Executive Summary during the investigation.
42. This summary is different in terms of detail from the rest of Fire Strategy (as would be expected) and the Commissioner does not regard it as falling within the exception cited by the Council. Consequently, the Commissioner finds that the Council was not entitled to apply regulation 10(5)(a) of the EIRs to the Executive Summary of the Fire Strategy .

## Decision

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

The Commissioner finds that the exception in regulation 10(5)(a) of the EIRs applied to all but the Executive Summary of the Fire Strategy.

Given that the Council disclosed the Executive Summary to Mr S during the investigation, the Commissioner does not require the Council to take any action in respect of this failure.

## Appeal

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Should either Dundee City Council or Mr S 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**

**5 June 2019**



### 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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- (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;

...

(f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in paragraph (a) or, through those elements, by any of the matters referred to in paragraphs (b) and (c);

...

#### 5 Duty to make available environmental information on request

(1) Subject to paragraph (2), a Scottish public authority that holds environmental information shall make it available when requested to do so by any applicant.

(2) The duty under paragraph (1)-

...

(b) is subject to regulations 6 to 12.

...

#### 10 Exceptions from duty to make environmental information available

(1) A Scottish public authority may refuse a request to make environmental information available if -

(a) there is an exception to disclosure under paragraphs (4) or (5); and

- (b) in all the circumstances, the public interest in making the information available is outweighed by that in maintaining the exception.
- (2) In considering the application of the exceptions referred to in paragraphs (4) and (5), a Scottish public authority shall-
  - (a) interpret those paragraphs in a restrictive way; and
  - (b) apply a presumption in favour of disclosure.

...
- (5) A Scottish public authority may refuse to make environmental information available to the extent that its disclosure would, or would be likely to, prejudice substantially-
  - (a) international relations, defence, national security or public safety;

...

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