

# Decision Notice

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**Decision 135/2014 Ms Carol Joynes and City of Edinburgh Council**

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**Use of chemical treatment**

Reference No: 201400662

Decision Date: 19 June 2014



Scottish Information  
Commissioner

## Summary

On 23 July 2013, Ms Joynes asked City of Edinburgh Council (the Council) for information regarding chemical treatments applied to specific land. The Council responded by providing some information to Ms Joynes, stating that it did not hold other information. The Commissioner carried out an investigation and found that the Council did not hold the information sought by Ms Joynes.

## Relevant statutory provisions

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

## Background

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1. On 23 July 2013, Ms Joynes wrote to the Council, requesting information as to what chemical treatments had been applied to the land at a specific address, and on what dates.
2. The Council responded on 30 September 2013, informing Ms Joynes that it was dealing with the request under the EIRs. It stated that the area in question had been sprayed approximately two or three times with a named product. It stated that the dates on which the spraying took place was not recorded and issued a refusal notice in terms of regulation 10(4)(a) of the EIRs in respect of this information.
3. On 20 November 2013, Ms Joynes wrote to the Council requesting a review of its decision. She understood the Council to have stated previously that the area had first been sprayed on 18 May 2011, and sought confirmation of this.
4. The Council notified Ms Joynes of the outcome of its review on 19 December 2013. It confirmed that the only information that it held was that the Council applied a named chemical product to the area on 18th May 2011 and on three to four unspecified occasions thereafter.
5. On 27 March 2014, Ms Joynes wrote to the Commissioner, stating that she 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 specified modifications.
6. The application was validated by establishing that Ms Joynes made a request for information to a Scottish public authority and 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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7. On 30 April 2014, the investigating officer notified the Council in writing that an application had been received from Ms Joynes, 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. The Council was asked to explain the steps it had taken to establish what information it held and which fell within the scope of Ms Joynes' request.
8. The Council responded, providing submissions in support of its position that it did not hold 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 of the relevant submissions, or parts of submissions, made to her by both Ms Joynes and the Council. She is satisfied that no matter of relevance has been overlooked.

### **Application of the EIRs**

10. It is clear from the Council's correspondence with Ms Joynes that any information falling within the scope of the request would be environmental information, as defined in regulation 2(1) of the EIRs. The information in question relates to the application of chemical treatments to land and, as such, the Commissioner is satisfied that it would fall within either paragraph (a) or paragraph (c) of the definition of environmental information in regulation 2(1) of the EIRs (reproduced in the Appendix to this decision). Ms Joynes has not disputed the application of the EIRs in this case and the Commissioner will consider her request in what follows solely in terms of that regime.

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

11. 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. It is important to bear in mind that this obligation relates to information actually held by an authority when it receives the request, as opposed to information an applicant believes the authority should hold, but which is not in fact held.
12. 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.

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

13. Regulation 10(4)(a) of the EIRs provides that a Scottish public authority may refuse to make environmental information available to the extent that it does not hold that information when an applicant's request is received.
14. During the investigation, the Council provided full submissions on the steps taken to identify and locate information falling within the scope of Ms Joynes' request, concluding that it held no such information. It explained that the information provided in the original response to the applicant (and confirmed in the review response) was based on the personal recollection of a Council Officer. The Council acknowledged that this should have been made clearer to Ms Joynes.

15. The Council described the searches carried out, in electronic and paper records, to establish what relevant information it held. It explained which departments and individual staff members had been consulted, providing copies of the relevant communications. It explained that further searches were carried out during the investigation, confirming that no information was held. It described the steps being taken to ensure that such information was recorded in future.
16. Having considered the Council's submissions, the Commissioner is satisfied that it carried out adequate searches with a view to identifying and locating the information requested by Ms Joynes. The Commissioner notes the Council's assurance that information of this nature will now be recorded, should similar requests be made in the future.
17. In this case, therefore, the Commissioner is satisfied that the Council did not hold the information requested by Ms Joynes. Consequently, she does not consider there to be any conceivable public interest in requiring that information be made available. The Commissioner therefore concludes that, in all the circumstances of this case, 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.
18. The Commissioner is satisfied, therefore, that the Council was entitled to refuse Ms Joynes' request under regulation 10(4)(a) of the EIRs. Consequently, she is satisfied that, in this regard, the Council complied with regulation 5(1) of the EIRs.

## **Decision**

The Commissioner finds that, in respect of the matters raised in the application, City of Edinburgh Council complied with the Environmental Information (Scotland) Regulations 2004 in responding to the information request made by Ms Joynes.

## **Appeal**

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Should either Ms Joynes or City of Edinburgh 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.

**Margaret Keyse**  
**Head of Enforcement**  
**19 June 2014**

## Appendix

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Relevant statutory provisions

### 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;

...

#### 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;

...

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