

# Decision Notice

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**Decision 175/2016: Mr X and East Dunbartonshire Council**

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**Inspection, maintenance and repair of roads**

Reference No: 201600273

Decision Date: 12 August 2016



Scottish Information  
Commissioner

## Summary

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On 22 February 2015, Mr X asked East Dunbartonshire Council (the Council) for information relating to road inspection, maintenance and repair.

The Council responded by disclosing some information and providing explanations. Following a review, Mr X remained dissatisfied and applied to the Commissioner for a decision.

The Commissioner investigated and found that the Council had partially complied with Mr X's request for information in accordance with the EIRs. She was satisfied that the Council identified and located the information it held, but failed to conduct its review within statutory timescales.

## Relevant statutory provisions

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The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (Interpretation – definition of environmental information); 5(1) (Duty to make environmental information available on request); 16(4) and (5) (Review by Scottish public authority)

The full text of each of the statutory provisions cited above is reproduced in Appendix 1 to this decision. Both Appendix 1 and Appendix 2 form part of this decision.

## Background

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1. On 22 February 2015, Mr X made a request for information to the Council. The request was for a range of detailed information on the inspection, maintenance and repair of the Council's roads, following damage to Mr X's car. His request comprises 13 detailed questions which are reproduced in Appendix 2 at the end of this decision.
2. The Council responded on 19 March 2015, disclosing information to Mr X.
3. On 19 April 2015 Mr X wrote to the Council, requesting a review of its decision. He explained why he did not believe the Council had responded to various parts of his request in full. He did not express dissatisfaction with the Council's responses to points 4, 8 or 13 of his request, so these need not be considered further here.
4. The Council notified Mr X of the outcome of its review on 27 July 2015, acknowledging it was late in doing so and apologising for this. It provided some explanation of the context, with reference to a national code of practice (for which it provided a weblink to the online version). It reaffirmed its original responses, with some clarification and additional information. Specifically, it identified additional information pertinent to point 12 of the request, withholding this under two exceptions in the EIRs.
5. On 14 February 2016 Mr X wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Commissioner exercised her discretion under section 47(5) of FOISA and accepted this application, which was received after the expiry of the time allowed for making an application by section 47(4).
6. 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 X stated he was dissatisfied with the outcome of the Council's review because it was late and was not, in

his view, a complete response to his request. He also submitted that the handling of his request had become confused with the handling of a related complaint. He did not complain about the Council's application of exceptions to information located at review stage (so this will not be considered further).

## **Investigation**

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7. The application was accepted as valid. The Commissioner confirmed that Mr X 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. On 8 March 2016, the Council was notified in writing that Mr X had made a valid application. 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 answer specific questions, with reference to its handling of the request and the steps taken to identify and locate any relevant information held.

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

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

### **Application of the EIRs**

11. It is clear from the Council's correspondence with both Mr X and the Commissioner, and from the information itself, that the information sought by Mr X is properly considered to be environmental information, as defined in regulation 2(1) of the EIRs. That definition is reproduced in full in Appendix 1. Mr X made no comment on the Council's application of the EIRs in this case.
12. Therefore, the Commissioner will consider Mr X's request in what follows solely in terms of the EIRs.

### *Scope of investigation*

13. The Commissioner's remit is limited to deciding whether the Council complied with its legal obligations under the EIRs in responding to Mr X's request of 22 February 2015. The Commissioner cannot consider Mr X's concerns as to whether the Council has adequate arrangements in place for the inspection, maintenance and repair of its roads, or for maintaining records in respect of these matters. These issues do not fall within her remit in terms of the EIRs.

### **Information held by the Council**

14. Regulation 5(1) of the EIRs (subject to 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. In his requirement for review, Mr X questioned whether the Council, in providing answers to his questions by way of explanation rather than copies of documents or extracts from its

records, had responded fully to his request. He reiterated this in his application to the Commissioner.

16. The Commissioner must consider whether, in fact, the responses provided by the Council reflected the information it held adequately. She must take account of the review outcome (noting that this did rely to a large extent on a specific document, to which Mr X was given a link) and all relevant submissions from both the Council and Mr X. There may be occasions when providing copies of documents or other records makes it easier to verify the information provided, but the Commissioner cannot require the disclosure of such copies.
17. As the Commissioner has stated in previous cases, the standard of proof to apply in determining whether a public authority holds information is the civil standard of the balance of probabilities. In deciding where the balance lies, the Commissioner will consider the scope, quality and thoroughness and results of any searches carried out by the public authority. She will also consider, where appropriate, any other reason offered by the public authority to explain why it does not hold information. Other matters may affect the Commissioner's view, including, for example the discovery of materials elsewhere whose existence or content point to the existence of further information within the public authority which has not been brought to light.
18. In his application, Mr X explained why he expected the Council to hold more information. From his professional experience and his understanding of other authorities, he expected there to be additional management systems in place, with recording arrangements applied to evidence compliance. He directed the investigating officer to various materials in support of this view.
19. The Council explained how it identified and located the information Mr X sought. It provided details of its searches by its Roads and Insurance services, describing the systems and files it required it to search and the searches it required it to undertake. A substantial part of Mr X's request related to the Council's policies and procedures for maintenance of its roads. The Council explained that it had adopted the "Well-maintained Highways Code of Practice for Highway Maintenance Management July 2005" (the Code). This was the online document for which it had provided a weblink to Mr X in its review outcome.
20. Mr X commented that other local authorities, such as Aberdeen City Council, had also produced their own "local version" of this document. He expected East Dunbartonshire Council to have done the same. The Council explained that its policy was to abide by nationally agreed standards, which were in the Code: it did not consider additional policies and procedures to be necessary.
21. The Commissioner has considered all of the Council's submissions carefully and the points from Mr X regarding information he would expect to be held. She is satisfied that the appropriate services within the Council were identified for the purposes of searches. The Commissioner has considered the details of those searches she has been given, and also notes also the online information (the Code) identified in the review outcome: the extent, if any, to which this should be augmented by additional management systems is not a matter falling within her remit.
22. The Commissioner is satisfied that the Council carried out adequate, proportionate searches and enquiries to ascertain what information it held and which fell within the scope of Mr X's request. On balance, she is satisfied that it identified and located all relevant information it held. Whether there is a need for additional or more robust management arrangements in this area is not a matter on which the Commissioner can legitimately comment.

23. Consequently, in respect of the matters raised in Mr X's application and falling within her remit, the Commissioner is satisfied that the Council complied with regulation 5(1) of the EIRs in responding to the information request made by Mr X.

### **Handling of request**

24. Mr X expressed dissatisfaction with the Council's handling of his request. He believed this had become confused with a related complaint he had submitted, and that this was either deliberate stonewalling or a "symptom of cultural and systemic disrespect for FOI".
25. The Council refuted Mr X's assertions, noting that his complaint was not submitted until well after the information request had been dealt with. It provided examples which it believed demonstrated its efforts to keep the two processes separate.
26. The Commissioner notes that, throughout the EIRs process, the Council correctly advised Mr X of his rights of appeal to the Commissioner and of the correct process to follow in pursuing those rights. She also notes that the Council's complaint response letter of 7 January 2016 reminded Mr X that "complaints about FOI requests are subject to separate legislation and should be addressed to the Scottish Information Commissioner" (which Mr X acknowledged on 5 February 2016, confirming that he would review his position on the information request "after your response to my Stage 2 complaint").
27. In light of the submissions she has received on this point, the Commissioner concludes that any delay in lodging an application to the Commissioner under the EIRs was Mr X's own decision. While the Council may have delayed responding to Mr X's review request (see below), there is no evidence that it confused the information request and complaints processes, or that it gave confusing or misleading advice in relation to Mr X pursuing his rights under the EIRs. Apart from the delay in producing a review outcome (see below), that is as much of the Council's handling of this matter as the Commissioner can consider within her remit.

### **Timescales**

28. Regulation 16(4) of the EIRs allows Scottish public authorities a maximum of 20 working days after receipt of a requirement for review to notify the applicant of its decision. The Council recognised in its review letter that it had failed to meet this timescale. She notes that it gave Mr X an apology for this.
29. It is a matter of fact that the Council did not provide a response to Mr X's requirement for review within 20 working days. The Commissioner finds that it failed to comply with regulation 16(4) of the EIRs.
30. The Commissioner is concerned at the length of the delay (approximately three months) in providing Mr X with a review outcome. There must be proper checks in place to prevent delays of this length, which do not appear to have functioned on this occasion. If it has not already done so, the Council may wish to make use of the Commissioner's online self-assessment toolkit to review its practice, particularly Module 1 which covers timescales<sup>1</sup>. She strongly recommends that the Council now takes any steps necessary to prevent delays of this length in future.

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<sup>1</sup> <http://www.itspublicknowledge.info/ScottishPublicAuthorities/Self-AssessmentToolkit/Self-AssessmentToolkitIntroduction.aspx>

## Decision

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The Commissioner finds that, in respect of the matters raised by Mr X in his application, East Dunbartonshire Council (the Council) generally complied with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by Mr X.

The Commissioner finds that the Council complied with regulation 5(1) of the EIRs in identifying and locating all relevant information it held. However, she also finds that it failed to comply with regulation 16(4) of the EIRs, by failing to issue the outcome of its review within 20 working days.

## Appeal

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Should either Mr X or East Dunbartonshire 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**

**12 August 2016**

## Appendix 1: Relevant statutory provisions

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### The Environmental Information (Scotland) Regulations 2004

#### 2 Interpretation

(1) In these Regulations –

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"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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- (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;
- (d) reports on the implementation of environmental legislation;
- (e) costs benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in paragraph (c); and
- (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.

...

#### 16 Review by Scottish public authority

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(4) The Scottish public authority shall as soon as possible and no later than 20 working days after the date of receipt of the representations notify the applicant of its decision.

- (5) Where the Scottish public authority decides that it has not complied with its duty under these Regulations, it shall immediately take steps to remedy the breach of duty.

## Appendix 2: Mr X's Request dated 22.2.2015

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1. Your road maintenance and inspection policy.
2. The arrangements you have in place to implement this policy, specifically to inspect roads for damage, deterioration and defects (e.g. potholes).
3. Specifically the time periods for Inspections.
4. The performance standards for repairing road defects when identified by Council inspection.
5. The performance standards for repairing road defects when reported to the Council.
6. The performance standards for prioritisation of road repairs when defects are reported.
7. The arrangements you have in place to monitor the implementation of this policy, road inspection system and reactive repair arrangements.
8. The information you have on the benchmark and/or standard you have used to establish that your policy, inspection arrangements and defect repair response times are sufficient.
9. The road inspection records from the last 12 months for the section of Howe Road between the B802 junction and the B8048 (that stretch that is within East Dunbartonshire Council's boundary).
10. The repair records from the last 12 months for the section of Howe Road between the B802 junction and the B8048 (that stretch that is within East Dunbartonshire Council's boundary).
11. Details of defects (e.g. potholes reported to you in the last 6 months for the section of the section of Howe Road between the B802 junction and the B8048 (that stretch that is within East Dunbartonshire Council's boundary).
12. All the information you passed onto Gallacher Bassett to assist them handle my claim for the damage to my car tyre [reference provided].
13. The records relating to the repair to the section of Howe Road between the B802 junction and the B8048 (that stretch that is within East Dunbartonshire Council's boundary) which I reported to you following the damage to my car.

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