

# Decision Notice

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**Decision 144/2017: Mr George Finlay and Glasgow City Council**

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**Road maintenance policy and records**

Reference No: 201700967

Decision Date: 5 September 2017



Scottish Information  
Commissioner

## Summary

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The Council was asked for information relating to its road maintenance policy and the history of repairs to a specific road.

The Council considered the request under the EIRs, and issued a fees notice under regulation 8. It also applied section 39(2) of FOISA, on the basis that the request fell to be considered under the EIRs.

The Commissioner found that the Council correctly considered the request under the EIRs.

## Relevant statutory provisions

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) 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) (Interpretation) (paragraphs (a), (c) and (f) of definition of “environmental information”); 5(1) and (2)(b) (Duty to make available environmental information on request)

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.

All references to “the Commissioner” in this decision are to Margaret Keyse, who has been appointed by the Scottish Parliamentary Corporate Body to discharge the functions of the Commissioner under section 42(8) of FOISA.

## Background

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1. On 4 January 2017, Mr Finlay made a request for information to Glasgow City Council (the Council). In relation to a named street, Mr Finlay requested:
  - a) *A copy of your current road maintenance policy relating to that road. Please send me the full policy, but this should include details of the intended frequency of road safety inspections, how these inspections should be conducted and the maximum time between identification of a defect and repairs being carried out.*
  - b) *A copy of the road repair history for that road over the past two years. Again, please send me the full road repair history, but this should include:*
    - *dates of all safety inspections between the dates noted above;*
    - *details of how safety inspections were undertaken (walked or driven, speed of inspection vehicle etc.);*
    - *details of all carriageway defects identified, with description, date and time;*
    - *details of how the authority handled these defects, what repairs were undertaken and the time between the identification of each defect and a repair being carried out.*

2. The Council responded on 11 January 2017. It informed Mr Finlay that it was applying section 39(2) of FOISA, as the request was for environmental information and fell to be considered under the EIRs. It issued Mr Finlay with a fees notice for £34.96 under regulation 8 of the EIRs, confirming that it would respond to the request once the fee had been received.
3. On 11 February 2017, Mr Finlay wrote to the Council, requesting a review of its decision. He did not agree that the request should be considered under the EIRs and submitted that the information should be provided free of charge under FOISA.
4. The Council notified Mr Finlay of the outcome of its review on 9 March 2017. The Council upheld its earlier decision, explaining that it considered the information requested to fall within the definition of “environmental information” within regulation 2(1) of the EIRs, in particular paragraphs a), c) and f) of that definition (considered further below).
5. On 27 May 2017, Mr Finlay wrote to the Commissioner. Mr Finlay 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 Finlay stated he was seeking a decision on the Council’s refusal to provide the information free of charge.

## Investigation

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6. The application was accepted as valid. The Commissioner confirmed that Mr Finlay 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. Given that the basis of Mr Finlay’s requirement for review was whether the Council was correct to consider the request under the EIRs, this must form the basis of the Commissioner’s investigation.
8. On 28 June 2017, the Council was notified in writing that Mr Finlay 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 in relation to its handling of Mr Finlay’s request.
10. Given that part a) of Mr Finlay’s request related to policy on how the Council delivered its functions, the Council was asked whether the policy information requested should be published in line with its Publication Scheme under section 23(1) of FOISA.
11. The Council told the Commissioner that while it did not have a road maintenance policy for named roads, as was outlined in Mr Finlay’s request, it did hold a general Road Maintenance Policy which would fall within the scope of Mr Finlay’s request.
12. The Council accepted that this information should have been published under its Publication Scheme, in line with its obligations under FOISA and regulation 4 of the EIRs, and confirmed that it would take steps to remedy this. During the investigation it provided Mr Finlay with a web-link to where the information could be retrieved and apologised that this had not been provided at the time it dealt with his request.

13. The Council maintained that it had correctly considered the request under the EIRs, with submissions supporting its position.

## Commissioner's analysis and findings

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14. 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 Finlay and the Council. She is satisfied that no matter of relevance has been overlooked.

### Handling in terms of the EIRs

15. The Council dealt with Mr Finlay's request under the EIRs, having concluded that the information requested was environmental information as defined in regulation 2(1) of the EIRs.
16. Where information falls within the scope of this definition, a person has a right to access it (and the public authority has a corresponding obligation to respond) under the EIRs, subject to the various qualifications and exceptions contained in the EIRs.
17. In its submissions to the Commissioner, the Council referred to *Decision 062/2013 Mr D P Simpson and East Ayrshire Council*<sup>1</sup>, where the Commissioner accepted that information concerning road inspection reports fell to be considered as environmental information, to be dealt with under the EIRs.
18. In this current case, the Council stated that it had concluded the information requested by Mr Finlay was environmental information, based on the above decision and consideration of the following paragraphs of the definition in regulation 2 of the EIRs:
  - Paragraph (a) - the state of the elements of the environment, which include land and landscape.
  - Paragraph (c) - measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements and activities affecting or likely to affect the land and landscape, as well as measures or activities designed to protect the land and landscape.
  - Paragraph (f) - information on the state of human health and safety, which (the Council noted) includes built structures which are or may be affected by land and landscape. It submitted that man-made structures, including roads, could fall within this part of the definition.
19. It is clear from the Council's correspondence with Mr Finlay and its submissions to the Commissioner 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 road conditions and their repair, matters impacting on land and landscape, and affected to a significant extent by the elements of the environment. As the Council has stated, this is consistent with the view reached by the Commissioner in previous decisions.
20. In the circumstances, the Commissioner is satisfied that the information requested by Mr Finlay falls within the definition of environmental information set out in regulation 2(1), in

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<sup>1</sup> <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2013/201202109.aspx>

particular paragraphs (a), (c) and (f) of that definition. The Council was therefore obliged to deal with it under the EIRs.

### **Section 39(2) of FOISA – environmental information**

21. The exemption in section 39(2) of FOISA provides, in effect, that environmental information (as defined by regulation 2(1) of the EIRs) is exempt from disclosure under FOISA, thereby allowing any such information to be considered solely in terms of the EIRs. In this case, the Commissioner accepts that the Council was entitled to apply the exemption to the information withheld under FOISA, given her conclusion that it is properly classified as environmental information.
22. As there is a statutory right of access to environmental information available to Mr Finlay in this case, the Commissioner accepts, in all the circumstances, that the public interest in maintaining this exemption (and responding to the request under the EIRs, which is undoubtedly the correct statutory regime) outweighs any public interest in disclosing the information under FOISA.
23. The Commissioner therefore concludes that the Council was correct to apply section 39(2) of FOISA, and consider Mr Finlay's information request under the EIRs.

### **Decision**

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The Commissioner finds that, in the matters raised in Mr Finlay's application to the Commissioner, the Council complied with Part 1 of the Freedom of Information (Scotland) Act 2002 and the Environmental Information (Scotland) Regulations 2004 in responding to the information request made by Mr Finlay.

### **Appeal**

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Should either Mr Finlay 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.

**Margaret Keyse**  
**Acting Scottish Information Commissioner**

**5 September 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.

...

(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

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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;

...

(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.

...

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