

Decision Notice

Decision 155/2017: Mr B and East Dunbartonshire Council

Planning information

Reference No: 201601850

Decision Date: 18 September 2017



Scottish Information
Commissioner

Summary

The Council was asked for information about a specified planning application and housing development. It failed to respond to the request, but in its review outcome it withheld all of the information.

The Commissioner found that the Council did not hold some information specified in the request, and accepted that some information was already publicly available. However, she found that the Council was not entitled to rely on the exceptions it had cited in relation to some information covered by the request, and had failed to provide reasonable advice and assistance. She required the Council to issue a new review outcome in relation to parts of the request.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and 1(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) (parts (a) and (c) of the definition of "environmental information"); 5(1) and (2) (Duty to make available environmental information on request); 6(1) (Form and format of information); 9(1) and (2) (Duty to provide advice and assistance); 10(1), (2) and (4)(a) and (b) (Exceptions from duty to make environmental information available); 13(b) (Refusal to make information available); 16 (Review by Scottish public authority)

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 in this decision to "the Commissioner" 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

1. On 6 December 2015, Mr B made a request for information to East Dunbartonshire Council (the Council). The request was detailed and in parts referred to the response Mr B had received to questions he had asked previously. The request is summarised here:

All information /documentation held in whatever format by the Council or its predecessors in respect of:

- (i) Planning application TP/ED/15/0372.
- (ii) The Kirkintilloch Link Road (Initiative Road).
- (iii) The sale of Woodilee Hospital and the creation of the Woodilee housing development (to include the decision to accept 3 million pounds from developers and grant a substantial reduction in provision of affordable homes in proportion to market homes).
- (iv) The compulsory purchase of any land in relation to the Kirkintilloch Link Road (Initiative Road) with regard to both the original route of the road and the current route of the road.

- (v) All land (including plans) owned by the Council within 1 mile of each boundary of the above applicant site.
 - (vi) (a) The number of market and affordable homes completed in the Council area between January 2008 and November 2015 and their location.
(b) The number of market and affordable homes which were granted planning permission between November 2015 and December 2025 and their location.
 - (vii) Why the Council mapping system shows the Strathkelvin Railway Path at a location where it no longer exists.
 - (viii) Whether the applicant [for planning application TP/ED/15/0372] was asked to provide additional information or clarification, and if not, why not. If so, all such information/documentation in whatever form.
 - (ix) Whether the Planning Board had now visited the site and which board members were present: all such information/documentation in whatever form.
 - (x) Whether the applicant had submitted the additional documents, and if not, why not. If so, all such information/documentation in whatever form.
 - (xi) The report of handling relative to planning application TP/ED/15/0372 and all information/documentation used to inform the report, in any format.
2. The Council failed to respond to this request.
 3. On 11 January 2016, Mr B wrote to the Council requesting a review of its decision on the basis that it had failed to respond to his initial request for information.
 4. The Council failed to respond to this request for review.
 5. On 11 February 2016, Mr B made an application to the Commissioner under section 47(1) of FOISA. On 22 March 2016, the Commissioner issued *Decision 071/2016 Mr B and East Dunbartonshire Council*, which required the Council to provide a response to his requirement for review.
 6. The Council notified Mr B of the outcome of its review on 5 May 2016. In its review outcome, the Council advised Mr B that some of the information he was seeking was already publicly available, including information available on its website. It also notified him that it was refusing to provide some of the information he had asked for on the grounds of excessive costs, and that it did not hold some of the information he had asked for.
 7. On 10 October 2017, Mr B 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 B was dissatisfied with the outcome of the Council's review for a number of reasons. He believed the Council was wrong to say that some information was publicly available online, and he did not accept that the cost of complying with some parts of his request would incur excessive costs.

Investigation

8. The application was accepted as valid. The Commissioner confirmed that Mr B 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.
9. On 1 November 2016, the Council was notified in writing that Mr B had made a valid application and the case was allocated to an investigating officer.
10. 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 including justifying its reliance on any provisions of the EIRs it considered applicable to the information requested.
11. The Commissioner's investigation into this case involved significant correspondence and contact with the Council. The Council's submissions were often delayed, questions were often ignored or overlooked and the answers given were often unclear and required clarification. This extended contact added considerably to the time it took the Commissioner to understand what information was held by the Council and what exceptions it was relying on to withhold information from Mr B. The investigation process is discussed in more detail later on in this decision.

Commissioner's analysis and findings

12. 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 B and the Council. She is satisfied that no matter of relevance has been overlooked.

Scope of the investigation

13. During the investigation, Mr B confirmed that the only parts of the Council's response which he required the Commissioner to investigate related to requests (i), (ii), (iii), (iv), (v), (viii), (x) and (xi).
14. The Commissioner will restrict her decision to those specific requests.

Application of the EIRs

15. The Commissioner's thinking on the relationship between FOISA and the EIRs is set out in detail in *Decision 218/2007 Professor A D Hawkins and Transport Scotland*¹ and need not be repeated in full here.
16. The Council has acknowledged that, in its review outcome, it failed to indicate to Mr B whether it had considered his request under FOISA or the EIRs. It submitted that the request fell to be considered under the EIRs and stated that it wished to rely on section 39(2) of FOISA in relation to the information being withheld. For this exemption to apply, the information would require to be environmental information, as defined in regulation 2(1) of the EIRs.

¹ <http://www.itspublicknowledge.info/applicationsanddecisions/Decisions/2007/200600654.asp>

17. The Council provided submissions solely in terms of the EIRs. It explained that the information relates to a planning issue and, as such, is information relating to activities that affect the environment.
18. The Commissioner is satisfied, from the wording of Mr B's request and the Council's submissions, that the information covered by his request is environmental information, as defined in regulation 2(1) of the EIRs. The information relates to specific planning applications and developments and, as such, the Commissioner is satisfied that it would fall within paragraphs (a) and (c) of the definition of environmental information in regulation 2(1) of the EIRs (reproduced in Appendix 1 to this decision).
19. In this case, therefore, the Commissioner accepts that the Council was entitled to apply the exemption in section 39(2) of FOISA to the withheld information, given her conclusion that it is properly considered to be environmental information.
20. This exemption 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 the applicant in this case, the Commissioner accepts that the public interest in maintaining this exemption and dealing with the request in line with the requirements of the EIRs outweighs any public interest in disclosure of the information under FOISA. She has consequently proceeded to consider this case in what follows solely in terms of the EIRs.

Regulation 5(1) - Duty to make available environmental information on request

21. 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 is subject to the various qualifications contained in regulations 6 to 12 of the EIRs.
22. In this case, the Council submitted that, in refusing Mr B's request, it wished to variously rely upon regulations 6(1)(b), 10(4)(a) and 10(4)(b) of the EIRs.

Regulation 6(1)(b) – Form and format of information

23. In its review outcome, the Council notified Mr B that information falling under requests (i), (iii), (v) and (x) was in the public domain and could be accessed through its website or from other information providers.
24. During the investigation, the Council confirmed that it was seeking to rely on regulation 6(1)(b) in relation to information covered by Mr B's request which was already publicly available. Regulation 6(1)(b) of the EIRs states that, where an applicant requests that information is made available in a particular form or format, a Scottish public authority shall comply with that request unless the information is already publicly available and easily accessible to the applicant in another form or format.
25. In order to determine whether the Council dealt with Mr B's requests correctly, therefore, the Commissioner must be satisfied as to whether, at the time it responded to Mr B's requirement for review, the information held by the Council (and which fell within the scope of the request) was both publicly available and easily accessible to Mr B in another form or format.

Request (i) – Planning application TP/ED/15/0372

26. In request (i) Mr B asked for:

All information and documentation held in whatever format by the Council or its predecessors in respect of planning application TP/ED/15/0372.

27. In correspondence with the Commissioner, Mr B provided screen shots which demonstrated that the information he was seeking was not all available online at the time of the Council's response to him.
28. In its review outcome, the Council notified Mr B that he could access information falling within the scope of request (i) on its website, and that the information was publicly available. However, in response to questioning, the Council acknowledged that not all of the information falling within the scope of this request was available online: some of it was only made available to the public at the Council Planning Office. The Council accepted that it should have advised Mr B of this fact.
29. The Commissioner asked the Council to clarify which documents falling within the scope of request (i) were available online at the time of the request and which documents could only be viewed at the Council Planning Office. The Council provided the Commissioner with a pen drive that contained a range of folders and documents. The Council submitted that two of the folders contained information that could only be viewed in situ at Council offices and one folder contained information that was accessible on its website. The Commissioner reviewed these folders. She notes that while there were 27 documents available to view online, the vast majority of the documents could only be viewed at the Council Planning Office.

Request (iii) – sale of Woodilee Hospital and creation of Woodilee housing development

30. In request (iii) Mr B asked for:

All information and documentation held in whatever format by the Council or its predecessors in respect of the sale of Woodilee Hospital and the creation of the Woodilee housing development (to include the decision to accept 3 million pounds from developers and grant a substantial reduction in provision of affordable homes in proportion to market homes).

31. In its review outcome, the Council notified Mr B that the Woodilee hospital site was owned and sold by the NHS. It provided Mr B with a link to the Council's planning website and noted that information relating to the decision to accept £3 million from developers and grant a substantial reduction in provision of affordable homes in proportion to market homes was contained within the planning application and decision paperwork, which was available on its website. The Council also notified Mr B that a section 75 Agreement (planning obligations relating to the development) was publicly available from Registers of Scotland and from other search providers.
32. The Council later confirmed to the Commissioner that it held the information falling under the scope of request (iii), but it considered it did not have to comply with that part of the request under regulation 6(1)(b) of the EIRs, as it was reasonably available without the need to submit an information request. In further correspondence, the Council clarified that some of the information was not available on its planning website, but had to be viewed in person at its Planning Office. It submitted that Mr B had been advised of this.

Request (v) – land owned by the Council within 1 mile of the boundary

33. In request (v) Mr B asked for:

All information and documentation held in whatever format by the Council or its predecessors in respect of all land (including plans) owned by the Council within 1 mile of each boundary of the above applicant site.

34. In its review outcome, the Council notified Mr B that the information he was seeking was publicly available from Registers of Scotland or a number of other search providers.

35. During the investigation, the Council confirmed that it held information falling within the scope of request (v), but considered it did not have to comply with that part of the request under regulation 6(1)(b) of the EIRs. The Council later provided the Commissioner with this information, which comprised a single document.

Request (x) – additional documents from planning applicant

36. In request (x) Mr B asked for:

Confirmation of whether or not the planning applicant had submitted additional documents, and if not, why not. If so, all such information and/or documentation in whatever form.

37. In its review outcome, the Council notified Mr B that consultation on the planning application was continuing. It stated that “all documents are or will be available” on its planning portal and would form the basis of the Report to the Council’s Planning Board. The Council did not specifically state whether the planning applicant had supplied any additional documents, nor did it provide any such documents to Mr B, or indicate whether or not it held such information. The Council’s response was generic and failed to address the specific information request.

38. In correspondence with the Commissioner, the Council confirmed that it did hold information falling within the scope of request (x) and that Mr B could access this information at its Planning Office. The Council indicated that the information had previously been available online, but was no longer on its website as the planning application had been withdrawn. The Council noted that the information would be retained for a period of four years from the date when the planning application was withdrawn. The Council provided the Commissioner with a copy of the documents.

39. The Council confirmed that it was relying on regulation 6(1)(b) to withhold this information from Mr B, as he could access it at Council premises.

Commissioner’s conclusions on regulation 6(1)(b): requests (i), (iii) and (x)

40. The Commissioner accepts that the information requested by Mr B in requests (i), (iii) and (x) was publicly accessible: the information that was not available online could be viewed at Council premises. However, the Council failed to notify Mr B of this fact and simply referred him to its planning website. It is clear that when the Council responded to Mr B’s request for review, it made no effort to identify and locate the information he had asked for, nor did it provide him with instructions on how he could access this information at its Planning Office.

41. By failing to explain to Mr B that some information could only be accessed at its Planning Office, and by wrongly indicating that the information was available online, the Council made it impossible for Mr B to access this information. Therefore, the Commissioner does not accept that the Council was entitled to rely on regulation 6(1)(b) of the EIRs in relation to the

information falling under the scope of requests (i), (iii) and (x) as the information was not easily accessible to Mr B without an explanation of where he could find it.

42. A public authority which relies on regulation 6(1) of the EIRs must be mindful of its duty to provide reasonable advice and assistance, in line with regulation 9(1). The Council's compliance with regulation 9(1) is considered later in this decision notice.

Commissioner's conclusions on regulation 6(1)(b): request (v)

43. The Commissioner considers that the scope of request (v) is potentially very broad and could encompass a significant amount of information, certainly more than the single document provided to her by the Council. The Commissioner contacted Mr B to seek his views on the information that he expected to be covered by this request and he confirmed that it went beyond the single document identified by the Council.
44. Given the discrepancy between the information that Mr B considers his request should encompass, and the information that the Council has identified as falling within the scope of request (v), the Commissioner does not uphold its reliance on regulation 6(1)(b).
45. The Commissioner is not clear what information the Council holds, which is covered by part (v) of Mr B's request, so she cannot make a determination as to whether the information is publicly available and easily accessible to Mr B in another form or format. She finds that the Council was wrong to rely on regulation 6(1)(b) without first making reasonable attempts to establish what information it held which was covered by part (v) of Mr B's request.
46. If the Council had responded to Mr B's initial request within the statutory timescale, he would have been able to ask the Council to review the way in which it interpreted this part of his request. The Commissioner now requires the Council to review its response to request (v) and respond anew to Mr B, to ensure that it has identified and considered all information which is covered by this request. The Commissioner would strongly suggest that the Council contact Mr B first, to discuss the scope of request (v) and establish what information he hopes to receive.

Regulation 10(4)(a) – information not held

47. As noted above, 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. Regulation 10(4)(a) of the EIRs makes it clear that a public authority may refuse to make environmental information available if it does not hold the information when it receives the request. Regulation 10(4)(a) is subject to the public interest test in regulation 10(1)(b) of the EIRs.
48. During the investigation, the Council confirmed that it was relying on regulation 10(4)(a) to withhold information falling under the scope of requests (viii) and (xi).

Request (viii) – additional information or clarification from the planning applicant

49. As noted above, in request (viii) Mr B asked:

Has the applicant had been asked to provide additional information or clarification? If not, why not? If so, I would like all such information/documentation in whatever form.

50. In its review outcome, the Council notified Mr B that as none of the statutory consultees requested changes, there was no need for it to seek additional information or clarification. Mr B disagreed with this, noting that he was in possession of a letter from the Scottish

Environment Protection Agency (SEPA) (one of the statutory consultees) which appeared to contradict the Council's statement.

51. The Council was asked about the letter from SEPA and it submitted that "at the point of responding [to Mr B's request] none of the statutory consultees required changes". The Commissioner notes that the letter from SEPA dates from 1 July 2015, some time before Mr B made his request on 6 December 2015, and appears to contradict the Council's statement.
52. However, the Commissioner would note that in request (viii) Mr B was not asking whether the Council had received any responses from statutory consultees. He was asking whether the planning applicant had been asked to provide additional information or clarification.
53. In further questioning, the Council explained that the planning applicant provided additional information on 15 July 2015, but the Council did not hold any record showing it had contacted the planning applicant to obtain this additional information. The Council suggested that the planning applicant, or an agent of the planning applicant, may have been contacted by telephone, while noting that it holds no record confirming that this was the case.
54. The Council submitted that it had carried out a further search of the Planning File for the relevant planning application, and had concluded that it did not hold any information falling within the scope of request (viii). The Council acknowledged that it should have notified Mr B, in its review outcome, that regulation 10(4)(a) applies to this request.
55. Based on the submissions laid before her, the Commissioner has concluded that it is not possible to say whether the Council approached the planning applicant for additional information or clarification, but she is satisfied that the Council holds no record of any such contact with the planning applicant and that it has conducted reasonable searches.
56. In the circumstances, the Commissioner considers that the Council should have notified Mr B that the information he asked for in request (viii) was excepted from disclosure under regulation 10(4)(a) of the EIRS, on the basis that it was not held by the Council.

Request (xi) – handling report

57. In request (xi) Mr B asked:
I request to be provided with the report of handling relative to the above application and all information/documentation used to inform the report in whatever format.
58. In its review outcome, the Council advised Mr B that the report he was seeking did not exist. Mr B was dissatisfied with this response. He accepted that a final report may not have been prepared, but he considered it likely that a draft report would exist and that he was entitled to receive a copy.
59. When questioned, the Council maintained that no draft report was held at the time of Mr B's request for information. The Council was asked whether (at that time) it had identified any information that would feed into the report. It also explained that because the planning application referred to by Mr B was later withdrawn, there was no decision, and therefore no report on the handling of the application.
60. The Commissioner has considered the submissions from the Council and she accepts that the information requested by Mr B in request (xi) was not held by the Council at the time of his request. The Commissioner considers that the Council should have notified Mr B that the information was excepted from disclosure in terms of regulation 10(4)(a) of the EIRs, on the basis that it was not held.

61. The Council has now confirmed that the exception in regulation 10(4)(a) applies in relation to information covered by request (xi), as it does not hold the information.

Public interest test

62. As noted above, the exception in regulation 10(4)(a) is subject to the public interest test in regulation 10(1)(b) of the EIRs. This means it 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. The Commissioner is satisfied that the Council does not hold the information in question. Consequently, she does not consider there to be any conceivable public interest in requiring that the information be made available. 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.

63. The Commissioner is satisfied that, in relation to requests (viii) and (xi), the Council was entitled to rely on the exception in regulation 10(4)(a), on the basis that it did not hold the information requested by Mr B.

64. However, in failing to give Mr B a refusal notice which stated that the exception in regulation 10(4)(a) applied in relation to requests (viii) and (xi), the Council failed to comply with regulation 13(b) of the EIRs.

Regulation 10(4)(b) – manifestly unreasonable

65. Regulation 10(4)(b) provides that a Scottish public authority may refuse to make environmental information available to the extent that the request for information is manifestly unreasonable. This exception is also subject to the public interest test in regulation 10(1)(b) of the EIRs.

66. There is no definition of "manifestly unreasonable" in the EIRs, or in Directive 2003/4/EC from which the EIRs are derived. The Commissioner's general approach is that the following factors are relevant when considering whether a request is vexatious or manifestly unreasonable. These are that the request:

- (i) would impose a significant burden on the public body;
- (ii) does not have a serious purpose or value;
- (iii) is designed to cause disruption or annoyance to the public authority;
- (iv) has the effect of harassing the public authority; or
- (v) would otherwise, in the opinion of a reasonable person, be considered to be manifestly unreasonable or disproportionate.

67. This is not an exhaustive list. Depending on the circumstances, other factors may be relevant, provided the impact on the authority can be supported by evidence.

68. The Commissioner recognises that each case must be considered on its merits, taking all the circumstances into account. The term "manifestly unreasonable" must be applied to the request and not the requester, but an applicant's identity, and the history of their dealings with the public authority, may be relevant in considering the nature and effect of the request and the surrounding circumstances.

69. The Council submitted that it was relying on regulation 10(4)(b) in relation to requests (ii) and (iv).

70. The Council acknowledged that its review outcome had not clearly explained why it was unable to comply with these requests, but it noted that its intention was not to issue a straight refusal. Rather, it aimed to advise Mr B that the scope of the requests was very wide and compliance would involve a disproportionate amount of work relative to the information that he was likely to require.
71. The Council argued that it had left it open to Mr B to come back with a revised request that it could assist with. The Council also noted that it had offered to meet with Mr B to help with his questions, but that offer was not taken up.
72. In further submissions, the Council estimated that compliance with request (ii) would incur costs of £707.05, while compliance with request (iv) would incur costs of £1361.58. The Council provided a breakdown of how these costs were calculated.

Request (ii) – Kirkintilloch Link Road

73. In request (ii) Mr B sought:

All information/documentation held in whatever format by EDC or its predecessors in respect of the Kirkintilloch Link Road (Initiative Road).

74. The Council submitted that the planning file on the Kirkintilloch Link Road is held electronically and comprises 179 files with a combined size of 1.10 gigabytes (GB). The Council explained that these files vary in size but, on a conservative estimate, it would take 15 minutes to work through each of these files, which in total would be 44 hours and 45 minutes. The Council noted that this work would be carried out by a Planner on an hourly rate of £15.80, and that the total cost to the Council would be estimated at £707.05. (The charging rules under FOISA state that authorities can only charge a maximum of £15 per hour for staff costs, but there is no such rule under the EIRs.)
75. The Commissioner questioned the Council about these costs and asked it to provide a breakdown of the 15 minute estimate. The Council subsequently reviewed its calculations, and it argued that the cost of £707.05, based on 15 minutes per file, was very much at the lower end of the amount of time that would be required to comply with request (ii).
76. The Council submitted that while some of the 179 files were just 3-4 pages long, others were much larger, up to 300 pages in some instances. The Council argued that while the files were easy to locate, they contain large scale maps which cannot be printed on a standard printer, but must be printed out on a separate plotter held by the Planning department. It submitted that access to this plotter is limited and may require additional employees to support the printing.
77. The Council argued that the files would all have to be “verified” before release. When questioned on this point, it submitted that each file would have to be checked to ensure that all the documents contained in the planning file do, in fact, relate to the correct planning application. The Council expected this to be the case, but it submitted that it was possible for rogue documents to be misplaced in a file, and argued that as this would cause confusion it was necessary for it to take steps to prevent this.
78. The Commissioner questioned why the Council would have to print the information that fell under the scope of request (ii), and why it could not be sent to Mr B electronically, given that the information is held in that way.
79. The Council noted that the file size is some 1.10GB, making email impracticable: it would have to send Mr B over 40 emails to issue the information that way and, as the documents

vary in size, this would be a fairly complicated procedure. The Council noted that it might be possible to put the information onto a CD, but this is not something it does with any frequency. It would have to identify where it could obtain a CD writer before establishing whether the information could be transferred. It argued that the process is not standard and would not be straightforward for the Council.

80. The Council contended that as a right of access to the information already exists at the Planning Office, it would seem excessive to take the steps detailed above. The Council referred to the Town and Country Planning (Development Management Procedure) (Scotland) Regulations 2008 as setting out the rights of individuals to access planning information. (The Commissioner understands this be a reference to the Town and Country Planning (Development Management Procedure) (Scotland) Regulations 2013.) The Council submitted that if Mr B wants to look through the whole file to take a view on the appropriateness of the Council's actions then he is perfectly entitled to do so. It stated that he had been invited to do so on numerous occasions over the past year and a half, and argued that he does not have to rely on an information request to access the information.
81. The Council submitted that it would require substantially more than a week of employee time to provide Mr B with a copy of the planning file. This is time that could be spent on other day to day work, including dealing with ongoing operational matters and responding to other requests for information.
82. The Council noted it would likely be able to provide a clearer response to a more focused request. It reiterated that it had asked invited Mr B to work with the Council to make the request more reasonable, but that he had not taken up its offer of a meeting.

Commissioner's conclusions on request (ii)

83. The Council has submitted that compliance with request (ii) would impose a significant burden on its resources: it would involve more than 44 hours of staff time, which would have a detrimental impact on its ability to continue to carry out its statutory functions.
84. The Commissioner is not persuaded by some of the arguments provided by the Council. Generally, copying information onto a CD is a relatively straightforward task and something which would be reasonable for a public authority to undertake. If the information covered by request (ii) was provided electronically, this would significantly reduce the costs cited by the Council.
85. In addition, the Commissioner does not accept the Council's arguments about having to "verify" the information before release, in case there were any "rogue" documents hiding in the files. The Commissioner does not accept that that the Council is entitled to take this "verification" process into account when assessing the burden and/or costs of compliance with an information request. Even if the Council was entitled to take this into account, she does not accept that it would add any more time onto the information preparation stage and, while misfiling is always a possibility, it is not something that would be expected to occur in every file. The Commissioner considers that the Council has over-stated its argument on this point.
86. The Commissioner acknowledges the Council's argument that Mr B can access planning information at its offices. However, the Council has not sought to rely on regulation 6(1)(b) in relation to request (ii), but has argued that the request is manifestly unreasonable and that the information should be withheld under regulation 10(4)(b) of the EIRs.

87. The Commissioner is not satisfied that the Council has provided sufficient submissions or supporting evidence to demonstrate that Mr B's request was manifestly unreasonable for the purposes of regulation 10(4)(b). She does not uphold the Council's decision to rely upon this exception in relation to request (ii).
88. Having reached this finding, the Commissioner is not required to consider the public interest test in regulation 10(1)(b) of the EIRs.
89. The Commissioner requires the Council to respond to request (ii) in accordance with the requirements of the EIRs, otherwise than in terms of regulation 10(4)(b). In other words, the Commissioner requires the Council to carry out a fresh review of its response to request (ii) in accordance with regulation 16 of the EIRs, and to communicate the outcome to Mr B.

Request (iv) – compulsory purchase

90. In this request, Mr B sought;

All information/documentation held in whatever format by EDC or its predecessors in respect of the compulsory purchase of any land in relation to the Kirkintilloch Link Road (Initiative Road) with regard to both the original route of the road and the current route of the road.

91. The Council submitted that it holds approximately 200 documents and up to 600 pieces of correspondence in relation to the Kirkintilloch compulsory purchases. It notes that the information is held in hard copy files and that the items can be easily located as they are maintained in a structured filing system. The Council has argued that providing the information to Mr B would incur costs of approximately £1,000.
92. The Council explained that it had calculated costs based on a conservative estimate of 5 minutes per record, which would result in 4,000 minutes of employee time, or approximately 66 hours (up to ten working days).
93. Given the content of the information, the search would have to be carried out by a solicitor. The Council explained that the hourly rate of that position, in the middle of the pay band, is £20.63. Therefore, it has calculated the cost of employee time to be £1,361.58.
94. The Council submitted that its main concern with this request was its broad scope, and it argues that it seemed reasonable for it to ask Mr B to provide further detail on exactly what it is he requires rather than spend a disproportionate effort locating and providing information that is of no value to him.

Commissioner's conclusions on request (iv)

95. The Commissioner notes that the information requested by Mr B refers to compulsory purchase orders of land. The Commission considers it likely that this information is likely to involve some discussion of legal issues and costs and she accepts that it is appropriate for this information to be located and reviewed by a solicitor. She acknowledges that it is reasonable to calculate costs based on the hourly rate of a solicitor on the middle of the relevant pay band.
96. The Commissioner also considers that five minutes per record appears to be a realistic estimate of the time it would take to review and prepare each document. The Commissioner notes that although some of the documents covered by this request might be short, the information could be complex, in terms of the issues that would have to be considered, and she accepts that five minutes is a reasonable amount of time.

97. As noted above, while there is no definition of “manifestly unreasonable” in the EIRs, there are various factors which the Commissioner will consider when assessing whether a request for information is “manifestly unreasonable”. One of these factors is whether complying with the request would pose a significant burden on the public authority; another is whether the request would, in the opinion of a reasonable person, be considered manifestly unreasonable or disproportionate.
98. In this case, the Commissioner is satisfied that the Council’s estimated costs of complying with request (iv) are reasonable. She accepts that it could take 66 hours of staff time to comply with the request, which would amount to almost ten working days.
99. The Commissioner notes that while the Council is entitled to charge requesters for the cost of providing information under the EIRs, it has submitted that it does not do so. In any event, the issue to be considered is not only the level of the estimated costs, but whether the Council is required to comply with request (iv), regardless of the fee it would be entitled to charge, taking into account the resource and time burden this would create for the Council.
100. The Commissioner accepts that the burden of providing the information would fall to one of its in-house solicitors, as they are the only employees with sufficient knowledge of the subject matter to retrieve the information. Given the volume of information covered by request (iv) the Commissioner accepts that complying with the request would involve significant staff resources being diverted for a substantial period of time.
101. The Commissioner is minded to accept the arguments put forward by the Council that the request is manifestly unreasonable, but she notes that the Council did not provide Mr B with any explanation of the costs it would incur in complying with request (iv), nor did it explain to him what exception it was relying on to withhold the information he had requested.
102. In addition, the Commissioner notes that the Council has failed to provide her with any evidence that it has considered whether the public interest in making the information available was outweighed by that in maintaining the relevant exception (as required by regulation 10(1)(b) of the EIRs), despite being asked to do so.
103. In the circumstances, the Commissioner does not uphold the application of regulation 10(4)(b) with respect to request (iv). She requires the Council to carry out a fresh review of its response to request (iv) in accordance with regulation 16 of the EIRs, and to communicate the outcome to Mr B.
104. Having reached this finding, the Commissioner is not required to consider the public interest test in regulation 10(1)(b) of the EIRs.

Regulation 9 – advice and assistance

105. Regulation 9 of the EIRs requires Scottish public authorities to provide advice and assistance to applicants, so far as it would be reasonable to expect them do so.
106. Regulation 9(3) provides that Scottish a public authority shall be taken to have complied with this duty if it conforms to the guidance contained in the Scottish Ministers’ Code of Practice on the Discharge of Functions by Scottish Public Authorities under FOISA and the EIRs (the Section 60 Code of Practice).

107. The Section 60 Code of Practice² states that authorities have a duty to provide advice and assistance at all stages of a request. This includes clarifying what information an applicant wants after a request has been made (paragraph 5.1.1.).
108. The Commissioner has considered the Council's compliance with regulation 9 in relation to its handling of requests (i), (ii), (iii), (iv) and (x).
109. The Commissioner notes that the Council omitted to advise Mr B that he could access information falling within the scope of requests (i), (iii) and (x) at its planning office. It failed to explain what information he could access online and what information was only available to view at its premises. In addition, the Council did not explain to Mr B how he could access information at its premises. Because of these omissions, the Commissioner finds that the Council failed to comply with its duties under regulation 9 of the EIRs in respect of requests (i), (iii) and (x).
110. In relation to requests (ii) and (iv), the Council failed to provide Mr B with details of the cost of complying with these requests, nor did it suggest any way of narrowing the scope of these requests to reduce the costs and the potential burden on the Council. The Commissioner notes that the Council did offer to meet with Mr B, but this offer seems to refer to the entirety of his 11-point request, with the key purpose of the meeting being to resolve Mr B's "complaint", not to enable him to refine his requests. In his application to the Commissioner, Mr B argued that he had not made a complaint to the Council, he had simply requested information.
111. In light of the Council's failure to offer Mr B any assistance to narrow the scope of his information requests, the Commissioner finds that the Council failed to fulfil its duties under regulation 9 of the EIRs in relation to requests (ii) and (iv).

Council's engagement with the Commissioner and her staff

112. In this case, the Commissioner has been disappointed with the Council's communication with her office, which has hampered and prolonged her investigation. The Council repeatedly failed to provide details of the searches it had conducted, and provided vague or incomplete responses to clear questions. Its submissions were frequently late.
113. In some respects, the Council seemed to lack an understanding of its duties under freedom of information legislation. When asked to provide public interest arguments in relation to the exceptions it was relying upon, it failed to do so. At one stage in the investigation, the Commissioner was obliged to issue the Council with a formal Information Notice to obtain the information she required for her investigation. Even then, the Council missed the deadline for response and its submissions were not clear, so that the Commissioner had to chase up supplementary responses.
114. During the course of this investigation, the Commissioner met with the Council's Chief Executive to raise concerns about the Council's repeated failure to engage appropriately with her office, to respond appropriately and timeously to information requests, and to meet compliance deadlines. The Council has since provided the Commissioner with information stating how it aims to improve its practice. The Commissioner is still monitoring the Council under her Interventions Policy.

² <http://www.gov.scot/Resource/0051/00510851.pdf>

115. The investigation relating to Mr B's request has taken a considerable amount of time and resources, for a case which should have been relatively straightforward, given that much of the information covered by the request is available to view on the Council's website or in its offices. Much of the delay with this case was due to the Commissioner's staff having to go back repeatedly to the Council for clarification.
116. The Commissioner considers that if the Council had responded to Mr B's information request in the first place, and then provided him with a proper review outcome (i.e. one in which explained it why it was not going to provide him with information under the EIRs, and indicated the exceptions it was relying upon), and if it had told Mr B that he could access information at its Planning Office, it is highly likely that Mr B would not have appealed to the Commissioner at all, and that he could have had his information needs met many months ago.
117. The Commissioner would ask the Council to reflect on the failings identified in this case.

Decision

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

The Commissioner finds that the Council:

- was entitled to refuse to comply with some parts of Mr B's request under regulations 6(1)(b) and 10(4)(a) of the EIRs, where information was already available to Mr B or was not held by the Council. However, the refusal notice issued by the Council in these respects failed to comply with regulation 13(b) of the EIRs.
- was wrong to rely upon regulation 6(1)(b) in respect of some information (request (v)).
- failed to comply fully with regulation 9(1) of the EIRs, by failing to offer Mr B appropriate advice and assistance in relation to requests (i), (iii) and (x).
- wrongly relied upon regulation 10(4)(b) of the EIRs to withhold information covered by requests (ii) and (iv).

The Commissioner requires the Council to carry out a fresh review of its response to requests (ii), (iv) and (v) in accordance with regulation 16 of the EIRs and to communicate the outcome to Mr B.

The Commissioner requires the Council to take these actions by **2 November 2017**.

Appeal

Should either Mr B 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.

Enforcement

If the Council fails to comply with this decision, the Commissioner has the right to certify to the Court of Session that the Council has failed to comply. The Court has the right to inquire into the matter and may deal with the Council as if it had committed a contempt of court.

Margaret Keyse
Acting Scottish Information Commissioner

18 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 -

(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)-

(a) shall be complied with as soon as possible and in any event no later than 20 working days after the date of receipt of the request; and

(b) is subject to regulations 6 to 12.

...

6 Form and format of information

(1) Where an applicant requests that environmental information be made available in a particular form or format, a Scottish public authority shall comply with that request unless-

(a) it is reasonable for it to make the information available in another form or format; or

(b) the information is already publicly available and easily accessible to the applicant in another form or format.

...

9 Duty to provide advice and assistance

- (1) A Scottish public authority shall provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to applicants and prospective applicants.
- (2) Where a request has been formulated in too general a manner, the authority shall-
 - (a) ask the applicant as soon as possible, and in any event no later than 20 working days after the date of receipt of request, to provide more particulars in relation to the request; and
 - (b) assist the applicant in providing those particulars.

...

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;
 - (b) the request for information is manifestly unreasonable;

...

13 Refusal to make information available

Subject to regulations 10(8) and 11(6), if a request to make environmental information available is refused by a Scottish public authority in accordance with regulation 10, the refusal shall-

...

- (b) specify the reasons for the refusal including, as appropriate, any exception under regulation 10(4) or (5) or provision of regulation 11 and how the Scottish public authority has reached its decision with respect to the public interest under regulation 10(1)(b);

...

16 Review by Scottish public authority

- (1) Subject to paragraph (2), an applicant may make representations to a Scottish public authority if it appears to the applicant that the authority has not complied with any requirement of these Regulations in relation to the applicant's request.
- (2) Representations under paragraph (1) shall be made in writing to the Scottish public authority no later than 40 working days after either the date that the applicant receives any decision or notification which the applicant believes does not comply with these Regulations or the date by which such a decision or notification should have been made, or any other action should have been taken, by the authority but was not made or taken.
- (3) The Scottish public authority shall on receipt of such representations-
 - (a) consider them and any supporting evidence produced by the applicant; and
 - (b) review the matter and decide whether it has complied with these Regulations.
- (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.

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