

# Decision Notice 181/2019

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## Community benefit funds

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**Applicant: The Applicant**

**Public authority: North Ayrshire Council**

**Case Ref: 201901003**



Scottish Information  
Commissioner



## Summary

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The Council was asked about the amount of community benefit money that was appropriated under Local Development Plan Policy RES3.

Following an investigation, the Commissioner was satisfied that the Council did not hold the information requested.

## Relevant statutory provisions

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The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (paragraphs (a), (c) and (e) of definition of “environmental information”) (Interpretation); 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 Appendix 1 to this decision. The Appendix forms part of this decision.

## Background

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1. On 4 March 2019, the Applicant made a request for information to North Ayrshire Council (the Council). The information requested was:
  - (i) how much money by way of “community benefit” had been appropriated under the Council’s Local Development Plan Policy RES3;
  - (ii) how this sum of money had been calculated;
  - (iii) what this money had been used for or spent on.
2. As it considered the content of the request to be illegible, the Council contacted the Applicant on 4 March 2019 explaining the message could not be read and asking the Applicant to resend it.
3. The Applicant wrote to the Council on 8 April 2019, providing a further copy of the request, and requesting a review on the basis of the Council’s failure to respond within the statutory timescales set out in the legislation.
4. On 10 April 2019, the Council wrote to the Applicant. It explained that, as the original request was unreadable, it was taking the date of the request as 8 April 2019. The Council explained that, as it deemed the information requested to be environmental information, it would be considering the request under the EIRs.
5. The Council responded on 17 May 2019, apologising for the delay in responding. It referred the Applicant to an attached document.
6. On 17 May 2019, the Applicant wrote to the Council, requesting a review of its decision on the basis that the document provided (a redacted Section 75 agreement) did not satisfy his request and the Council, in his view, had not provided the information requested.

7. Having realised that it had failed to attach the document containing its intended response, the Council wrote to the Applicant with this on 20 May 2019. In its response, the Council provided some information and informed the Applicant, in terms of regulation 10(4)(a) of the EIRs, that it did not hold other information, believing that this may be held by a third party - the Kelburn Works Restoration Trust (the Trust). The Council asked the Applicant if he still wished to continue with his request for review.
8. On 20 May 2019, the Applicant confirmed he wished the Council to carry out a review. He did not believe the Council could transfer information to a third party that was not subject to Freedom of Information legislation, stating the Council should now obtain the information requested from the named party and disclose it to him.
9. The Council notified the Applicant of the outcome of its review on 14 June 2019, fully upholding its original decision, with explanation. It explained that neither Policy RES3 nor the planning permission obliged the proceedings, considerations and decisions of the Trust to be disclosed to the Council, and responsibility for monitoring receipt or disbursement of funds lay with the Trust, not the Council. The Council provided the Applicant with contact details for the Trust, should he wish to request details from them.
10. On 14 June 2019, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of the Freedom of Information (Scotland) Act 2002 (FOISA). By virtue of regulation 17 of the EIRs, Part 4 of FOISA applies to the enforcement of the EIRs as it applies to the enforcement of FOISA, subject to specified modifications. The Applicant stated he was unhappy with the outcome of the Council's review because he was not satisfied with the information provided, and, in his view, Policy RES3 – which was subject to open book accounting – did not allow the Council to abrogate its responsibilities under Freedom of Information legislation.
11. On 10 July 2019, the Applicant wrote again to the Commissioner, providing documentation which, in his view, contradicted the Council's position that it did not hold the information requested.

## **Investigation**

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12. The application was accepted as valid. The Commissioner confirmed that the Applicant made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to him for a decision.
13. On 25 July 2019, the Council was notified in writing that the Applicant had made a valid application and the case was allocated to an investigating officer.
14. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Council was invited to comment on this application and to answer specific questions, with particular reference to the searches carried out to identify and locate the information requested.

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

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

## **Handling in terms of the EIRs**

16. The Council considered the Applicant's request under the EIRs, having concluded that the information requested was environmental information as defined in regulation 2(1) of the EIRs.
17. 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 restrictions and exceptions contained in the EIRs.
18. The Council submitted that the information requested by the Applicant concerned land and its use, and related to a planning policy and associated costs or benefits. Consequently, the Council considered the subject matter fell within the definition of environmental information as set out in regulation 2(1) of the EIRs. The Commissioner accepts this as a reasonable description and, in the circumstances, is satisfied that the information requested by the Applicant falls within the definition of environmental information set out in regulation 2(1), in particular paragraphs (a), (c) and (e) of that definition.
19. The Applicant has not challenged the Council's decision to deal with the information as environmental information and the Commissioner will consider the handling of the request in what follows solely in terms of the EIRs.

## **Regulation 5(1) – Duty to make environmental information available**

20. 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 information that is held by the authority when it receives a request.
21. 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.
22. On receipt of a request for environmental information, therefore, the authority must ascertain what information it holds falling within the scope of the request. Having done so, regulation 5(1) requires the authority to provide that information to the requester, unless a qualification in regulations 6 to 12 applies (regulation 5(2)(b)).
23. A Scottish public authority applying any of the exceptions under regulation 10 of the EIRs must interpret them in a restrictive way and apply a presumption in favour of disclosure (regulation 10(2)). Even where the exception applies, the information must be disclosed unless, in all the circumstances, the public interest in making the information available is outweighed by that in maintaining the exception (regulation 10(1)(b)).
24. In this case, the Council confirmed to the Commissioner that it wished to rely upon the exception in regulation 10(4)(a) of the EIRs.

## **Regulation 10(4)(a) – Information not held**

25. Regulation 10(4)(a) of the EIRs states that a Scottish public authority may refuse to make environmental information available to the extent that it does not hold that information when the applicant's request is received.
26. The standard of proof to determine whether a Scottish public authority holds information is the civil standard of the balance of probabilities. In determining where the balance of probabilities lies, the Commissioner considers the scope, quality, thoroughness and results

of the searches carried out by the public authority. He also considers, where appropriate, any reason offered by the public authority to explain why it does not hold the information. While it may be relevant as part of this exercise to explore expectations about what information the authority should hold, ultimately the Commissioner's role is to determine what relevant recorded information is (or was, at the time the request was received) actually held by the public authority.

27. The Commissioner has taken account of the arguments in the Applicant's requirement for review, his application and subsequent correspondence with the Commissioner's office, in which he provides reasons as to why he considers the Council ought to hold the information requested.

#### *The Council's submissions*

28. In its submissions to the Commissioner, the Council stated that it had responded to the request with the information it held, along with an explanation that the figure provided was that which it understood to have been paid to the Trust. As further information might be held by the Trust, the Council submitted that (under its duty to advise and assist) it provided the Applicant with contact details should he wish to request the information from the third party.
29. The Council explained that it was not responsible for the disbursement of funds remitted by the developer to the Trust and that this was a matter for the Trustees.
30. The Council understood that the figure in question had been disclosed to the Applicant previously, in connection with an earlier information request. It confirmed that, at the time of the request under consideration here, it held no further information on the amounts released by the developer to the Trust, in addition to that which had previously been disclosed to the Applicant.
31. Refuting the Applicant's claim that the Council had abrogated its responsibilities under Freedom of Information legislation, the Council explained that the terms of Policy RES3 required a Trust or other legal arrangement to be established. Neither Policy RES3 nor the planning permission which had been granted obliged the proceedings, considerations, decisions or financial receipts of the Trust to be disclosed to the Council. The Council stated it was not responsible for monitoring receipt or disbursement of funds and that this fell to the Trust, with the principle of open book accounting relating to the developer.

#### *Searches*

32. The Council explained and provided supporting evidence of the searches it had undertaken to identify any information falling within the scope of the request.
  - Searches were carried out of the email accounts of staff with direct recent involvement with this case – namely, the Senior Planning Manager, Senior Development Management Officers (both former and current), and the former Senior Officer (Legal Services) – using the following search terms: RES3, Ladies Walk Fairlie, Regatta View Fairlie, Dawn Homes, Castlepark Gardens and planning reference 12/00159/PPM. No further information to that previously disclosed was identified.
  - Searches of the Council's IDOX system were carried out using the same search terms, but no further relevant information was identified.
  - Discussions took place with the officer now dealing with this matter and the Senior Planning Manager, who were both satisfied no further relevant information was held.

- A search of the hard copy file held in Legal Services was carried out – again no further relevant information was identified.
33. In conclusion, the Council’s position was that, given the circumstances and the extent and results of the searches carried out, these were sufficient to allow it to conclude that no further information was held.
  34. Having considered all the relevant submissions by both parties and the terms of the request, the Commissioner is satisfied that the Council took adequate, proportionate steps in the circumstances to establish whether it held any information that fell within the scope of the request. He accepts that any information relevant to the request would have been capable of being identified using the searches described by the Council.
  35. He has also taken into account the reasons provided by the Council which explain why the information is not held, including the terms of Policy RES3 and the Deed of Trust relating to the Kelburn Castle Restoration Works. He can see nothing in these documents to persuade him that the Council is obliged to hold the information requested by the Applicant in this case.
  36. As explained previously, the Commissioner can only consider what relevant information is actually held by the Council (or was held by it at the time it received the request). He cannot consider what information it should hold, or what the Applicant might believe it should hold.
  37. The Commissioner would further comment that there is no provision in FOISA or the EIRs that obliges a public authority to create, or obtain from third parties, information it does not hold at the time it receives a request for information, in order to be able to satisfy the terms of such a request. Only recorded information held at the time of receipt of the request, which is captured by the scope of that request, can be considered to be held by the authority.
  38. In conclusion, the Commissioner is satisfied, on the balance of probabilities, that the Council does not (and did not, on receiving the request), hold any further information falling within the scope of the request.

*The public interest*

39. The exception in regulation 10(4)(a) of the EIRs is subject to the public interest test in regulation 10(1)(b) and so can only apply if, in all the circumstances of the case, the public interest in maintaining the exception outweighs that in making the information available. In this case, for the reasons set out above, the Commissioner is satisfied that the Council does not (and did not, on receiving the request) hold any information covered by the request. Consequently, he accepts that there is no conceivable public interest in requiring the disclosure of such information and finds that the public interest in making information available is outweighed by that in maintaining the exception.

## **Decision**

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The Commissioner finds that North Ayrshire Council complied with the Environmental Information (Scotland) Regulations 2004 in responding to the information request made by the Applicant.

## **Appeal**

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Should either the Applicant 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**  
**Head of Enforcement**

**19 December 2019**



### The Environmental Information (Scotland) Regulations 2004

#### 2 Interpretation

(1) In these Regulations –

...

"environmental information" has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on

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(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;

...

(e) costs benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in paragraph (c); and

...

#### 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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