

# Decision Notice

---

**Decision 066/2019: Mr U East Lothian Council**

---

## **Sewage information**

Reference No: 201900018

Decision Date: 30 April 2019



Scottish Information  
Commissioner

## Summary

---

The Council was asked about the installation of an overflow sewage storage tank. The Council withheld some information on the basis that disclosure would prejudice substantially the proceedings of the Council.

The Commissioner investigated and found that the Council had failed to identify and locate all the relevant information it held and had not been entitled to withhold information under the exception claimed. The withheld information was disclosed during the investigation.

## Relevant statutory provisions

---

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (paragraphs (b) and (c) of definition of "environmental information"); 5(1) and (2)(b) (Duty to make environmental information available on request); 10(1), (2) and (5)(d) (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

---

1. On 14 June 2018, Mr U made a request for information to East Lothian Council (the Council). The information requested was all documents held in relation to the installation of a specific overflow sewage tank, in particular:
  - a) *Members' library Document 63/08 "Grant of Rights for Drainage Equipment, Pencaitland Road, Haddington";*
  - b) *The Deed of Servitude granted by the Council to the developers' consortium in, I have been told, April 2017;*
  - c) *The document confirming the formal agreement of the then Ward Councillors to this proposal in 2008, which I have been told occurred;*
  - d) *The dates and sums of all payments already or due to be received by the Council in conjunction with the agreements made with the developers or other parties;*
  - e) *The request received by East Lothian Council for this installation on the public amenity land;*
  - f) *Documentation explaining why the Council agreed to this request rather than requesting other options, such as managing the additional excess sewage flows within the Letham Mains site itself;*
  - g) *Information provided to, and consultations held with, local residents and businesses; and*
  - h) *The expert assessments that led the Council to conclude that the proposed installation would not lead to unacceptable local nuisance and loss of amenity because of, for example, increased flood risk, sewage smells or maintenance requirements.*
2. The Council responded on 31 August 2018. It advised that it considered the information held relative to parts a), b), c), e) and h) of his request to be excepted from disclosure under

regulation 10(5)(d) of the EIRs. The Council provided some information relating to part d) of his request and advised that it did not hold information for parts f) and g).

3. On 6 October 2018, Mr U wrote to the Council, requesting a review of its decision on the basis that any information held should be disclosed in the public interest. He advised that any personal data could be redacted from the information. Mr U noted, but did not question, the response to parts f) and g) of the request: however, he was not satisfied that he had been given a full response to part (d).
4. The Council notified Mr U of the outcome of its review on 6 November 2018 and upheld its original response.
5. On 4 January 2019, Mr U wrote to the Commissioner. Mr U applied to the Commissioner 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. Mr U stated he was dissatisfied that the information requested had not been provided.

## Investigation

---

6. The application was accepted as valid. The Commissioner confirmed that Mr U 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.
7. On 24 January 2019, the Council was notified in writing that Mr U had made a valid application. The Council was asked to send the Commissioner the information withheld from Mr U. The Council provided the information held, which fell within the scope of parts a) and b) of Mr U's request. In relation to parts c), e) and h) of the request, it advised that it now wished to rely upon regulation 10(4)(a) of the EIRs, on the basis that it did not hold the information requested. The case was allocated to an investigating officer.
8. 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 questions, with specific reference to regulation 10(5)(d) of the EIRs. It was also asked to explain the steps the Council had taken to identify and locate the information requested.
9. The Council initially advised the Commissioner that, having reconsidered its position, it had provided Mr U with the information previously withheld under regulation 10(5)(d) of the EIRs.
10. Following further communication with the investigating office, the Council responded to the Commissioner, explaining the steps taken to identify the information held. It confirmed that that during the investigation it had located further information falling within the scope of Mr U's request. The Council provided this further information to Mr U, subject to the redaction of personal data, with an apology that the information had not been identified and provided at the time it dealt with his request.
11. Mr U acknowledged receipt of the information disclosed, and accepted the redaction of the personal data. However, he continued to seek a decision from the Commissioner on the steps taken by the Council to identify and locate any relevant information.

## 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 him by both Mr U and the Council. He is satisfied that no matter of relevance has been overlooked.

### Application of the EIRs

13. It is clear from the Council's correspondence with both Mr U and the Commissioner, and from the information itself, that the information sought by Mr U is properly considered to be environmental information, as defined in regulation 2(1) of the EIRs. It relates to the installation of a sewage overflow tank, and so the Commissioner is satisfied that it falls within either paragraph (b) or paragraph (c) of the definition in regulation 2(1) (the text of each paragraph is reproduced in Appendix 1). Mr U has not disputed this and the Commissioner will consider the information in what follows solely in terms of the EIRs.

### Information held by the Council

14. Regulation 5(1) of the EIRs (subject to the various qualifications contained in regulations 6 to 12) requires a Scottish public authority which holds environmental information to make it available when requested to do so by any applicant. It is important to bear in mind that this obligation relates to information actually held by an authority when it receives the request, as opposed to information an applicant believes the authority should hold, but which is not in fact held.
15. Under the EIRs, a public authority may refuse to make environmental information available if one or more of the exceptions in regulation 10 apply and, in all the circumstances of the case, the public interest in maintaining the exception or exceptions outweighs the public interest in making the information available.
16. The standard proof to determine whether a Scottish public authority holds information is the civil standard of the balance of probabilities. In determining where the balance 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 as to what information the authority should hold, ultimately the Commissioner's role is to determine what relevant information is actually held by the public authority (or was, at the time it received the request).
17. The Commissioner has taken account of the submissions provided by Mr U, in which he provided reasons why he believed the Council should have held further information falling within the scope of his request.
18. The Council advised the Commissioner that during the investigation it had become apparent that its searches for the information had not been focussed in the correct area. It explained that following additional searches during the investigation, it had located further information falling within the scope of Mr U's request. As mentioned above, this information was disclosed to Mr U.
19. The Council provided submissions in response to the questions put by the investigating officer on this matter. The Council confirmed the searches and enquiries it undertook to ascertain whether it held any information falling within the scope of Mr U's request, with explanation as to the discovery of the additional information. The Council concluded that,

other than the information that had been disclosed to Mr U, it held no further information falling within the scope of Mr U's request. The Council provided supporting evidence confirming the outcomes of its searches.

20. Having considered all relevant submissions and the terms of the requests, the Commissioner accepts that (by the close of the investigation) the Council had identified and located all the information it held falling within the scope of the request under investigation. He is also satisfied that the information located during the investigation has now been provided to Mr U.
21. However, it is evident that adequate searches were not carried out in dealing with Mr U's request or his requirement for review. If they had been, the Commissioner believes the information should have been located at that time. This may have removed the need for Mr U to make an application to the Commissioner.
22. In failing to take adequate steps to identify, locate and provide the requested information, the Commissioner finds that the Council failed to comply with regulation 5(1) of the EIRs.

### **Regulation 10(5)(d) of the EIRs**

23. The exception in regulation 10(5)(d) provides that a Scottish public authority may refuse to make environmental information available to the extent that its disclosure would, or would be likely to, prejudice substantially the confidentiality of the proceedings of any public authority where such confidentiality is provided for by law.
24. In responding to Mr U's request and request for review, the Council informed Mr U that it considered information falling within the scope of parts a), b), c), e) and h) of his request was excepted from disclosure under regulation 10(5)(d) of the EIRs.
25. As mentioned above, during the investigation the Council provided Mr U with all of the information that it held falling within the scope of his request, including the information which it had originally withheld under regulation 10(5)(d) of the EIRs. In responding to the Commissioner, the Council advised it had no submissions to make regarding the application of regulation 10(5)(d) of the EIRs.
26. In the absence of submissions from the Council as to why the information was initially considered excepted from disclosure, the Commissioner has no option but to find that disclosure of the information would not have had the substantially prejudicial impact required for regulation 10(5)(d) of the EIRs to be engaged. Consequently, in this case, the Commissioner is not satisfied that the information requested was properly withheld under this exception: by withholding the information under regulation 10(5)(d) of the EIRs, the Council breached regulation 5(1) of the EIRs.
27. Having reached that conclusion, the Commissioner is not required to consider the public interest test in regulation 10(1)(b) of the EIRs.

### **Handling of request**

28. The Commissioner is concerned that it appears to have taken the Council until an application was made to the Commissioner before it took adequate and appropriate steps to determine what information it actually held falling within the scope of Mr U's request. It is also apparent here that the Council issued a response which could not be justified, before fully considering what information was held and whether the tests could be met to justify the application of an exception.

29. Overall, the Commissioner cannot stress enough the importance of giving proper consideration to the tests that have to be met for an exception (or exemptions, under FOISA) to apply, when dealing with requests under both FOISA and the EIRs. Equally, it is vital that adequate steps are taken to identify, locate and provide any relevant information held, in order that unnecessary delay is avoided in securing the applicant's right to information.
30. While no useful purpose would be served by requiring the Council to take any specific action in this case, the Commissioner would urge it to ensure that it meets these obligations fully in future.

## **Decision**

---

The Commissioner finds that East Lothian Council (the Council) failed to comply with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by Mr U.

By failing to identify the information it held falling within the scope of the request, and by withholding information under regulation 10(5)(d) of the EIRs, the Council failed to comply with the EIRs, in particular regulation 5(1).

Given that the information identified has been disclosed to Mr U, the Commissioner does not require the Council to take any action in respect of these failures, in response to Mr U's application.

## **Appeal**

---

Should either Mr U 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**

**30 April 2019**

## Appendix 1 Relevant statutory provisions

---

### Environmental Information (Scotland) Regulations 2004

#### 2 Interpretation

- (1) In these Regulations –

...

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

...

- (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;

...

#### 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.

...

(5) A Scottish public authority may refuse to make environmental information available to the extent that its disclosure would, or would be likely to, prejudice substantially-

...

(d) the confidentiality of the proceedings of any public authority where such confidentiality is provided for by law;

...

**Scottish Information Commissioner**

Kinburn Castle  
Doubledykes Road  
St Andrews, Fife  
KY16 9DS

t 01334 464610

f 01334 464611

[enquiries@itspublicknowledge.info](mailto:enquiries@itspublicknowledge.info)

**[www.itspublicknowledge.info](http://www.itspublicknowledge.info)**