

# Decision Notice



Decision 070/2008 Mr James Grant and Aberdeen City Council

Copy of a District Valuer's report

Reference No: 200701795

Decision Date: 25 June 2008

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**Kevin Dunion**

Scottish Information Commissioner

Kinburn Castle  
Doubledykes Road  
St Andrews KY16 9DS  
Tel: 01334 464610



## Summary

Mr James Grant (Mr Grant) requested a copy of a District Valuer's Report from Aberdeen City Council (the Council). The Council responded under the terms of the Freedom of Information (Scotland) Act 2002 (FOISA) by applying the exemption in section 30(c) on the basis that premature release of "private" documents would, or would be likely to, prejudice substantially the effective conduct of public affairs. Following a review, Mr Grant remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the Council had failed to deal with Mr Grant's request for information in accordance with the Environmental Information (Scotland) Regulations 2004 (EIRs), by incorrectly applying regulation 10(4)(d) and 10(4)(e) to the information requested.

The Commissioner therefore requires the Council to supply Mr Grant with a full un-redacted copy of the report in question, within 45 days after the date of intimation of this decision.

## Relevant statutory provisions and other sources

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The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (Interpretation) (definition of "the Directive" and definitions (a), (b) and (c) of "environmental information"; 5(1) (Duty to make available environmental information on request); 10(1), (2)(a) and (b), (4)(d) and (e) (Exceptions from duty to make environmental information available) and 13(d) (Refusal to make information available)

Freedom of Information (Scotland) Act 2002 (FOISA) section 39(2) (Health, safety and the environment)

The full text of each of the statutory provisions cited above is reproduced in the Appendix to this decision. The Appendix forms part of this decision.

The Aarhus Convention: An Implementation Guide

<http://www.unece.org/env/pp/documents/cep43e.pdf>

Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:041:0026:0032:EN:PDF>



*Decision 218/2007 Professor A D Hawkins and Transport Scotland (the Hawkins Decision), 19 November 2007.*

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

## Background

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1. On 19 February 2007, Mr Grant wrote to the Council requesting a copy of a District Valuer's Report applicable to property which he owns.
2. The Council responded on 20 March 2007. In this response, the Council confirmed that it was willing to release part of the document requested by Mr Grant, but that it considered the remainder of the document to be exempt from disclosure in terms of section 30(c) (Prejudice to the effective conduct of public affairs) of FOISA. The Council advised Mr Grant that it considered that the public interest in withholding the remainder of the information outweighed that in disclosing the information.
3. On 27 June 2007, Mr Grant wrote to the Council requesting a review of its decision. In particular, Mr Grant drew to the Council's attention that in a previous meeting with a representative of the Council involved with the Aberdeen Western Peripheral Route (AWPR), he and his wife were shown the full contents of the Report in question. Mr Grant went on to confirm that they were informed at this meeting that they could not have a copy of the Report to take away with them.
4. The Council notified Mr Grant of the outcome of its review on 24 July 2007. The Council upheld its original decision.
5. On 13 December 2007, Mr Grant wrote to the Commissioner's Office, stating that he was dissatisfied with the outcome of the Council's review and applying to the Commissioner for a decision. The application was validated by establishing that Mr Grant had made a request for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its response to that request.

## Investigation

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6. On 19 December 2007, the Council was notified in writing that an application had been received from Mr Grant and, on 22 January 2008, it was asked to provide the Commissioner's Office with the information withheld from Mr Grant. The Council responded with the information requested and the case was then allocated to an investigating officer.



7. The Commissioner has the power to effect settlement in respect of an application which has been made to him. In this case, efforts were made by the investigating officer to effect a settlement between Mr Grant and the Council over the release of the full contents of the Report. Mr Grant had already been given full access to the Report in a previous meeting with a representative from the Council. However, a mutually agreeable arrangement could not be found and, as such, the investigating officer informed both Mr Grant and the Council that the next step was for a decision to be made by the Commissioner in this matter. Both parties confirmed their acceptance of this position.
8. The investigating officer subsequently contacted the Council, providing it with an opportunity to provide comments on the application and asking it to respond to specific questions on the application, such as whether the request for information should have been dealt with under the EIRs rather than under FOISA.
9. It should be noted that should information fall within the definition of environmental information, authorities have both an obligation and an option to consider. They have the obligation of dealing with the request under the EIRs and they have the option of claiming the exemption in section 39(2) of FOISA, which means they do not, at the same time, have to respond to the request under FOISA.
10. In its response, the Council confirmed that it agreed that the request for information should be dealt with under the EIRs. The Council went on to confirm that, on this basis, it wished to rely on the exceptions in regulations 10(4)(d) and 10(4)(e) of the EIRs to withhold the information requested by Mr Grant and to apply the exemption in section 39(2) of FOISA.

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

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11. In coming to a decision on this matter, the Commissioner has considered all the information and the submissions that have been presented by both Mr Grant and the Council and is satisfied that no matter of relevance has been overlooked.

### **FOISA or the EIRs?**

12. In the Commissioner's *Decision 218/2007 Professor A D Hawkins and Transport Scotland*, he considered the relationship between FOISA and the EIRs at some length. As such, the Commissioner does not intend to discuss this at length in this decision. However, broadly, the Commissioner's position on the interaction between the two regimes is as follows:
  - The definition of what constitutes environmental information should not be viewed narrowly, but in line with the definition contained in regulation 1 of the EIRs
  - There are two separate statutory frameworks for access to environmental information and an authority is required to consider any request for environmental information under both FOISA and EIRs



- Any request for environmental information therefore must be dealt with under the EIRs
  - In responding to a request for environmental information under FOISA, an authority may claim the exemption in section 39(2).
  - If the authority does not choose to claim the section 39(2) exemption it must be deal with the request fully under FOISA, by providing the information, withholding it under another exemption in Part 2 of FOISA, or claiming that it is not obliged to comply with the request by virtue of another provision in Part 1 (or a combination of these)
  - The Commissioner is entitled (and indeed obliged) where he considers a request for environmental information has not been dealt with under the EIRs to consider how it should have been dealt with under that regime.
13. Firstly, therefore, the Commissioner must determine whether the information withheld is environmental information. If it is, the Commissioner must go on to consider the Council's handling of the request in terms of the EIRs.
14. Environmental information is defined in regulation 2 of the EIRs. Where information falls within the scope of this definition, a person has a right to access it under the EIRs, subject to the various restrictions and exceptions contained in the EIRs.
15. Having considered the information requested by Mr Grant, it is the Commissioner's opinion that the information sought is environmental information. The information contained within the Report requested by Mr Grant relates to policies and plans which will have a direct impact on the land use and landscape (and, so, the state of the elements of the environment) of a particular area and, as such, fall under the definition of environmental information contained in regulation 2(c) of the EIRs.
16. The Council was notified of the Commissioner's thinking with respect to the EIRs in the circumstances of this case. In its submissions to the investigating officer, the Council confirmed that it agreed that the information was environmental, citing 39(2) of FOISA and confirming that it wished to rely on the exceptions under regulations 10(4)(d) and 10(4)(e).
17. The exemption in section 39(2) is subject to the public interest test in section 2(1)(b) of FOISA. The Commissioner's view is that, in this case, as there is a separate statutory right of access to environmental information, the public interest in maintaining this exemption and allowing access in line with the requirements of the EIRs outweighs the public interest in the disclosure of information under FOISA.
18. Having concluded that the information in question is environmental information, the Commissioner must consider whether the Council was correct in its application of the exceptions in regulations 10(4)(d) and 10(4)(e) of the EIRs to withhold the information.



### Application of regulation 10(4)(d) – Incomplete data

19. Regulation 10(4)(d) provides that a Scottish public authority may refuse to make environmental information available to the extent that it relates to material which is still in the course of completion, to unfinished documents or incomplete data.
20. Regulation 13(d) provides that where a Scottish public authority refuses to disclose information on the basis of the exception in regulation 10(4)(d), the authority shall state the time by which the authority considers that the information will be finished or completed.
21. In addition, in considering the application of this exception, regulation 10(2) states that Scottish public authorities shall interpret the exception in a restrictive way and apply a presumption in favour of disclosure.
22. The Council argues that the Report from the District Valuer to the Council represents advice which is opinion and not fact and may require re-assessment as a result of the public inquiry into the AWPR preferred route, which has not yet been held (it has subsequently been confirmed that the inquiry is due to begin on 9 September 2008). The Council went on to say that in its view the report is essentially a “snapshot “ in time and may not be the only factor involved in making a final decision with respect to the property in question. With reference to the requirement contained in regulation 13(d) of the EIRs, the Council indicated that the report will not be finalised until ministerial approval has been received and that the matter would be resolved after the public inquiry.
23. The Commissioner has considered the content of the District Valuer’s Report and has referred to the Aarhus Convention: An Implementation Guide for guidance on the application of exception 10(4)(d). The Commissioner is unable to accept that the report in question relates to material which is still in the course of completion, to unfinished documents or to incomplete date.
24. The report represents a Report from the District Valuer to the Council and there is no indication that this Report is either incomplete or unfinished. The document does not appear to be in a preparatory state; it appears to be a complete Report with a clear start and end point. Whether the content represents advice or fact is not relevant to the consideration of this exception. The Commissioner accepts that the advice and opinion detailed in the report could be subject to change as a consequence of developments surrounding the AWPR preferred route. However, this report can clearly be seen to be a completed document which aims to provide guidance based on the information available to the District Valuer at the time.
25. The Commissioner accepts that the AWPR preferred route project is a work in progress. However, in considering this exception, the Council needs to focus on whether this particular document is a work in progress and the Commissioner for the reasons noted above is unable to accept that it is.



26. Having decided that regulation 10(4)(d) of the EIRs does not apply to the information requested, the Commissioner does not require to consider the public interest arguments put forward by the Council in relation to this exception.

#### **Application of regulation 10(4)(e) – Internal communications**

27. Under regulation 10(4)(e) of the EIRs, a Scottish public authority may refuse to make environmental information available to the extent that the request involves making available internal communications.
28. This regulation directly reflects Article 4.1(e) of the European Directive 2003/4/EC on public access to environmental information, and also Article 4.3(c) of the Convention on access to information, public participation in decision-making and access to justice in environmental matters, established at the Aarhus Convention. The regulation, however, does not expand upon what is meant by internal communications.
29. As with all of the exceptions under regulation 10, a Scottish public authority applying this exception must do so in a restrictive manner and apply a presumption in favour of disclosure (regulation 10(2)(b)). Even where the exception applies, the information must be released unless, in all the circumstances of the case, the public interest in making the information available is outweighed by that in maintaining the exception (regulation 10(1)(b)).
30. For information to fall within the scope of the exceptions, it need only be established that the information is an “internal communication”. Only if the Commissioner decides that a document is an “internal communication” will he be required to go on and consider the public interest test.
31. Before going on to consider whether the Report falls within the scope of what can be considered to be classed as an “internal communication”, it is appropriate to clarify the relationship between the District Valuer and the Council. The District Valuer is employed by the District Valuation Service, which is the commercial branch of the Valuation Office Agency (VOA). The VOA is an Executive Agency of HM Revenue and Customs. The Council is carrying out work on behalf of Transport Scotland, which is an Agency of the Scottish Government. The AWPR Design Team is made up of all the organisations involved in the AWPR project.
32. In support of its application of the exception in regulation 10(4)(e), the Council submitted that, due to the size of the AWPR project, the District Valuer has become an integral member of the AWPR Design Team and, as such, communications between the District Valuer and the Council are internal. The Council also cited a decision from the (UK) Information Commissioner relating to a request for information made to the Department for Communities and Local Government for a report made by a Planning Inspector, which came to the view that the report was indeed an “internal communication” for the purposes of the EIRs. The decision can be viewed at:  
[http://www.ico.gov.uk/upload/documents/decisionnotices/2006/decision\\_notice\\_fs50070181.pdf](http://www.ico.gov.uk/upload/documents/decisionnotices/2006/decision_notice_fs50070181.pdf)



33. However, the Commissioner considers the role of the Planning Inspector in that case to be different from the current set of circumstances. The Planning Inspector was appointed by the Secretary of State and the Inspector made a report and recommendation to the Secretary of State based on the evidence and submissions considered in the course of the planning inquiry. The Inspector's role therefore constituted an integral part of the same legal and administrative function as that performed by the Secretary of State himself and, of course, the Secretary of State is in effect the same public authority as the Department for Communities and Local Government.
34. However, in this case, the District Valuer is employed by HM Customs & Excise, which is a completely separate organisation from the Council. The fact that the Council, in this context, is carrying out work on behalf of Transport Scotland does not alter this position. The Commissioner is not aware of any administrative or legal relationship between the Council and the District Valuation Service (such as a formal appointment to act on its behalf) to give credence to a suggestion that the communications should be regarded as "internal."
35. The Commissioner accepts that the District Valuer will be an important contributor to the AWPR project, but the mere fact that a working relationship exists between the District Valuer and the Council in the context of the AWPR project does not automatically mean that communications between the two can be classed as "internal communications" for the purposes of the EIRs.
36. In coming to this decision, the Commissioner has given weight to the requirement to interpret the exception in regulation 10(4)(e) in a restrictive manner.
37. The Commissioner is therefore satisfied that in this case the District Valuer's Report cannot be considered as an "internal communication" for the purposes of the EIRs. It is clear, that this document has been created independently of the Council and contains advice from the District Valuer to the Council.
38. The Commissioner does not dismiss the possibility that, in certain cases, communications between two or more separate public authorities may be capable of being considered as internal communications for the purposes of regulation 10(4)(e). However, he will expect an authority to be able to highlight particular aspects of the administrative and legal relationship between the two bodies to show why communications between them should be considered to be internal. This will include consideration, on a case-by-case basis, of matters such as the nature and context of the particular relationship and the nature of the communication itself.
39. As the Commissioner has found that this exception in regulation 10(4)(e) of the EIRs does not apply to the information withheld in this case, he is not required to go on to consider the public interest under regulation 10(1) of the EIRs.



## **DECISION**

The Commissioner finds that Aberdeen City Council (the Council) failed to comply with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by Mr Grant. The Council incorrectly applied the regulations in 10(4)(d) and 10(4)(e) of the EIRs in withholding the information requested by Mr Grant

The Commissioner therefore requires the Council to supply Mr Grant with a full, un-redacted copy of the Report requested, within 45 days after the date of intimation of this decision notice.

## **Appeal**

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Should either Mr Grant or the Council wish to appeal against this decision, there is an 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 notice.

**Kevin Dunion**  
**Scottish Information Commissioner**  
**25 June 2008**



## Appendix

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### The Environmental Information (Scotland) Regulations 2004

#### 2 Interpretation

(1) In these Regulations –

...

"the Directive" means Directive 2003/4/EC of the European Parliament and of the Council on public access to environmental information and repealing Council Directive 90/313/EEC;

"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;
- (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other released 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.

...



## 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

...

- (d) the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data; or
- (e) the request involves making available internal communications.

## 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-

...

- (d) if the exception in regulation 10(4)(d) is relied on, state the time by which the authority considers that the information will be finished or completed; ...



**Freedom of Information (Scotland) Act 2002**

...

**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.

...