

Decision Notice



Decision 020/2013 Mr Daniel Henderson and Falkirk Council

Historical maps and potentially contaminated land sites

Reference No: 201201085

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www.itspublicknowledge.info

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Summary

Mr Henderson asked Falkirk Council (the Council) for copies of historical maps (request 1) and for information relating to potentially contaminated land sites (request 2) held on the Council's database.

With respect to request 1, the Council argued that the information was otherwise accessible to Mr Henderson, but also that providing the information would, or would be likely to, substantially prejudice the interests of the person who provided it with the information. With respect to request 2, the Council refused to provide the information on the basis that it was incomplete.

During the investigation, the Council stated that it did not actually hold the information sought by Mr Henderson in request 2, but also argued that this request was manifestly unreasonable. However, towards the end of the investigation, the Council provided Mr Henderson with the information he had asked for.

The Commissioner found that the Council had failed to deal with Mr Henderson's requests for information in accordance with the EIRs.

Relevant statutory provisions

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (Interpretation) (definition (a) to (c) of "environmental information"); 5(1), (2)(b) and (3) (Duty to make environmental information available on request); 6(1)(a) and (b) (Form and format of information); 10(1), (2), (4)(a), (b) and (d) and (5)(f) (Exceptions from duty to make environmental information available)

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.



Background

Request 1

1. On 8 December 2011, Mr Henderson wrote to the Council requesting "...copies of historical maps (prior to 1960) that you hold on your database". This request was made in the context of correspondence relating to potentially contaminated land sites and the "database" was reference to the Council's Geographical Information Systems (GIS) database which recorded these sites.
2. The Council responded on 9 December 2011. The Council stated that it was unable to provide Mr Henderson with the maps due to copyright restrictions, stating that it was unable to provide externally sourced data of this kind to persons outwith the Council. It quoted from a guidance note, produced for council employees by Forth Valley GIS, stating:
Externally sourced data such as Ordnance Survey data must only be used for Internal Business use: solely and explicitly to fulfil the mapping requirements for the administration and operation of the Council.
3. On 12 December 2011, Mr Henderson wrote to the Council requesting a review of its decision. He asked the Council to advise him of the exception in terms of the EIRs it was relying on to withhold information and explain why the exception applied.
4. The Council notified Mr Henderson of the outcome of its review on 15 December 2011. The Council informed Mr Henderson that it held the information, but that it was relying on regulation 10(5)(f) of the EIRs to withhold the information from him. The Council stated that the information in question was not owned by the Council, but held in digital form under licence, and that under the terms of that licence the Council was only entitled to make a limited number of prints for internal or private use and that to release the information would be a breach of its licence agreement.

Request 2

5. On 15 March 2012, Mr Henderson wrote again to the Council requesting a list of all the "potentially contaminated" sites held on the Council's database (i.e. the GIS database referred to above), along with their locations and a very brief note as to why each site was "potentially contaminated".



6. The Council responded on 26 March 2012. It informed Mr Henderson that it was relying on regulation 10(4)(d) of the EIRs (“material in the course of completion, etc.”) to withhold the information sought by Mr Henderson. The Council stated that it was in the process of reassessing the 1650 potentially contaminated sites which had previously been identified. It expressed concern as to the potentially misleading consequences of disclosure prior to completion of the reassessment. The Council did, however, state that it continued to actively disseminate a wide range of information related to contaminated land and routinely provided access for any member of the public to any reports/data undertaken in terms of its duties under Part IIA of the Environmental Protection Act 1990.
7. On 4 April 2012, Mr Henderson wrote to the Council requesting a review of its decision. He did not accept that the Council had complied with its statutory obligations in terms of the EIRs. Mr Henderson highlighted that, in one respect, the Council identified disclosure as potentially misleading, while on the other hand it routinely provided access for the public to information on these sites. Mr Henderson also highlighted that the database in question would be subject to ongoing change and consequently (on the Council’s reasoning) would never be completed.
8. The Council notified Mr Henderson of the outcome of its review on 26 April 2012. The Council maintained that the information was incomplete and that it was correct to apply regulation 10(4)(d) to it.
9. On 29 May 2012, Mr Henderson wrote to the Commissioner with reference to both requests, stating that he was dissatisfied with the outcome of the Council’s reviews and applying 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 certain specified modifications.
10. The application was validated by establishing that Mr Henderson had made requests for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its responses to those requests. The case was then allocated to an investigating officer.

Investigation

11. On 1 June 2012, the Council was notified in writing that an application had been received from Mr Henderson and was asked to provide the Commissioner with any information withheld from him. The Council responded with a sample of the information requested and the case was then allocated to an investigating officer.



12. The investigating officer subsequently contacted the Council, giving it an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking it to respond to specific questions. The Council was asked (with particular reference to the requirements of the exceptions cited in its responses to Mr Henderson) to justify its reliance on any provisions of the EIRs it considered applicable to the information requested.
13. In respect of request 1, it was established during the course of the investigation that Mr Henderson did not simply seek copies of historical maps (which the Council had advised him were accessible by other means), but a list of the “potentially contaminated sites” overlaid upon a map, rather than a textual reference to the location of a site.
14. Mr Henderson advised that he had specifically sought *historical* maps (pre 1962) as he understood that the Council could not refuse this request on the grounds of Crown copyright, which it had previously referred to in correspondence. Mr Henderson advised that he had previously been supplied with textual descriptions of sites, but this had resulted in errors and confusion, which is why he sought copies of the historical maps held on the database.
15. During the investigation, the Council advised the investigating officer that, with respect to request 2, it sought to rely on regulations 10(4)(a) (“information not held”) and 10(4)(b) (“request manifestly unreasonable”) of the EIRs, in addition to regulation 10(4)(d).
16. The relevant submissions received from both the Council and Mr Henderson will be considered fully in the Commissioner’s analysis and findings below.

Commissioner’s analysis and findings

17. In coming to a decision on this matter, the Commissioner has considered a sample of the withheld information and the submissions made to her by both Mr Henderson and the Council and is satisfied that no matter of relevance has been overlooked.

Environmental information

18. Mr Henderson has not challenged the Council’s decision that the information he requested was environmental. Considering the subject matter of the request and the sample of information supplied to the Commissioner, she is satisfied that the information can properly be regarded as environmental information as defined by paragraphs (a), (b) and (c) of the definition in regulation 2(1) (reproduced in the Appendix to this decision). Consequently, the Commissioner accepts that the Council was correct in dealing with this case under the EIRs.



Request 1

19. Mr Henderson sought "...copies of the historical maps (prior to 1960)" held on the Council's GIS database. When considered in the context of the ongoing correspondence with the Council with regard to contaminated land, it is clear that Mr Henderson sought copies of these maps to assist his understanding of the locations of "potentially contaminated sites". This was confirmed during the investigation.
20. The Council submitted that it was relying on exception contained in regulation 10(5)(f), and also on regulation 6(1)(b) of the EIRs, in relation to this request.
21. 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.
22. In order to determine whether the Council dealt with Mr Henderson's request correctly, the Commissioner must be satisfied as to whether, at the time it responded to the request, the information held by the Council (and which fell within the scope of the request) was both publicly available and easily accessible to Mr Henderson in another form or format.
23. The Council advised Mr Henderson that the information he requested was available through a variety of sources, namely the Council's Research and Information Unit, the Council's Archives and Falkirk Library. The Council also submitted that it had informed Mr Henderson that historical Ordnance Survey Maps were readily available via the National Map Library of Scotland, Ordnance Survey and several internet companies.
24. The Council also highlighted that, during a meeting with Mr Henderson, he confirmed that he had already obtained copies of the historical maps from a Falkirk Council Library. It therefore concluded that the information Mr Henderson requested was readily available in the public domain.
25. The Commissioner accepts that simple copies of "historical maps" were publicly available to Mr Henderson at the time of his request. However, Mr Henderson specifically sought copies of the historical maps **held on the Council's database**. It is clear from the context of this request that Mr Henderson did not simply seek copies of ordnance survey maps, but rather a reference tool for understanding the location of contaminated land sites. From the correspondence provided, there is no confirmation from the Council that these maps, available through other means, were the maps used in the Council's GIS database. The Commissioner cannot therefore, accept the Council's reliance on regulation 6(1)(b) in responding to Mr Henderson's request.



Regulation 10(5)(f)

26. Regulation 10(5)(f) of the EIRs states 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 interests of the person who provided the information where that person –
- (i) was not under, and could not have been put under, any legal obligation to supply the information;
 - (ii) did not supply it in circumstances such that it could, apart from [the EIRs], be made available; and
 - (iii) has not consented to its disclosure.
27. The Commissioner's briefing¹ on regulation 10(5)(f) states that certain points should be addressed in considering whether this exception applies. These are:
- Was the information provided by a third party?
 - Was the third party under a legal obligation to provide the information?
 - Could the provider be required by law to provide it?
 - Would release of the information cause substantial harm to the interests of the provider?
 - Is the information otherwise publicly available?
 - Has the provider consented to disclosure?
28. The Council described the GIS system used by its Contaminated Land Team. It explained that it used information from a variety of third party sources, such as base maps from Ordnance Survey. The third party data was managed and maintained externally by Forth Valley GIS, under a Service Level Agreement. Additional third party data, including historical mapping and contaminated land data information, was purchased from a commercial provider and licensed to the Council.
29. The Council stated that, under the terms of the licence, it was only entitled to make a limited number of prints for internal or private use. It confirmed that the third party providing the information was not under any legal obligation to provide the information, and could not be put under any legal obligation to provide the information. The Council also argued that the equivalent information was already in the public domain (see above) and confirmed that the third party in question had not consented to its disclosure.

¹ <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section33/Section33.asp>



30. While no evidence was provided to show that consent was actively sought by the Council, the Council stated that the third party in question had not consented to disclosure. The Commissioner understands this to be on the basis of its licence agreement with the third party in question. In the circumstances, the Commissioner accepts that the tests in regulation 10(5)(f)(i), (ii) and (iii) are satisfied in relation to the withheld information. She is now required to consider whether disclosure of this information would, or would be likely to, prejudice substantially the interests of the information provider.
31. The Council did not provide further arguments or evidence as to why the third party's interests would, or would be likely to be, prejudiced substantially by provision of the information, other than reference to the protection of the licensor's commercial interests. From information obtained during the investigation, the Commissioner accepts that the third party provider has an interest in copyright in the withheld information.
32. Alongside his application, Mr Henderson provided the Commissioner with an extract from Forth Valley GIS guidance note, which states:
- Under FOI, you can supply the public with a single reference copy of a map containing Council information overlaid on top of OS map information (e.g. School catchment area).*
- and
- If a member of the public wants a map displaying ONLY Ordnance Survey material for their own personal use, they must obtain it commercially from one of the many stockists of Ordnance Survey Mapping....*
- Please note: this is not to be confused with requests for authority data displayed on top of contextual Ordnance Survey maps (permitted under the Freedom of Information Act).*
33. Mr Henderson also highlighted that the Council was a member of the One Scotland Mapping Agreement with Ordnance Survey, which entitles all Councils to use data to meet their public service delivery obligations, suggesting this included making information available to the public².
34. Having considered the arguments presented by both the Council and Mr Henderson, and in the absence of further evidence from the Council as to why the third party's interests would, or would be likely to, be prejudiced substantially by disclosure, the Commissioner cannot accept that regulation 10(5)(f) applies. In reaching this conclusion, the Commissioner has taken account of section 50 of the Copyright, Designs and Patents Act 1988 (the 1988 Act), which would suggest that Parliament did not envisage disclosure of this kind being prejudicial to a copyright holder's interests.

² <http://www.ordnancesurvey.co.uk/oswebsite/public-sector/scotland/licensing.html>



35. Section 50 of the 1988 Act states that if a particular “act” (e.g. the release of information in response to an FOI request) is required by an Act of Parliament, then the doing of that act does not infringe copyright. However, the usual copyright restrictions will apply to any subsequent use of the information by the requester. Specific provisions have already been put in place regarding the “act” of replying to information requests under FOISA – see article 3 of the Freedom of Information (Scotland) Act 2002 (Consequential Modifications) Order 2004. The Commissioner would expect the same principle to apply to requests made and responded to under the EIRs. In any event, regulation 5(3) of the EIRs provides that any enactment or rule of law which would prevent the making available of information in accordance with the EIRs shall not apply.
36. The Commissioner recognises that simple copies of Ordnance Survey maps are available to members of the public through commercial means and that the EIRs are not a means to access such information. However, in this instance Mr Henderson sought copies of the maps in order to assist his understanding of the information collated on the GIS database relating to “potentially contaminated sites”: he did not simply seek copies of historical maps. The matter is therefore covered by request 2 (see below) and the Commissioner does not require the Council to take any action in respect of its incorrect application of regulations 6(1)(b) and 10(5)(f) in this case.

Request 2

Regulation 10(4)(a)

37. Regulation 10(4)(a) of the EIRs states that Scottish public authority may refuse to make environmental information available to the extent that it does not hold that information when an applicant’s request is received.
38. The Council stated that it did not have a specific list of contaminated land sites showing locations or a description showing why the site was potentially contaminated. By way of explanation, the Council described the manner in which it recorded information relating to contaminated land. The Council described its responsibilities in respect of contaminated land, under both Part IIA of the Environmental Protection Act 1990 and the Planning Regime. In meeting these responsibilities, it was supported by the GIS system.
39. The Council explained that the GIS system, as employed by it, was a visual one. Potentially contaminated areas were input into the system and shown as coloured shapes (normally reflecting the boundaries of previous uses of the land) on a layer overlying the base maps. The Council stated that this information is generated as a “shape file” and presented in the form of a “polygon layer”. There was another way of presenting the information, as “point data” on a layer as the “points layer” (which would show the co-ordinates on the map), but the Council explained that it did not have this element of the system as it was not required for its purposes.



40. The Council stated that the information could be represented in table and text form. It provided examples of the information which could be extracted from the system, explaining that the information could be represented in an Excel spreadsheet showing all sites identified by a number (from the map-based system), but no location would be identified beyond this number and the description of the site would be by reference to the (normally historical) use of the land.
41. The Commissioner has considered the explanations presented by the Council, but does not accept that it does not hold the information requested by Mr Henderson. In reaching this conclusion, the Commissioner notes that the arguments presented by the Council centre on the form in which the information has been requested by Mr Henderson: he sought a “list” of potentially contaminated sites.
42. The Council acknowledged that in some instances it would be incumbent upon a public authority to compile a list in the form requested, but stated that in this instance the creation of a would require a great deal of skill and judgement, taking the work beyond simple compilation of raw data.
43. The Commissioner acknowledges that Mr Henderson asked for a “list” (that is, something in textual form) and that his preference for receiving the information in the form of a map was only expressed during the investigation or in the context of other correspondence with the Council relating to the subject matter of his request. However, the supplementary information provided by the Council during the investigation (examples of the information which could be generated by its database, such as an Excel spreadsheet) appears to provide a relevant “list” for the purposes of Mr Henderson’s request, used along with the associated GIS maps. The Commissioner notes that individual sites can be identified (by number, corresponding with the site numbering on the maps) and that a brief description of why the site is “potentially contaminated” can be provided, by reference to use. Consequently, the Commissioner cannot accept that the Council does (or did) not hold the information and finds that it was incorrect in its application of regulation 10(4)(a) to this request. The form in which Mr Henderson requested (and could be provided with) the information is considered further below.

Regulation 10(4)(b)

44. Regulation 10(4)(b) states that a Scottish public authority may refuse to make environmental information available to the extent that the request is manifestly unreasonable. There is no definition of “manifestly unreasonable” in the EIRs, or in Directive 2003/4/EC from which they are derived. There is no single test for what sort of request may be manifestly unreasonable. Rather, it is to be judged on each individual request, bearing in mind all of the circumstances of the case. However, the Commissioner is of the view that regulation 10(4)(b) will provide an exception to the duty to comply with a request where that request is vexatious, where it would incur disproportionate costs for the public authority or where responding would otherwise be an unreasonable diversion of the authority's resources.



45. The Council, in relying on this exception, stated that it already disclosed the information from the database with reference to individual particular sites. The Council supplied copies of the type of information disclosed. It stated that it recognised the public interest in knowing this information and it submitted that this form of provision met the public interest in supplying the information, contextualised to the individual sites.
46. The Council submitted that in this (site-specific) manner, it could contextualise the information in relation to the nature of the request and apply a high degree of skill to the consideration of the broader implications for that site. To attempt to do this on a general basis by the creation of a list, it argued, would be an enormous task and (because of its general nature) would lack the benefit which came from the focus of a specific example.
47. The Council stated that it would be contrary to the public interest to move from the individualised provision of the information for a specific site to the generalised provision of information for the Falkirk area as a whole.
48. Although the Commissioner acknowledges the Council's position with respect to the manner in which the information is held in the GIS database, and its comments with respect to the process involved in the creation of a specific list, she is unable to conclude that this, in itself, is sufficient to conclude that this request is manifestly unreasonable.
49. The Commissioner notes that, alongside the GIS map(s), the form in which the Council can currently provide the information (identified in Appendices 3 and 4 to the Council's submissions to the Commissioner of 19 December 2012) would appear to comprise a relevant list (see paragraph 43 above). Alongside the map, the provision of this information would appear to meet the terms of Mr Henderson's request. Neither of these methods would require the exercise of skill or judgement, to such an extent as to render the request "manifestly unreasonable".
50. The Commissioner notes that the basis of the Council's arguments in relation to this exception appears to be that it would be more meaningful to provide information from the database in contextualised form in response to site-specific requests. However, it does not follow that it is therefore manifestly unreasonable to provide the more generalised information requested here. It would still be open to the Council to provide more generalised contextual information about the quality of the data currently held. Moreover, there would appear to be no reason why the provision of site-specific information should not continue (as indeed may be required to comply with future information requests)

Regulation 6(1)(a)

51. In relying on the exception in regulation 10(4)(b), the Council also argued that the provision of the information in the individualised form in response to particular requests engaged regulation 6(1)(a), in that it was reasonable for the Council to make the information available in this individual form rather than by way of a list. The Council argued that the work that would be involved to create such a list was in itself indicative of Mr Henderson's request being manifestly unreasonable.



52. The Commissioner does not accept that the Council was correct to refer to regulation 6(1)(a) in relation to this request. In particular, the Commissioner notes that the Council's reference to this regulation is in relation to each specific site, where requested. Therefore, to obtain all the information captured by the current request, the requester would require to have knowledge of all the potentially contaminated sites at the outset. In addition, this regulation would require that the information requested would be available, in its *entirety*, in this alternative form, which is not (and could not practicably be) the case in these circumstances. The Commissioner does not, therefore, accept the Council's reliance on regulation 10(4)(b) in relation to this request, nor its reference to regulation 6(1)(a) when relying on this exception.

Regulation 10(4)(d)

53. 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 to incomplete data.
54. Regulation 13(d) provides that where a Scottish public authority refuses to make information available on the basis of the exception in regulation 10(4)(d), the authority shall state the time by which it considers that the information will be finished or completed.
55. In support of its reliance on regulation 10(4)(d), the Council explained that it had conducted a screening exercise in 2001, which identified approximately 1500 potentially contaminated sites within its area. A subsequent modelling exercise identified in excess of 1650 potentially contaminated sites which, the Council indicated, were in the early stages of being re-assessed, risk categorised and prioritised. The Council stated that this was a significant project: since 2001, it had completed this process for 250 potentially contaminated sites. It envisaged that the re-assessment process would take a number of years to complete: it hoped to have completed a detailed assessment of those sites currently identified as "high risk" by 2020, but a more specific timeframe could not be provided due to a number of budgetary and personnel constraints.
56. Part IIA of the Environmental Protection Act 1990 established that Local Authorities had a responsibility to identify, prioritise and remediate contaminated land for the protection of human health, sensitive ecosystems, the water environment and property. The Council's inspection process commenced in September 2001 and it set up a GIS system populated with data obtained from historical maps, databases and anecdotal information. As indicated above, a modelling exercise has since identified over 1650 sites as potentially contaminated, with additional sites being added to the system as further environmental information becomes available. The Council emphasised that this did not mean the identified sites were actually contaminated, but all have a potential to be contaminated.
57. The Council stated that the information is known to be inaccurate until the re-assessment was completed, and to place it into the public domain might result in misrepresentation and unnecessary concern.



58. The Council provided some examples of misrepresentation which might result from disclosure of the information. These included a serious risk of damage to the value and marketability of properties identified as potentially contaminated, which would have a detrimental impact on any property/landowner wishing to sell their property/land and also cause problems for potential buyers. It also argued that release of incomplete data would result in unnecessary concern and potential stress for residents and other site users, if they incorrectly thought that they were living/working on a potentially contaminated land site.
59. As argued above, the Council routinely provides access for any member of the public to any completed reports/data compiled under its Part IIA duties (which include the sites identified as potentially contaminated under Part IIA prioritisation works) and continues to disseminate actively information that is held in relation to contaminated land through a variety of methods.
60. During the investigation, the Council confirmed that its Contaminated Land Team utilised the data held on the GIS database relating to “potentially contaminated sites” when determining whether a contaminated land assessment was required. Where it considered that there might be potential contamination issues, then a contaminated land condition would be placed on a planning application. In doing so, the Council referred to its Supplementary Planning Guidance Note, which states that planning applicants will be required to consider contamination if their proposed development falls within 250m of a former industrial use or other potentially contaminative activity.
61. The Aarhus Implementation Guidance (produced by the United Nations Economic Commission for Europe as guidance on the international convention from which the EIRs are derived) provides (at page 58) that “in the course of completion” suggests that the information in question will have more work done on it within some reasonable time-frame.
62. The Commissioner considers that the Council was incorrect in its application of the exception in regulation 10(4)(d). In reaching this conclusion, the Commissioner notes that the Council is actively using the information contained in the database to form decisions about whether a contaminated land assessment is required. The fact that this database is used to inform decisions does not suggest to the Commissioner that the information contained in this database is unfinished or incomplete. The Commissioner accepts that the information contained within this database may change over time, but she does not accept that this allows the Council to argue that the information is incomplete.
63. The Commissioner notes that a number of the arguments presented by the Council to withhold the information centre around the misrepresentation that might occur as a result of the disclosure of inaccurate data. However, she believes these concerns could be mitigated by the provision of a covering explanatory note in the provision of the information. She does not accept the fact that the Council has recognised the data to be inaccurate as a reason for stating that the information is incomplete. In all the circumstances, therefore, the Commissioner does not accept that the exception has been engaged in this case.



Other comments

64. At a late stage in this investigation, the Council provided Mr Henderson with a copy of the Excel spreadsheet, extracted from its GIS database (supplied to the Commissioner alongside its submissions of 19 December 2012), with a copy of the relevant GIS map layer, in electronic form. The Commissioner is satisfied that this information satisfies the terms of Mr Henderson's requests and that no information has been redacted from the information supplied.
65. As a consequence, the Commissioner does not require the Council to take any action in respect of the failures detailed above. However, the Commissioner is disappointed that it took an extended period and her intervention before the Council was willing to provide this information to Mr Henderson. She notes specifically that it is not unusual for geographically linked data to be provided to the public in such a form as requested by Mr Henderson³. She also notes that to provide the information to Mr Henderson in a format without the base map layer would render the information in question meaningless, which she considers to be wholly against the spirit of the EIRs: this should have been taken into account by the Council in interpreting Mr Henderson's request.

DECISION

The Commissioner finds that Falkirk Council (the Council) failed to comply with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information requests made by Mr Henderson.

With regard to request 1, the Commissioner finds that the Council was incorrect in its reliance on regulations 6(1)(b) and 10(5)(f) of the EIRs. With respect to request 2, the Commissioner finds that the Council was not entitled to withhold the information on the basis of the exceptions in regulations 10(4)(a), (b) or (d), nor was it correct to rely on regulation 6(1)(a) to withhold the information. In all of these respects, it failed to deal with the requests in accordance with regulation 5(1) of the EIRs.

As the information in question was provided to Mr Henderson during the investigation, the Commissioner does not require any action to be taken in respect of these failings.

³ See, for example, <http://www.snh.gov.uk/publications-data-and-research/snhi-information-service/map/>



Appeal

Should either Mr Henderson or Falkirk 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.

Margaret Keyse
Head of Enforcement
18 February 2013



Appendix

Relevant statutory provisions

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;
- (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.



- (3) Any enactment or rule of law which would prevent the making available of information in accordance with these Regulations shall not apply.

...

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.

...

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
- ...
- (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;

...



- (d) the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data; or
- ...
- (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-
- ...
- (f) the interests of the person who provided the information where that person-
 - (i) was not under, and could not have been put under, any legal obligation to supply the information;
 - (ii) did not supply it in circumstances such that it could, apart from these Regulations, be made available; and
 - (iii) has not consented to its disclosure.
- ...