

# Decision Notice

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## Decision 138/2017: Mary Flett and Orkney Islands Council

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### Road repairs on the A960

Reference No: 201700640

Decision Date: 29 August 2017



Scottish Information  
Commissioner

## Summary

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The Council was asked (in two separate requests) for information relating to work carried out on a section of the A960 road.

The Council disclosed some information and stated that it did not hold other information.

The Commissioner was satisfied that the Council did not hold any additional information falling within the scope of the requests, accepting that it did not hold some of the information requested. However, she found that the Council failed to meet the required timescale for responding to one of the requests.

## Relevant statutory provisions

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (4) (General entitlement); 10(1) (Time for compliance); 17(1) (Notice that information is not held)

The full text of each of the statutory provisions cited above is reproduced in Appendix 1 to this decision. The Appendix forms part of this decision.

All references to “the Commissioner” in this decision are to Margaret Keyse, who has been appointed by the Scottish Parliamentary Corporate Body to discharge the functions of the Commissioner under section 42(8) of FOISA.

## Background

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1. This decision concerns two separate requests for information made by Ms Flett. These are described as Ms Flett’s first and second information requests in what follows.

### Ms Flett’s first information request

2. On 11 January 2017, Ms Flett made a request for information to Orkney Islands Council (the Council). The request concerned recent resurfacing work carried out on a stretch of the A960 road. The information requested was:

*1a) The A960 West Waterhall to Heathery Loan was resurfaced by the Council in sections in 2016 i.e. West Waterhall to Wideford Burn and Wideford Burn to Heathery Loan, therefore could you provide me with the respective dates that ‘actual’ resurfacing work (not signage) commenced and subsequently ‘actual’ resurfacing work ended (not signage) on each of the afore mentioned sections and supply me with all council held records documenting the resurfacing work on these respective sections in 2016?*

*1b) Can you inform me and supply me with all documentation held by Orkney Island Council as to when signage was first placed on these respective sections prior to resurfacing and when these respective sections were cleared of all signage in relation to road resurfacing in 2016?*

*2a) Could you supply me with all council planning documentation in relation to the resurfacing work of the afore mentioned respective sections carried out in 2016?*

*The response to include but not exclusive to the estimated; time scale for completion, cost of materials, man hours and total cost of road resurfacing respectively.*

*2b) As question 1a above deals with the 'actual' time for completion, could you therefore inform me and supply me with all council held documentation re the 'actual' cost of materials, man hours and total cost of road resurfacing for the above sections respectively?*

Ms Flett also requested other information that is not the subject of this decision notice.

3. The Council responded on 14 February 2017. The Council disclosed information relating to each part of the first information request. The information comprised job cards and records, the programme of works, traffic order and measurement sheet with materials and total cost details.

### **Ms Flett's second information request**

4. On 15 February 2017, Ms Flett made a further information request to the Council in relation to the same subject matter. The information requested was "a grid referenced map" with the exact co-ordinates of three specified locations.
5. The Council responded on 28 February 2017. The Council informed Ms Flett that it did not hold a map of the type requested.
6. On 1 March 2017, Ms Flett wrote to the Council, requesting a review of both decisions. In relation to her first information request, she expressed dissatisfaction that not all of the information which she expected the Council to hold had been disclosed. She also complained that some of the information disclosed to her appeared to be incomplete or was difficult to read due to the way in which it had been copied. In relation to her second information request, she believed the Council must hold a map of the type requested.

### **Review response**

7. The Council notified Ms Flett of the outcome of its review on 29 March 2017. The Council reviewed its responses to both information requests. In relation to the first request, the Council reprinted some of the information and disclosed this to Ms Flett, acknowledging that some of the documents had only been scanned on one side originally. The Council also disclosed some photographs which it considered fell within the scope of part 1b) of the first request. The Council reiterated that it believed it had disclosed all the relevant information that it held in relation to the first request. In relation to the second request, the Council again informed Ms Flett that it did not hold a grid referenced map.
8. On 5 April 2017, Ms Flett wrote to the Commissioner. She applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Ms Flett stated she was dissatisfied with the outcome of the Council's review because she did not consider that it had disclosed all of the relevant information it held. Additionally, she was dissatisfied that the Council had failed to comply with her first information request within 20 working days.

### **Investigation**

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9. The application was accepted as valid. The Commissioner confirmed that Ms Flett made requests for information to a Scottish public authority and asked the authority to review its responses to those requests before applying to her for a decision.

10. On 12 May 2017, the Council was notified in writing that Ms Flett had made a valid application and the case was allocated to an investigating officer.
11. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Council was invited to comment on this application and answer specific questions, focusing on the steps taken to identify and locate the information requested.

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

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12. In coming to a decision on this matter, the Commissioner considered all of the relevant submissions, or parts of submissions, made to her by both Ms Flett and the Council. She is satisfied that no matter of relevance has been overlooked.

### **Has all relevant information been identified?**

13. Ms Flett submitted that, in relation to her first information request, the Council had not disclosed all of the relevant information she believed it ought to hold.
14. Ms Flett stated that, in correspondence with the Council, it had referred to place names that had not been included in her initial request and had failed to indicate where it deemed these specific points to be located.
15. Ms Flett also complained that the photographs disclosed to her contained no information as to their provenance or veracity.
16. Specifically in relation to parts 2a) and 2b) of the request, she argued that the Council must hold additional information beyond that disclosed to her. In her view, the Council required such information in order to calculate ongoing expenditure. She also queried the absence of specific information which, in her view, the Council ought to hold.
17. The Council explained the searches it had undertaken in order to locate and retrieve any relevant information falling within the scope of Ms Flett's request.
18. The Council provided the Commissioner with copies of internal correspondence explaining the work areas where searches for relevant information had been conducted and the results of those searches.
19. Specifically in relation to the photographs disclosed to Ms Flett, the Council explained that it did not use the function on the camera used to take the photographs which would date when they were taken. The Council explained that, as a result, the photographs displayed a default date. The Council stated that it could not confirm exactly when the photographs had been taken, although it could confirm that they had been taken for the purposes of an Incident Report. It stated that the alleged incident took place on 19 May 2016 and report was completed on 23 May 2016, so the photographs would have been taken within that timeframe.

### *The Commissioner's view*

20. While Ms Flett may have genuine reasons for believing that the Council should hold further information, the Commissioner can only consider whether or not the Council identified and located the information it actually held.
21. As stated in many previous decisions, the Commissioner's remit extends only to consideration of whether a Scottish public authority actually holds the requested information

and whether it has complied with Part 1 of FOISA in responding to a request. The Commissioner cannot comment on whether the Council ought to hold additional information in relation to a specific matter, or what records it should maintain in relation to that matter.

22. Specifically in relation to the photographs, the Commissioner accepts the Council's position that, if the camera was not set to record the date on which they were taken, it is unlikely that there would be recorded information (as would be required for FOISA to apply) as to when that happened.
23. Having considered the Council's submissions, the Commissioner is satisfied that the Council took adequate, proportionate steps and carried out adequate, proportionate searches, with a view to identifying and locating the information requested by Ms Flett. She accepts that Ms Flett was provided with the relevant information held by the Council and falling within the scope of her first information request.
24. Consequently, the Commissioner is satisfied, on the balance of probabilities, that the Council does not (and did not, on receiving Ms Flett's request) hold any further information falling within the scope of Ms Flett's first information request. Consequently, she is satisfied that the Council complied with section 1(1) of FOISA in responding to this request.

### **Section 17 – notice that information is not held**

25. In relation to Ms Flett's second information request, the Council informed her that it did not hold a map of the type requested.
26. In Ms Flett's view, the Council's position was preposterous and unhelpful. She considered it beyond comprehension that place names referred to in correspondence from the Council could not be identified on a map.
27. The Council explained that it did not hold the information requested by Ms Flett. It noted that, in correspondence with her, it had described a specific geographical point on the A960 as "the Airport". However, that spot was not a designated place which corresponded with any particular landmarks in the area. The Council confirmed again that it did not hold any information containing the records which Ms Flett had requested – i.e. a map of the type envisaged in her second request.
28. The Commissioner reiterates the points in paragraph 21 above concerning her remit in cases of this nature.
29. Having considered the Council's explanation of why it does not hold the specific information requested, the Commissioner accepts that the Council does not hold this information. The Commissioner acknowledges this is information that Ms Flett believes (as a result of ongoing correspondence) the Council ought to hold. However, the Commissioner accepts the Council's explanation of how and why it had described an unnamed geographical point in a specific manner and why it did not hold any recorded information falling within the scope of this part of Ms Flett's request.
30. The Commissioner therefore finds that the Council was correct to give notice (in terms of section 17(1) of FOISA) that it did not hold any information falling within the scope of Ms Flett's second information request.

### **Section 10(1) – Time for compliance**

31. In her application to the Commissioner, Ms Flett complained that the Council had not responded to her first information request timeously.

32. Section 10(1) of FOISA gives Scottish public authorities a maximum of 20 working days following the date of receipt of the request to comply with a request for information. This is subject to qualifications that are not relevant in this case.
33. The Council stated that, as far as it was aware, it had responded to Ms Flett's request timeously by email on 27 January 2017. The Council explained also that, around this time, it was experiencing difficulties with emails. This was exacerbated by the fact that the attachments to its response to Ms Flett contained more than 10MB of storage. The Council stated that it had not received any automatic notification to suggest that the email had not been sent.
34. The Council explained that it was only after Ms Flett had contacted it, that it was alerted to the fact that she had not received its email. The Council then resent the response on 14 February 2017.
35. The Commissioner notes the Council's submissions and its position that the response was issued within the timescale permitted under section 10 of FOISA. However, she notes also the acknowledged issues at the time regarding the Council's email systems and the point regarding the size of the attachments to its response (the implications of which should have been understood by the Council). Consequently, the Commissioner finds, on the balance of probabilities, that the Council did not provide a response to Ms Flett's first information request within 20 working days. Therefore, she finds that the Council failed to comply with section 10(1) of FOISA in relation to the first information request.
36. Given that the Council responded to the first information request on 14 February 2017, the Commissioner does not require it to take any further action in relation to Ms Flett's application.

## Decision

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The Commissioner finds that Orkney Islands Council (the Council) partially complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Ms Flett.

The Commissioner finds that the Council complied with Part 1 of FOISA by:

- (i) identifying, locating and disclosing all of the information it held and which fell within the scope of Ms Flett's first information request; and
- (ii) correctly giving notice, in terms of section 17(1) of FOISA, that it did not hold information falling within the scope of her second request.

However, the Commissioner finds also that the Council failed to respond to Ms Flett's first information request within the timescale laid down in section 10(1) of FOISA. The Commissioner does not require the Council to take any action in respect of this failure, in response to Ms Flett's application, given that the Council did subsequently provide a response to her.

## **Appeal**

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Should either Ms Flett 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**  
**Acting Scottish Information Commissioner**  
**29 August 2017**

## Appendix 1: Relevant statutory provisions

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### Freedom of Information (Scotland) Act 2002

#### 1 General entitlement

- (1) A person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority.

...

- (4) The information to be given by the authority is that held by it at the time the request is received, except that, subject to subsection (5), any amendment or deletion which would have been made, regardless of the receipt of the request, between that time and the time it gives the information may be made before the information is given.

...

#### 10 Time for compliance

- (1) Subject to subsections (2) and (3), a Scottish public authority receiving a request which requires it to comply with section 1(1) must comply promptly; and in any event by not later than the twentieth working day after-

- (a) in a case other than that mentioned in paragraph (b), the receipt by the authority of the request; or
- (b) in a case where section 1(3) applies, the receipt by it of the further information.

...

#### 17 Notice that information is not held

- (1) Where-
- (a) a Scottish public authority receives a request which would require it either-
- (i) to comply with section 1(1); or
- (ii) to determine any question arising by virtue of paragraph (a) or (b) of section 2(1),

if it held the information to which the request relates; but

- (b) the authority does not hold that information,

it must, within the time allowed by or by virtue of section 10 for complying with the request, give the applicant notice in writing that it does not hold it.

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