

# Decision Notice



Decision 004/2011 Mr Tom Stitt and Clackmannanshire Council

Contaminated land at Alva Gas Works

Reference No: 201001479

Decision Date: 6 January 2011

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**Kevin Dunion**

Scottish Information Commissioner

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## Summary

Mr Stitt asked Clackmannanshire Council (the Council) for information relating to contaminated land at the former Alva Gas Works site. The Council provided some information to Mr Stitt, but withheld a small amount of information under regulation 10(4)(e) of the EIRs, on the basis that disclosure would involve making available internal communications and that it was in the public interest not to disclose those communications. Following a review, Mr Stitt remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the Council was entitled to withhold the information in question from Mr Stitt. He also found that the Council was correct to advise Mr Stitt that it did not hold any additional information in relation to his request. However, the Commissioner found that, by failing to advise Mr Stitt of the timeframes within which a requirement for review could be submitted, the Council failed to comply with regulation 13(e) of the EIRs. However, he did not require the Council to take any action in respect of this failure.

## Relevant statutory provisions and other sources

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions) and 39(2) (Health, safety and the environment)

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1)(Interpretation) (definitions (a) to (c) of environmental information); 5(1) and (2)(b) (Duty to make environmental information available on request); 10(1), (2) and 4(a) and (e) (Exceptions from duty to make environmental information available); 13(e)(Refusal to make information available) and 16(2) (Review by Scottish public authority)

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

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1. On 18 May 2010, Mr Stitt wrote to the Council requesting correspondence, memos and meeting notes relating to contaminated land at Alva Gas Work, particularly the correspondence and notes that related to discussion of his particular circumstances between 27 March 2010 and 18 May 2010. Mr Stitt also sought the minutes of the Council's Overview Panel (portfolio holders) group from 28 November 2008 to 18 May 2010.
2. The Council responded on 16 June 2010. The Council provided Mr Stitt with some information, but also advised him that some of the information identified was excepted from disclosure under regulation 10(4)(e) of the EIRs. In respect of the Council's Overview Panel minutes, the Council advised Mr Stitt that it had assumed that he was seeking references to either himself or to the contaminated land at the Alva Gas Works site within these minutes. The Council advised Mr Stitt that, following a search of the minutes, no such reference was found, and therefore advised him that no relevant information was held.
3. On the same date, Mr Stitt wrote to the Council requesting a review of its decision. In particular, he wished the Council to review what had been disclosed or not.
4. The Council sought clarification of Mr Stitt's review on 22 June 2010. Mr Stitt clarified the extent of his review later that same day, advising that he sought the Overview Panel meeting minutes from 26 November 2008 to 18 May 2010 and information relating to two briefings between named individuals which he understood to have taken place. In addition, Mr Stitt indicated that he was not satisfied with the Council's decision to withhold some information falling within the scope of his request.
5. The Council notified Mr Stitt of the outcome of its review on 6 July 2010. The Council advised Mr Stitt that it had again checked the minutes of the Overview Panel for instances where either his case or the Alva Gas Works site was mentioned. The Council identified one excerpt which it considered to fall within the scope of Mr Stitt's request. This excerpt was provided to him.
6. The Council notified Mr Stitt that no recorded information was held with regard to the briefings he had mentioned. The Council also upheld its reliance on regulation 10(4)(e) of the EIRs in respect of the information withheld by the Council in relation to part of his request.
7. On 26 July 2010, Mr Stitt wrote to the Commissioner, stating that he was dissatisfied with the outcome of the Council's review and applying to the Commissioner for a decision in terms of section 47(1) of 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.
8. The application was validated by establishing that Mr Stitt 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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9. On 5 August 2010, the Council was notified in writing that an application had been received from Mr Stitt and was asked to provide the Commissioner with any information withheld from him. The Council responded with the information requested and the case was then allocated to an investigating officer.
10. 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. In particular, the Council was asked to justify its reliance on any provisions of the EIRs it considered applied to the information requested.
11. The investigating officer also contacted Mr Stitt during the investigation, seeking his submissions on the matters to be considered in the case. Mr Stitt's submissions, along with those of the Council, are summarised and considered (where relevant) in the Commissioner's analysis and findings section below.
12. The investigating officer also sought and received clarification from Mr Stitt as to the scope of his request, with particular regard to his request for copies of the Council's Overview Panel minutes between specified dates.

## Commissioner's analysis and findings

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13. In coming to a decision on this matter, the Commissioner has considered all of the withheld information and the submissions made to him by both Mr Stitt and the Council and is satisfied that no matter of relevance has been overlooked.

### Handling in terms of the EIRs

14. From the point of its initial response, the Council considered the information that it held and which fell within the terms of Mr Stitt's information request in terms of the EIRs, on the basis that it was environmental information, as defined in regulation 2(1) the EIRs.
15. Since Mr Stitt's information request sought information relating to contaminated land, the Commissioner has no difficulty in agreeing with the Council that, to the extent that it was held, the information caught by this request is environmental information for the purposes of the EIRs. The information relates to certain works at a specific site, and involves measures (such as statutory planning measures) and activities (the operations on the site) affecting or likely to affect the elements referred to in part (a) of the definition, in particular air, atmosphere and landscape or factors referred to in part (b) of the definition.



16. As such, the Commissioner is satisfied that any information held by the Council which falls within the scope of Mr Stitt's request is environmental information as defined in part (c) of the definition.
17. The exemption in section 39(2) of FOISA provides that environmental information, as defined by regulation 2(1) of the EIRs, is exempt from disclosure under FOISA, thereby allowing any such information to be considered solely in terms of the EIRs. In this case, having concluded that the information requested by Mr Stitt is environmental information, the Commissioner accepts that the Council was entitled apply this exemption in its response to Mr Mitchell's request for information.
18. As there is a separate statutory right of access to environmental information available to the applicant in this case, the Commissioner also accepts that the public interest in maintaining this exemption, and in dealing with the request in line with the requirements of the EIRs, outweighs any public interest in disclosure of the information under FOISA. The Commissioner has therefore proceeded to consider this case in what follows solely in terms of the EIRs.

*Extent of information held*

19. The Commissioner first of all considered whether the Council had identified all relevant information falling within the terms of Mr Stitt's request.
20. Mr Stitt's request sought copies of the Council's Overview Panel minutes between specified dates. As noted above, the Council interpreted his request as seeking all incidences where either Mr Stitt or the Alva Gas works site was mentioned within these minutes. During the course of the investigation, the investigating officer confirmed with Mr Stitt that this interpretation was acceptable to him.
21. Having initially responded that no such information was held, the Council supplied to Mr Stitt a single relevant extract from a minute. It maintained that no further relevant information was held within the specified minutes.
22. When he requested a review, Mr Stitt indicated that he expected the Council to hold records relating to two briefings that he understood to have taken place between particular persons. If records were held in relation to such briefings, the Commissioner considers that they would be likely to fall within the broad terms of Mr Stitt's information request. The Council's response on this point did not confirm whether or not such briefings had taken place, but indicated that, whether or not they did, no recorded information was held in relation to them.
23. The Council was asked about the searches undertaken in response to Mr Stitt's information request. In response, the Council explained that it had searched corporate IT networks and local PCs for emails or other files that match the expressed criteria of Mr Stitt's request. Additionally, particular data sets such as Overview Panel agendas and minutes files were the subject of further scrutiny by an independent officer to help build confidence in the conclusion that no further information was held.



24. In relation to non-electronic data sets, the Council advised that all files, where it was felt that anything matching the criteria specified might be located, were manually searched, as were personal diary logs held by key officers. In addition, the Council advised that, with their permission, Councillors' personal files held on the Council's systems were also checked.
25. Having considered the searches undertaken by the Council and the specific terms of Mr Stitt's request, the Commissioner is satisfied that the Council has conducted thorough and reasonable searches to identify any information falling within the terms of Mr Stitt's request. He concludes on balance of probabilities that the Council was correct in its assertion that no further relevant recorded information is held.
26. The Commissioner next considered the information that has been withheld from Mr Stitt.

*Regulation 10(4)(e) – Internal communications*

27. Regulation 10(1) of the EIRs provides that a public authority may refuse to make environmental information available if one or more of the exceptions in regulation 10(4) or (5) applies to that information 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. It should be noted that, under regulation 10(2), authorities are required to interpret the exceptions in a restrictive way and apply a presumption in favour of disclosure.
28. The Council applied the exception in regulation 10(4)(e) of the EIRs to the information it withheld from Mr Stitt. The Council stated that the information withheld constituted internal correspondence amongst officers (including Council solicitors) and involved a discussion of the options relating to the contaminated land that the Council may have wished to consider pursuing.
29. For information to fall within the scope of this exception, it need only be established that it is an internal communication (which the Council maintained was the case in respect of this information).
30. The withheld information comprises a number of email exchanges alongside attached discussion papers. The information includes legal advice and discussion of that advice within a series of exchanges involving only Council staff.
31. Having examined the withheld information, the Commissioner is satisfied that the documents to which the Council has applied regulation 10(4)(e) are all internal communications for the purposes of the EIRs. He therefore concludes that the exception was correctly applied to this information.
32. As noted above, the application of the exception is subject to the public interest test in regulation 10(1)(b).
33. When considering how the public interest would be served by releasing the information, the Council indicated that disclosure would:
  - serve to maintain the transparency of Council actions and the decision making process



- serve the interests of accountability and the demonstration of good administration
  - provide the public with information on how public funds were being used and help facilitate meaningful scrutiny
  - provide public information on environmental matters and the Council's approach to managing related issues
  - provide reassurances to the public in relation to the Council's application of the powers it has at its disposal
34. When considering how the public interest would be served by maintaining the exception, the Council indicated that:
- future decision making procedures could be compromised if, as a consequence of this case, officers felt that they could not freely and confidentially provide professional views, guidance and advice
  - a potential compromising position in relation to the receipt/discussion of technical and legal advice would occur. The Council considered it vital that officers receive candid and confidential advice to facilitate full and frank discussions in relation to options for action. To do otherwise, it stated, would impact on the quality of the decisions taken and this in turn would not serve the public interest.
  - there would be an impact on the likelihood of action (legal or enforcement action) being successful if officers did not receive the benefit of free and candid advice
  - it would be in a weakened position in relation to negotiations with landowners over options for action. The Council aver that it is not reasonable to expect it to be placed in a weaker position in respect to potential legal or other action than would be the case for any organisation not subject to FOISA/EIRs.
  - its financial position could be weakened, leading to an inappropriate drain on public finances, if the completion of appropriate action is frustrated by the absence of competent advice, or the premature release of that advice or comments thereon
  - there could be an increase in the relative overall cost of bringing the issue to a conclusion
35. The Council, although acknowledging that there is a strong case for accepting that there is a general public interest in contaminated land issues, submitted that the information withheld relates specifically to a small piece of privately owned garden ground used and accessed by few individuals. The Council informed the Commissioner that the ground in question posed no significant risk to the public at large and there was therefore no significant need to keep the public informed of a danger to the environment, or to the general health and safety of citizens.



36. In concluding, the Council stated that it is essential that decision makers within the Council are free to seek expert advice in support of day-to-day activities. The Council considered it vital that there is a level of confidence and trust between the individuals involved and a shared understanding of “confidentiality” where information is shared. The Council argued that, in some cases, it could be prejudicial to the outcome and detrimental to the general application of public funds, were that information to become common knowledge. In this respect the Council argued that it should be considered to be in a similar position to any other organisation not subject to FOISA/the EIRs where advice is sought in relation to the ongoing management of an issue which involves conflict, disagreement or the potential for legal or enforcement action. It was the Council’s view that releasing information of this nature would be prejudicial to the outcome (of any legal or enforcement action) and not in the public interest.
37. Within his submissions, Mr Stitt stated that there was a public interest in allowing him and the people of Alva access to this information to assert their right to live in an environment adequate to their well being and health, and that access to the information would improve trust within communities and increase public authority accountability, creating greater transparency and openness.
38. The Commissioner recognises the arguments presented by both Mr Stitt and the Council, but is mindful that the information under consideration is the provision and discussion of legal advice provided by Council solicitors which concerns a relatively small area of private garden ground. Although regulation 10(5)(d)(confidentiality provided by law) may have been a more appropriate exception to apply in these circumstances, the Commissioner recognises that the general public interest arguments in favour of withholding legal advice can equally apply to the exception in regulation 10(4)(e) in this case.
39. As the Commissioner has noted in a number of previous decisions, the courts have long recognised the strong public interest in maintaining the right to confidentiality of communications between legal adviser and client on administration of justice grounds. Many of the arguments in favour of maintaining confidentiality of communications were discussed in a House of Lords case, *Three Rivers District Council and others v Governor and Company of the Bank of England (2004) UKHL 48*, and the Commissioner will apply the same reasoning to communications attracting legal professional privilege generally.
40. Having considered the public interest arguments on both sides, and while accepting that there might be reasons which would justify disclosing legal advice of this kind in certain circumstances, in this instance the Commissioner is not satisfied that the public interest in disclosure of this particular legal advice is sufficiently compelling to outweigh the strong public interest in maintaining the confidentiality of communications between legal advisor and client.
41. Equally, the Commissioner is satisfied that there is a strong public interest in allowing the free and frank discussion and exchanges surrounding the provision of this legal advice. Consequently, he accepts that the Council correctly withheld the remaining information from Mr Stitt, at the time of his request, under regulation 10(4)(e) of the EIRs.

*Handling of Mr Stitt’s request*





42. Within his application to the Commissioner, Mr Stitt raised concerns about the manner in which his request was handled. Specifically, he was concerned that he was not advised of the timescales within which he was required to submit a request for review to the Council.
43. Regulation 16(2) of the EIRs provides that a requirement for review must be made by no later than 40 working days after the expiry of the time allowed by virtue of regulation 5(2)(a) for complying with a request.
44. Regulation 13 of the EIRs specifies various requirements of the refusal notice issued by a public authority which declines to provide all of the information requested by an applicant. For example, the refusal must be made in writing, and explain which exception has been judged to apply and why. Regulation 13(e) requires that the notice inform the applicant of the review provisions under regulation 16 and of the enforcement and appeal provisions available in accordance with regulation 17.
45. Although there is no explicit reference in regulation 13(e) to the timescales for review, the Commissioner considers that this timescale is central to the review procedure and it is critical that the applicant is aware of this in order to follow the procedure appropriately. The Commissioner therefore considers that in order to properly inform an applicant of the review provisions, reference must be made to the timescale in which the requirement for review is made.
46. In this respect the Commissioner finds that the Council breached the EIRs in failing to fully comply with the requirements of regulation 13(e).

## DECISION

The Commissioner finds that Clackmannanshire Council (the Council) partially complied with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by Mr Stitt.

The Commissioner finds that by correctly apply regulation 10(4)(e) to the information withheld, the Council complied with the EIRs. In addition, the Commissioner finds that the Council was correct in its assertion that no further information was held in relation to Mr Stitt's request.

However, by failing to adequately advise Mr Stitt of the timeframes within which a requirement for review could be submitted, the Council failed to comply with regulation 13(e) of the EIRs.

Given that Mr Stitt's application was not hindered by this omission, the Commissioner does not require the Council to take any action in response to this failure.



## Appeal

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Should either Mr Stitt 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.

**Margaret Keyse**  
**Head of Enforcement**  
**6 January 2011**



## Appendix

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### Relevant statutory provisions

#### 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.

...

- (6) This section is subject to sections 2, 9, 12 and 14.

##### 2 Effect of exemptions

- (1) To information which is exempt information by virtue of any provision of Part 2, section 1 applies only to the extent that –

...

- (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

##### 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.



## The Environmental Information (Scotland) Regulations 2004

### 2 Interpretation

(1) In these Regulations –

...

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

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- (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
- (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.
- ...
- (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;
  - ...
  - (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-

- ...
- (e) inform the applicant of the review provisions under regulation 16 and of the enforcement and appeal provisions available in accordance with regulation 17.



**16 Review by Scottish public authority**

...

- (2) Representations under paragraph (1) shall be made in writing to the Scottish public authority no later than 40 working days after either the date that the applicant receives any decision or notification which the applicant believes does not comply with these Regulations or the date by which such a decision or notification should have been made, or any other action should have been taken, by the authority but was not made or taken.

...