

# Decision Notice



Decision 203/2012 Mr Tim Quelch and the City of Edinburgh Council

Operating Guidelines

Reference No: 201201458

Decision Date: 12 December 2012

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**Rosemary Agnew**

Scottish Information Commissioner

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## Summary

Mr Quelch asked the City of Edinburgh Council (the Council) for its Property Conservation Statutory Repairs Protocol and operational guidelines concerning the execution of statutory repairs. The Council disclosed the Protocol Manual, but Mr Quelch did not accept that the Council had provided him with all of the information that fell within the scope of the request.

During the investigation the Council disclosed information from a number of procedural documents relating to statutory repairs. As a result, the Commissioner found that the Council had breached the EIRs in responding to Mr Quelch's request. She advised the Council that it should ensure that all relevant information was identified before responding to requests in future.

## Relevant statutory provisions

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

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (Interpretation) (definitions (a) and (c) of "environmental information"); 5(1) (Duty to make environmental information available on request)

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. The background to this case relates to a request made by Mr Quelch on 22 July 2010, in which he asked the Council for its policy, procedures and scheme of delegated authority in exercising its statutory powers under the Statutory Notice legislation. During an investigation carried out by the Commissioner, the Council advised Mr Quelch that it did not hold this information and Mr Quelch accepted this. However, in later correspondence with the Council in May 2012, Mr Quelch was made aware that the Council held a Protocol Manual, which provides guidance on carrying out repairs under statutory notice and appeared to be information covered by his earlier request.



2. On 18 June 2012, Mr Quelch asked the Council for the following (amongst other things not the subject of the decision):
  - the Property Conservation Statutory Repairs Protocol (Protocol Manual);
  - operational guidelines concerning the execution of statutory repairs under the Statutory Notice system;
  - clarification of whether such operational guidelines are included in the Protocol Manual;
  - any other operational guidelines not covered by the Protocol Manual.
3. The Council responded on 19 June 2012. The Council advised Mr Quelch that the Protocol Manual was an internal document and not for public circulation. The Council did not provide any further clarification concerning the existence of operational guidelines.
4. On 20 June 2012, Mr Quelch asked the Council to undertake a review of his request, as he still required the information he had asked for.
5. The Council notified Mr Quelch of the outcome of its review on 18 July 2012. The Council disclosed a copy of the Protocol Manual, but did not address the question of whether any additional operational guidelines were held.
6. On 30 July 2012, Mr Quelch emailed 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.
7. The application was validated by establishing that Mr Quelch 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. The case was then allocated to an investigating officer.

## Investigation

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8. In his application, Mr Quelch commented that he had received copies of two other statutory repair protocols from a third party, which he considered fell within the scope of his request and should have been provided by the Council. Mr Quelch asked the Commissioner to investigate this point and to establish whether the Council held any other information covered by his request.



9. On 15 August 2012, the Council was notified in writing that an application had been received from Mr Quelch. The Council was given the opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA). The Council was asked to comment on whether it considered that the two documents which Mr Quelch had obtained from the third party fell within the scope of his request, and to conduct additional searches to establish whether any further relevant information was held.
10. Initially, the Council considered that no further information was held, but following further discussion of the interpretation of Mr Quelch's request, the Council identified and disclosed additional information.
11. The relevant submissions received from both the Council and Mr Quelch will be considered fully in the Commissioner's analysis and findings below.

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

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12. In coming to a decision on this matter, the Commissioner has considered all of the submissions made to her by both Mr Quelch and the Council and is satisfied that no matter of relevance has been overlooked.

### **FOISA or EIRs?**

13. It is clear from the Council's correspondence with both Mr Quelch and the Commissioner that it considered the information requested was environmental information, as defined in regulation 2(1) of the EIRs. The information in question concerns guidelines to follow when carrying out building repair work under the statutory notice regime, and the Commissioner is satisfied that it falls within either paragraph (a) or paragraph (c) of the definition of environmental information contained in regulation 2(1) of the EIRs, being information on the state of the elements of the environment, or on measures and activities affecting or likely to affect the state of those elements.

### **Section 39(2) of FOISA – environmental information**

14. The exemption in section 39(2) of FOISA provides, in effect, that environmental information (as defined by regulation 2(1)) is exempt from disclosure under FOISA, thereby allowing any such information to be considered solely in terms of the EIRs. In this case, the Commissioner accepts that the Council was entitled to apply the exemption to the withheld information, given her conclusion that it is properly classified as environmental information.
15. As there is a separate statutory right of access to environmental information available to Mr Quelch 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 disclosing the information under FOISA.



### Scope of investigation

16. As noted in paragraph 1 above, Mr Quelch was dissatisfied with the response to an earlier information request (22 July 2010). During the investigation of that case, the Council had advised that it did not hold any relevant information, and Mr Quelch had accepted this in good faith. Subsequently, he learned that he had been misinformed, and that the information in the Protocol Manual should have been identified as falling within the scope of his request.
17. Following this, Mr Quelch submitted a request to the Council on 18 June 2012. It is this request which is the subject of this decision. In his correspondence with the investigating officer, Mr Quelch has asserted that the Council's response to his request of 22 July 2010 should also fall within scope of the current investigation and decision.
18. The Council has been unable to explain why a copy of the Protocol Manual was not provided to Mr Quelch when it responded to his request of 22 July 2010.
19. The Commissioner has noted the Council's failure to identify and provide information covered by Mr Quelch's earlier request, and may take this into account in relation to future enforcement action, but the current decision is limited to the matters raised by Mr Quelch in relation to his request of 18 June 2012. It is not open to the Commissioner to include any other matters in her decision. Where this decision does not resolve matters which are still of concern to Mr Quelch, he may wish to submit new requests to the Council.
20. In what follows, the Commissioner will consider Mr Quelch's request of 18 June 2012 for operational guidelines concerning the execution of statutory repairs under the Statutory Notice system.

### Information held and disclosed

21. Regulation 5(1) of the EIRs requires a Scottish public authority which holds environmental information to make it available when requested to do so by any applicant. It is important to bear in mind that this obligation relates to information actually held by an authority when it receives the request, as opposed to information an applicant believes the authority should hold, but which is not in fact held.
22. In his request of 18 June 2012, Mr Quelch asked for the Protocol Manual, but he also sought information pertaining to the operating guidelines used by the Council in its repairs under the statutory notice regime. The Council disclosed a copy of the Protocol Manual in its review response, but did not address the rest of Mr Quelch's request.
23. As noted previously, Mr Quelch obtained (from a third party) two documents which he considered to be information covered by his request. This was raised with the Council during the investigation.



24. The Council initially advised that it considered the two additional documents to fall outwith the scope of Mr Quelch's request. The Council understood Mr Quelch's request to be for protocol or operational guidance documents that determine how the Council staff manage statutory notice repair works, and it did not consider that this applied to the two documents in question.
25. A summary of the Council's comments was provided to Mr Quelch, who explained why he considered these documents fell within the scope of his request, which had been broadly framed, and why he believed it likely that additional information would be held by the Council.
26. The Council was provided with a summary of Mr Quelch's comments and was asked to re-consider the scope of Mr Quelch's request and advise whether additional relevant information was held.
27. In response, the Council provided copies of 11 additional technical statutory repair procedures and advised that they were designed to be read in conjunction with the Protocol Manual (which, as noted above, had already been disclosed to Mr Quelch). The Council advised that these 11 documents, in addition to the two other documents which Mr Quelch had obtained from a third party, could be considered to fall within scope of the request. Following discussion with the investigating officer, the Council disclosed these 13 additional documents to Mr Quelch.
28. Mr Quelch identified one additional document referenced in the procedures disclosed by the Council, and the Council also disclosed this information during the investigation.
29. The Commissioner considers that the Council interpreted Mr Quelch's request too narrowly, focussing only on the request for the Protocol Manual, without offering advice or assistance, or seeking clarification of the other parts of his request. Only when the Council received additional explanation of the information sought by Mr Quelch did it consider a broader interpretation of his request. The Commissioner notes that the Council then identified and disclosed an additional 14 documents.
30. The Commissioner would encourage the Council to engage earlier with requesters in future, especially where a request for extensive or wide-ranging information has been received, so that it can be sure that all relevant information has been identified and considered.
31. Having considered the Council's submissions, the searches conducted by the Council during the investigation of this case, and the fact that the information disclosed covers the relevant aspects of repairs to the fabric of a building, the Commissioner is satisfied that the Council has now identified and disclosed the information falling within scope of Mr Quelch's request for information pertaining to "operating guidelines".
32. The Commissioner notes that the Council disclosed a copy of the Protocol Manual in its review response to Mr Quelch, but did not disclose the other relevant information associated with the Council's operating guidelines and covered by Mr Quelch's request until after the investigation commenced. Consequently, the Commissioner has concluded that the Council failed to comply with regulation 5(1) of the EIRs in responding to Mr Quelch's request.



33. Although the Commissioner has not required the Council to take any further action in relation to the failures identified in this decision, she advises the Council to ensure that, in future, it identifies all information covered by a request before issuing its response.

## DECISION

The Commissioner finds that the City of Edinburgh Council (the Council) failed to comply with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by Mr Tim Quelch. The Council failed to comply with regulation 5(1) of the EIRs by not disclosing information that fell within the scope of his request.

Given that the Council has now disclosed this information, the Commissioner does not require it to take any action in response to this breach.

## Appeal

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Should either Mr Quelch or the City of Edinburgh 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**  
**12 December 2012**



## 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 –

- (a) the provision does not confer absolute exemption; and  
(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;

...

(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.

...