

# Decision Notice

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## Decision 140/2014 Ms Catherine Birley and City of Edinburgh Council

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### **Planning application**

Reference No: 201302881

Decision Date: 23 June 2014



Scottish Information  
Commissioner

## Summary

On 10 June 2013, Ms Birley asked City of Edinburgh Council (the Council) for information concerning plans for a development at Malta Terrace, Edinburgh. The Council informed Ms Birley that the information was available on its website.

During the Commissioner's investigation, the Council disclosed information to Ms Birley and accepted that the information she had asked for had not been available on its website at the time of her request (and so it failed to deal with the request in accordance with the EIRs). By the close of the investigation, the Commissioner was satisfied that the Council had disclosed all the information it held and which was covered by the request.

## Relevant statutory provisions

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The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (paragraphs (a) and (c) of definition of "environmental information"); 5(1) and (2)(b) (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. On 10 June 2013, Ms Birley emailed the Council and asked for copies of all documents, including, minutes, agendas, meeting notes and telephone notes, between S1 Developers (or their representatives) and Members and officials of the Council, relating to plans for development at 1 Malta Terrace.
2. On 16 August 2013, the Council emailed Ms Birley to inform her that the information she was seeking was in the process of being placed on its online planning portal. She would be sent the website link once it became available (this was provided during a telephone conversation on 6 September 2013).
3. The Council emailed Ms Birley on 9 September 2013, confirming that it was dealing with her request under the EIRs. The Council stated that it was relying on regulation 6 of the EIRs in relation to information published on its website (and therefore publicly available and easily accessible). The Council confirmed that it would carry out further checks in response to points raised by Ms Birley about information she had not been able to access: it acknowledged that some of this had yet to be placed on the website.
4. On 9 September 2013, Ms Birley emailed the Council requesting a review of its decision. She identified further information she expected to be available that she could not find on the planning portal. The Council interpreted this as a new information request. Ms Birley reiterated her requirement for review on 25 October 2013, having received no response: this communication was interpreted as a requirement for review.
5. The Council notified Ms Birley of the outcome of its review on 26 November 2013 and apologised for the delay in responding.

6. The Council acknowledged that it should not have applied regulation 6 of the EIRs, given that the information was still subject to the planning process and not available for disclosure when it received Ms Birley's request. However, having carried out its review, it concluded that all of the relevant information it held had since been published on the planning portal and that it held no further information falling within the scope of the request.
7. On 4 December 2013, Ms Birley wrote to the Commissioner, stating that she 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 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 specified modifications.
8. The application was validated by establishing that Ms Birley made a request for information to a Scottish public authority and 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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9. The investigating officer contacted the Council, notifying it that an application had been received and giving it an opportunity to provide comments (as required by section 49(3)(a) of FOISA). The Council was asked to describe the steps it had taken to establish what relevant information it held, and also to respond to specific points raised by Ms Birley in relation to information she believed the Council should hold.
10. The Council conducted further searches during the investigation and located additional information, which was disclosed to Ms Birley.
11. Ms Birley accepted that the Council was unlikely to hold any further information falling within the scope of her request. However, she expressed concerns about the possible destruction of information before the Council responded to her information request.

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

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

### **Handling of the request under the EIRs**

13. It is clear from the Council's correspondence with both Ms Birley and the Commissioner that any information falling within the scope of the request would be environmental information, as defined in regulation 2(1) of the EIRs. The information in question concerns a planning application for a relatively substantial, new development and the Commissioner is satisfied that it would fall within either paragraph (a) of the definition of environmental information contained in regulation 2(1) of the EIRs (as information on the state of the elements of the environment) or paragraph (c) of that definition (as information on measures affecting or likely to affect those elements).

## **Was all relevant information identified, located and provided by the Council?**

14. 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. This obligation relates to the information held by an authority when it receives a request. .
15. The Commissioner notes that Ms Birley was able to locate some of the information she required by accessing the Council's planning portal, but that she was of the view that numerous further pieces of information should be held but were not accessible there.
16. During the investigation, the Council provided the Commissioner with a 14-page table which looked at each of the items Ms Birley believed the Council should hold and which detailed the searches the Council had carried out for the information. The table contained descriptions of searches carried out at the request and at the review stages and of those searches carried out in response to the investigating officer's further instigation, with links to where publicly available information could be found. Some additional information was located and provided to Ms Birley at this stage.
17. After receiving the additional information, Ms Birley acknowledged that the Council was unlikely to hold further information falling within the scope of the request. However, she was concerned that information may have been destroyed before the Council responded to her information request. She highlighted two particular items she had expected the Council to hold:
  - (i) speaking notes used by the planning officer for a presentation to the Development Management Sub- Committee, and
  - (ii) a traffic analysis prepared by the developer.
18. In response to Ms Birley's concerns, put to it by the Commissioner, the Council submitted that its Planning Service followed the Scottish Government's guidance regarding the retention and maintenance of the information required under the appropriate planning legislation and in compliance with the Planning Register. To comply with these requirements, Council stated, it employed two pieces of software: Idox, an electronic records management tool (used to retain information required to be held under the appropriate planning legislation), and UNIFORM, the software programme used to process the planning applications and issue the necessary reports and correspondence regarding the development.
19. The Council submitted that, following further investigations by one of its Principal Planners in response to Ms Birley's concerns, it was unaware of any information being disposed of from the electronic records created by the above programmes between the receipt of Ms Birley's request on the 11 June 2013 and the planning decision being made on the 14 June 2013.
20. The Principal Planner also confirmed that no additional information falling within the scope of Ms Birley's request had been found following Council officers searching their email accounts and personal archives in April 2014. The Principal Planner's investigation confirmed that no information which would have met Ms Birley's request was disposed of after 11 June 2013, when Ms Birley's request was received by it.
21. With regard to the two specific items identified by Ms Birley, the Council's Principal Planner submitted that no speaking notes were made by the Council Officers who made the presentations to the Development Management Sub-Committee. The normal practice in such situations was for the officer making the presentation to rely on the Committee report, so there were no differences between the report and the presentation.

22. In relation to the traffic analysis (shown to Ms Birley by the developer), the Council stated that, had it received this information, it would have been uploaded into Idox as part of the planning process. It did not hold this information.
23. The Council stated that its Freedom of Information Unit had received Ms Birley's information request by email on 11 June 2013, and on the same day had issued an acknowledgment email to her.
24. On 13 June 2013, its Freedom of Information Unit had assigned the request to the Planning and Building service area through AXLR8. This is the software used by the Freedom of Information Unit for assigning information requests to relevant service areas, to ask them to check whether they hold any information which would fulfil the request. The Council stated that the assignment form sent to the relevant service area included details of the information Ms Birley was seeking and that AXLR8 also held copies of all emails and correspondence relating to the request.
25. The Commissioner has carefully considered all the submissions she has obtained from both Ms Birley and the Council during the investigation. These include the Council's submissions on the particular items highlighted by Ms Birley. There would appear to be no basis for any reasonable concern that information falling within the scope of the request was destroyed between the Council receiving the request and it being dealt with. In all the circumstances, the Commissioner accepts that any further relevant information held by the Council is likely to have been located through the searches the Council carried out during this investigation.
26. On the balance of probabilities, therefore, the Commissioner is satisfied that the Council has now identified, located and provided all of the information it holds and which falls within scope of Ms Birley's request.
27. However, the Commissioner must also conclude that the Council did not identify, locate and provide all relevant information until after her investigation had commenced. Consequently, she must conclude that the Council failed to comply with regulation 5(1) of the EIRs in responding to Ms Birley's request. As the Council has now provided Ms Birley with all the information it holds, the Commissioner does not require the Council to do anything further with regard to this breach.
28. In reaching the above conclusions, the Commissioner would reiterate that her investigation has been confined, necessarily, to her remit under the legislation she enforces. While she appreciates that these are issues of concern to Ms Birley, she cannot comment on what information the Council should have held at the material time, what information the Council should decide to retain, or how long any particular information should be retained by the Council.

## **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 Ms Birley. By failing to make available all the relevant information it held, none of which was subject to any exception or other relevant provision, the Council failed to deal with the request in accordance with regulation 5(1).

Given that the Council has since provided Ms Birley with all the relevant information it held, the Commissioner does not require the Council to take any action in respect of this failure in response to Ms Birley's application.

## **Appeal**

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Should either Ms Birley or City of Edinburgh 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**  
**Head of Enforcement**  
**23 June 2014**

## Appendix

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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;

...

(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.

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**Scottish Information Commissioner**

Kinburn Castle  
Doubledykes Road  
St Andrews, Fife  
KY16 9DS

t 01334 464610

f 01334 464611

[enquiries@itspublicknowledge.info](mailto:enquiries@itspublicknowledge.info)

**[www.itspublicknowledge.info](http://www.itspublicknowledge.info)**