

# Decision Notice

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**Decision 171/2015 Mr Guy Duman and City of Edinburgh Council**

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## **Advertising drums**

Reference No: 201501367

Decision Date: 6 November 2015



Scottish Information  
Commissioner

## Summary

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On 2 June 2015, Mr Duman asked City of Edinburgh Council (the Council) for evidence of who gave authority on behalf of the Council to introduce three specified advertising drums. The Council told Mr Duman that it held no recorded information.

During the investigation, the Council notified the Commissioner that it did hold information falling within the scope of the request and that this had been provided to Mr Duman. As a result, the Commissioner found that the Council failed to comply with the EIRs by informing Mr Duman that it did not hold information falling within the scope of the request.

The Commissioner was satisfied that, by the end of the investigation, all relevant information had been provided to Mr Duman.

## 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 available environmental information on request); 10(1), (2) and (4)(a) (Exceptions from duty to make environmental information available)

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.

## Background

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1. On 2 June 2015, Mr Duman wrote to the Council and asked for:  
  
“... evidence of who gave authority on behalf of [the Council] to introduce the three advertising drums owned and operated by City Centre Posters (CCP) and as clearly branded as part of the Authorised Advertising Project (AAP) into the Meadows park and under precisely what terms were they introduced.”
2. The Council responded on 26 June 2015. While providing some background information, the Council informed Mr Duman that it did not hold any recorded information falling within the scope of his request. It applied the exception in regulation 10(4)(a) of the EIRs.
3. On 26 June 2015, Mr Duman wrote to the Council requesting a review of its decision, seeking confirmation that no recorded information was held.
4. The Council notified Mr Duman of the outcome of its review on 23 July 2015. It confirmed that it held no information and upheld its original decision without modification.
5. On 24 July 2015, Mr Duman wrote to the Commissioner. He applied 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 specified modifications. Mr Duman believed the Council held the information he sought.

## Investigation

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6. The application was accepted as valid and allocated to an investigating officer. The Commissioner confirmed that Mr Duman made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to her for a decision.
7. On 14 August 2015, the investigating officer notified the Council in writing that an application had been received from Mr Duman, 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 explain the steps it had taken to identify and locate the information Mr Duman requested.
8. The Council responded, explaining the searches carried out to ascertain what information was held. It further explained that, during the investigation, it had located information falling within the scope of the request, as contained in minutes referred to by Mr Duman. It confirmed that this information had been provided to Mr Duman, subject to minor redaction of personal data.
9. Mr Duman acknowledged receipt of the information, accepting the redaction of the personal data. These redactions will not be considered further by the Commissioner.

## Commissioner's analysis and findings

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10. 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 Mr Duman and the Council. She is satisfied that no matter of relevance has been overlooked.

### Application of the EIRs

11. It is clear from the Council's correspondence with both Mr Duman and the Commissioner, and from the information itself, that the information sought by Mr Duman is properly considered to be environmental information, as defined in regulation 2(1) of the EIRs. It relates to structures known as advertising drums, situated in public view on Council-owned land, and the Commissioner is satisfied that it falls within either paragraph (a) or paragraph (c) of the definition in regulation 2(1) (the text of each paragraph is reproduced in Appendix 1). Mr Duman has not disputed this and the Commissioner will consider the information in what follows solely in terms of the EIRs

### Regulation 5(1) of the EIRs

12. Regulation 5(1) of the EIRs (subject to the various qualifications contained in regulations 6 to 12) 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.
13. Under the EIRs, a public authority may refuse to make environmental information available if one or more of the exceptions in regulation 10 apply 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.

14. Regulation 10(4)(a) of the EIRs provides that a 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.
15. In his submissions to the Commissioner, Mr Duman did not accept that the Council held no information falling within the scope of his request and drew reference to minutes of a meeting which made reference to information falling within the scope of his request being held.
16. During the investigation, the Council provided full submissions on the steps taken to identify and locate information falling within the scope of Mr Duman's request. It described the searches carried out, in electronic and paper records, to establish what relevant information it held, providing evidence of the outcome of these searches.
17. The investigating officer asked the Council about information referred to in a minute identified by Mr Duman. Following discussion, the Council acknowledged that this additional information fell within the scope of Mr Duman's request and provided a copy to Mr Duman. Mr Duman confirmed receipt of this.
18. Having considered all relevant submissions and the terms of the request, the Commissioner accepts that (by the close of the investigation) the Council had carried out adequate, proportionate searches to ascertain whether any relevant information was held. She is also satisfied that the information located during the investigation has now been provided to Mr Duman.
19. However, given that additional information was located during the investigation, it is evident that the Council did not take adequate steps to identify and locate all relevant information in dealing with Mr Duman's information request and requirement for review. In failing to do this, and in applying regulation 10(4)(a) of the EIRs, the Council failed to comply with regulation 5(1) of the EIRs.

## Decision

The Commissioner finds that City of Edinburgh Council failed to comply with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by Mr Duman. The Council was wrong to rely on regulation 10(4)(a) in responding to Mr Duman.

The Commissioner finds that the Council failed to comply with regulation 5(1) of the EIRs in responding to the request.

Given that the information held has now been provided to Mr Duman, the Commissioner does not require the Council to take any action regarding this failure, in response to Mr Duman's application.

## **Appeal**

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Should either Mr Duman 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**

**6 November2015**

## Appendix 1 Relevant statutory provisions

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### 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.

...

(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;

...

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