

# Decision Notice 154/2020

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## Eastwood Park Masterplan and development proposals

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**Applicant: The Applicant**

**Public authority: East Renfrewshire Council**

**Case Ref: 201902186 and 201902195**



Scottish Information  
Commissioner

## Summary

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The Council was asked for information about the visioning and masterplanning of Eastwood Park. Information was disclosed during the investigation. The Commissioner found that the Council had breached the EIRs in responding to the requests, because the information should have been disclosed at the time of asking.

## 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 “) (Interpretation); 5(1) and (2)(b) (Duty to make environmental information available on request); 10((1), (2) and (4)(d) (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. The Applicant has made a series of information requests, some of which concerned decisions on how to develop Eastwood Park. This Decision Notice concerns two applications lodged to elicit information on the visioning and masterplanning for Eastwood Park.

### Request 1

2. On 29 May 2019, the Applicant made a request for information to East Renfrewshire Council (the Council). The information requested was that contained in correspondence and documents/reports produced by Peter Brett Associates and the Council in regard to the visioning and masterplanning of Eastwood Park.
3. The Council responded on 26 June 2019 under the EIRs, withholding the information sought under regulation 10(4)(d) on the grounds that it remained either unfinished or incomplete.
4. On 9 July 2019, the Applicant wrote to the Council, requesting a review of its decision. Given the timing of decisions in relation to the development, he did not accept that the information would still be unfinished or incomplete. He did not accept that there was any reason for withholding it.
5. The Council notified the Applicant of the outcome of its review on 7 August 2019, upholding its decision to apply regulation 10(4)(d) with further explanations as to why the information remained unfinished or incomplete.

### Request 2

6. On 3 September 2019, the Applicant emailed a further request for information which included, but was not limited to, the visioning and masterplanning information already sought in request 1. It included contact and payment information in relation to these matters, in addition, all from 1 January 2019.
7. The Council responded on 3 October 2019, providing some information, but also noting the respects in which it considered this request to be a repeat of request1. The Council stated

that it was withholding information for the period subsequent to request 1, under sections 30(b)(ii) and (c) of the Freedom of Information (Scotland) Act 2002 (FOISA).

8. On 8 October 2019, in two separate emails, the Applicant required the Council to review its decision on request 2, setting out why he believed that the information requested was capable of disclosure. He did not believe the Council had answered either request 1 or request 2 in full.
9. The Council notified the Applicant of the outcome of its review on 6 November 2019, acknowledging that the request was for environmental information and substituting a new decision under the EIRs. It affirmed its position that it was only responding to request 2 to the extent that it had not been answered already in relation to request 1 and confirmed that it considered it had identified all relevant information and applied regulation 10(4)(d) of the EIRs to the information previously withheld.

### **Applications for requests 1 and 2**

10. The Applicant appealed requests 1 and 2 on 28 November 2019 and 12 February 2020 respectively. Both applications have been conjoined for the purposes of investigation and will now be considered together in this Decision Notice.
11. In both applications, the Applicant wrote to the Commissioner, applying 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.
12. The Applicant challenged the Council's reasons for withholding information under regulation 10(4)(d) and questioned whether all relevant information had been identified. He did not accept that request 1 had been answered in full, as claimed by the Council in responding to request 2.

### **Investigation**

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13. Both applications were accepted as valid. The Commissioner confirmed that the Applicant made requests for information to a Scottish public authority and asked the authority to review its responses to those requests before applying to him for a decision.
14. On 6 and 10 December 2019 respectively, the Council was notified in writing that the Applicant had made valid applications. The Council was asked to send the Commissioner the information it withheld from the Applicant for both. The Council provided the information and the case was allocated to an investigating officer.
15. 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 to answer specific questions. These related to the application of regulation 10(4)(d) to the withheld information for both applications, and also to the steps taken to identify and locate any relevant information held. The Council was also asked to comment on the extent to which it considered request 2 to be a repeat of request 1.
16. Submissions were received from both parties during the investigation. The Council also provide the Applicant with the withheld information (in the form of four versions of the draft masterplan) during the investigation: the Applicant appeared content that this was the information he sought, but continued to seek a decision from the Commissioner on the Council's earlier handling of the request.

## Commissioner's analysis and findings

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17. In coming to a decision on this matter, the Commissioner considered all of the withheld information and the relevant submissions, or parts of submissions, made to him by both the Applicant and the Council. He is satisfied that no matter of relevance has been overlooked.

### Handling in terms of the EIRs

18. At review stage, the Council dealt with both requests under the EIRs, as they related to environmental information as defined in regulation 2(1) of the EIRs. Specifically, it considered the information to relate to issues pertaining to the built and natural environment, namely the proposed use of the ground forming the current Eastwood Park.
19. Having considered the requests, the information identified by the Council as covered by them and the Council's submissions, the Commissioner is satisfied that the Council was correct in dealing with the requests as requests for environmental information, as defined in regulation 2(1) of the EIRs, particularly paragraphs (a) and (c) of that definition (see Appendix 1).
20. The Applicant has not disputed the Council's decision to deal with the request under the EIRs and, in what follows, the Commissioner will consider this case solely in terms of the EIRs.

### Information held and regulation 10(4)(d)

21. The Council provided details of the process by which it established what information was held for both requests. These included the places searched, the search terms and timeframes used and why these would be expected to capture any relevant information. It also provided submissions on the retention of drafts. Having considered these submissions, the Commissioner is satisfied that the searches were proportionate, reasonable and capable of identifying the information described in both requests. He notes that this information was provided to the Applicant during the investigation, and that the Applicant appears content that this was the information he sought.
22. The exception in regulation 10(4)(d) of the EIRs applies to "material which is still in the course of completion, ... unfinished documents or ... incomplete data". *The Aarhus Convention: An Implementation Guide*<sup>1</sup> provides guidance (at page 85) as to the type of material this exception is intended to cover. It describes the expression "in the course of completion" as relating to the process of preparation of the information or document and not to any decision-making process for the purpose of which the information or document has been prepared. It also states that the words "in the course of completion" suggest that the term refers to individual documents that are actively being worked on by the public authority, and which will have more work done on them within some reasonable timeframe.
23. In this case, the Council's arguments appear to relate to the fact that a senior management decision on the draft report and its submission to Council was still outstanding at the time of the review. No indication has been given as to the effect of this situation on any individual version of the draft as withheld (and subsequently disclosed), each of which appears to be complete in itself. In the circumstances, the Commissioner cannot accept, from the

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<sup>1</sup> [https://www.unece.org/fileadmin/DAM/env/pp/Publications/Aarhus\\_Implementation\\_Guide\\_interactive\\_eng.pdf](https://www.unece.org/fileadmin/DAM/env/pp/Publications/Aarhus_Implementation_Guide_interactive_eng.pdf)

submissions received, that the Council was correct to apply the exception to the information under consideration here.

24. By failing to make available the withheld information at the time of review (for both requests 1 and 2, insofar as falling within the scope of each of them), the Commissioner concludes that the Council breached regulation 5(1) of the EIRs.
25. Given the information has now been provided to the Applicant, the Commissioner does not require further steps to be taken in this regard, on this occasion.

### **Whether request 1 went “unanswered”**

26. While the Commissioner notes the Applicant’s unhappiness with the outcome of request 1, it is apparent that the Council did respond to that request (certainly at review stage) with what was, on the face of it, a full and final response to the request made. The Applicant’s remedy was to apply to the Commissioner for a decision if he was unhappy with that response (as he did, in the case under consideration here). Clearly, request 2 did repeat request 1 to some extent and that was unnecessary – in responding to a requirement for review, the Council had fulfilled its role in relation to request 1 and need not have been called upon to, in effect, consider it again.

## **Decision**

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The Commissioner finds that, in respect of the matters specified in the applications for requests 1 and 2, East Renfrewshire Council (the Council) failed to comply with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information requests made by the Applicant.

The Commissioner finds that the Council failed to comply with regulation 5(1) of the EIRs by not making the withheld information available in response to the Applicant’s request or his requirement for review.

Given that the withheld information was made available to the Applicant during this investigation, the Commissioner does not require the Council to take any action in respect of this failure, in response to the Applicant’s applications.

## **Appeal**

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Should either the Applicant 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**  
**Head of Enforcement**

**27 November 2020**

### 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.

(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

...

(d) the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data; or

...

**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)**