

# Decision Notice

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**Decision 131/2014 Ms Kay Smith and the City of Edinburgh Council**

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**Budgetary information**

Reference No: 201400612

Decision Date: 16 June 2014



Scottish Information  
Commissioner

## Summary

On 7 January 2014, Ms Smith asked the City of Edinburgh Council (the Council) for information relating to the budget surplus generated by its Pest Control Section. The Council informed Ms Smith that it did not hold the information she had requested.

Following an investigation, the Commissioner accepted that the Council did not hold the information and that it had complied with the EIRs in the way it dealt with Ms Smith's request.

## Relevant statutory provisions

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The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 5(1) and (2)(b) (Duty to make environmental information available); 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 the Appendix to this decision. The Appendix forms part of this decision.

## Background

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1. On 7 January 2014, Ms Smith emailed the Council requesting the following information:  
*"Regards the budget for the Pest Control Section of Environmental Services. Could you please provide details as to what the surplus made by that section over the past five accountable years has been spent on? Where did the money go?"*
2. The Council responded on 3 February 2014. The Council informed Ms Smith that it did not hold the information she had requested. The Council stated that any budget surplus was not identified for specific projects or work areas, but contributed to ensuring the overall Services for Communities financial position was within the total budget allocated by the Council. The Council informed Ms Smith that the information was excepted from disclosure in terms of regulation 10(4)(a) of the EIRs, on the basis that it did not hold the information.
3. On 3 February 2014, Ms Smith emailed the Council requesting a review of its decision. Ms Smith asked the Council to explain the meaning and reasoning behind its decision.
4. The Council notified Ms Smith of the outcome of its review on 14 March 2014. The Council upheld its original decision that it did not hold the information. It expanded slightly upon the explanation provided in its initial response.
5. On 17 March 2014, Ms Smith 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 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.
6. The application was validated by establishing that Ms Smith 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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7. 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, including questions about the process followed by the Council in relation to budget surpluses.
8. The Council responded on 7 May 2014.

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

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9. 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 Ms Smith and the Council. She is satisfied that no matter of relevance has been overlooked.

### **FOISA or EIRs?**

10. In its initial response of 3 February 2014, and its review response of 14 March 2014, the Council informed Ms Lang that it considered the requested information was environmental information and that the request should be handled under the EIRs. The Commissioner agrees with the Council that the information under consideration is environmental. She will therefore consider Ms Lang's application in terms of the EIRs.

### **Regulation 10(4)(a) – information not held**

11. Regulation 10(4)(a) of the EIRs states 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.
12. In her application to the Commissioner, Ms Smith stated that there appeared to be no clear public accountability in relation to any surplus made by the Pest Control Section. Ms Smith stated that no figures had been provided to evidence and prove how the surplus had contributed to balancing the Services for Communities budgetary allocation over the five years covered by her request.
13. In its responses to Ms Smith, the Council explained that any such surplus was not ring-fenced for the Pest Control Section's continued use, but contributed to ensuring the overall Services for Communities budget was within the total budget allocated by the Council.
14. In its submissions to the Commissioner, the Council stated that any budget underspend, through income or expenditure, would be added to the Council's overall resources rather than being ring-fenced by a particular service. The Council indicated that there were certain exceptions, in areas such as licensing, where legislation states that expenditure and income are ring-fenced for a particular service. In this respect, the Council cited the position regarding the licensing of Houses in Multiple Occupation (HMO) where fees raised from HMO licenses cannot be used to subsidise any other public service. Similarly, charges levied by a local authority relating to any other public service should not be used to provide a subsidy for any work on HMO licensing.
15. The Council explained that its budgetary arrangements allowed it to consider overall resources available in deciding on its expenditure priorities. The Council provided the

Commissioner with links to information on its website, documenting the Council's decision on spending priorities and its Financial Regulations.<sup>1,2</sup>

16. The Commissioner accepts the Council's explanation that any surpluses generated by the Pest Control Section are simply included within the Council's overall budgetary resources and are not reallocated to specific, definable work areas. Given that this is so, the Commissioner would not expect the Council to hold information showing what the surplus from the Pest Control Section had been spent on, or to be able to provide this level of analysis.
17. The Commissioner accepts that the Council does not hold the requested information. She acknowledges that Ms Smith may believe more information *should* be held, for the purposes of accountability, but the Commissioner can only consider whether information *is* held (rather than whether it should be).

#### *The public interest test*

18. The exception in regulation 10(4)(a) is subject to the public interest test in regulation 10(1)(b) of the EIRs and can only apply if, in all the circumstances, the public interest in maintaining the exception outweighs the public interest in making the information available.
19. In this case, the Commissioner is satisfied that the Council does not hold the information sought by Ms Smith. Consequently, she does consider there to be any conceivable public interest in requiring that the information be made available. The Commissioner therefore concludes that the public interest in making the requested information available is outweighed by that in maintaining the exception in regulation 10(4)(a) of the EIRs.
20. The Commissioner is satisfied, therefore, that the Council was entitled to refuse Ms Smith's request under regulation 10(4)(a) of the EIRs, on the basis that it did not hold the requested information.

## **Decision**

The Commissioner finds that the City of Edinburgh Council complied with the Environmental Information (Scotland) Regulations 2004 in responding to the information request made by Ms Smith.

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<sup>1</sup> [http://www.edinburgh.gov.uk/meetings/meeting/2909/city\\_of\\_edinburgh\\_council](http://www.edinburgh.gov.uk/meetings/meeting/2909/city_of_edinburgh_council)

<sup>2</sup> [http://www.edinburgh.gov.uk/info/20031/councillors\\_and\\_committees/635/council\\_procedures\\_and\\_standing\\_orders](http://www.edinburgh.gov.uk/info/20031/councillors_and_committees/635/council_procedures_and_standing_orders)

## **Appeal**

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Should either Ms Smith or the 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**  
**16 June 2014**

## Appendix

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Relevant statutory provisions

### **The Environmental Information (Scotland) Regulations 2004**

#### **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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