

# Decision Notice

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## **Decision 229/2016: Mr Andrew Hill and Ayrshire Housing**

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### **Ownership and maintenance of land**

Reference No: 201601471

Decision Date: 27 October 2016



Scottish Information  
Commissioner

## Summary

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On 4 July 2016, Mr Hill asked Ayrshire Housing for information relating to the ownership and maintenance of an area of grassland.

Ayrshire Housing told Mr Hill that, because the information he had asked for was not environmental, it did not have to provide a response in terms of the Environmental Information (Scotland) Regulations 2004 (the EIRs).

The Commissioner investigated and found that some of the information requested by Mr Hill was environmental information, and that Ayrshire Housing had failed to respond to Mr Hill's request for information in accordance with the EIRs. The Commissioner required Ayrshire Housing to carry out a review and to notify Mr Hill of the outcome, in line with regulation 16 of the EIRs.

## Relevant statutory provisions

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The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (Interpretation) (paragraphs (a) and (c) of definition of "environmental information"); 5(1) and (2) (Duty to make environmental information available on request); 16(1), (3) and (5) (Review by Scottish public authority)

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. In *Decision 118/2014 Mr X and Dunbritton Housing Association Ltd*<sup>1</sup>, the Commissioner established that housing associations are Scottish public authorities for the purposes of the EIRs. This is because housing associations have public responsibilities relating to the environment and are under the control of the Scottish Housing Regulator. The effect of this is that if a housing association receives a request for environmental information, it is required to respond to it under the EIRs.
2. On 4 July 2016, Mr Hill made a request for information to Ayrshire Housing, as follows:
  - (i) The details of the owner(s) of the land comprised of a roughly triangular area of grass enclosed by the public road of Leslie Crescent, Ayr and a public footpath on the same road. For the avoidance of doubt this area of grassland is within the postcode area of KA7 3BP. Where the release of any data would identify a living individual, please supply details of the nature of the owner (council, individual, housing association, etc).
  - (ii) The Quarterly costs of maintaining the grass area detailed in 1 above.
  - (iii) The details of who is legally responsible for the payment of the costs in 2 above. Where the release of any data would identify a living individual, please supply details of the nature of the owner (council, individual, housing association, etc).

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<sup>1</sup> <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2014/201302209.aspx>

- (iv) The amount of money raised for the quarterly costs from owners and tenants in the surrounding area of the grass area identified in 1 above.
  - (v) The number of houses who are asked to contribute to any costs detailed in 2 above. Where possible, please break this information down by whether they are home owners, council tenants, private tenants, etc.
  - (vi) The number of households who have refused to make any contributions to the costs detailed in 2 above.
  - (vii) The number of households detailed in question 6 who have been referred to debt collection agencies or legal agents for the purpose of recovering any money due.
  - (viii) The number of households detailed in question 6 who have been pursued via the courts for payment of any money due, and an indication of whether the finding were for the pursuer or the defender.
3. Ayrshire Housing did not respond to this request.
  4. On 4 August 2016, Mr Hill wrote to Ayrshire Housing requesting a review of its decision on the basis that it had failed to provide him with a response within the 20 working days specified in the EIRs.
  5. Ayrshire Housing notified Mr Hill of the outcome of its review on 16 August 2016. It explained that it had taken advice from its solicitors and did not consider his information request to fall within the scope of the EIRs.
  6. On 17 August 2016, Mr Hill 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 Hill explained that he was dissatisfied with the outcome of Ayrshire Housing's review because he considered that his information request fell within the scope of the EIRs.

## Investigation

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7. The application was accepted as valid. The Commissioner confirmed that Mr Hill made a request for information to a Scottish public authority (as defined in regulation 2 of the EIRs) and asked the authority to review its response to that request before applying to her for a decision.
8. On 7 September 2016, Ayrshire Housing was notified in writing that Mr Hill had made a valid application. Ayrshire Housing was asked to send the Commissioner the information withheld from Mr Hill. Ayrshire Housing provided the information and the case was allocated to an investigating officer.
9. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. Ayrshire Housing was invited to comment on this application and answer specific questions including justifying its view that the requested information was not environmental.

## Commissioner's analysis and findings

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10. 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 her by both Mr Hill and Ayrshire Housing. She is satisfied that no matter of relevance has been overlooked.

### **Is the requested information environmental?**

11. Environmental information is defined in regulation 2(1) of the EIRs (the relevant parts of the definition are reproduced in the Appendix to this decision). Where information falls within the scope of this definition, a person has a right to access it under the EIRs, subject to the various restrictions and exceptions contained in the EIRs.
12. Ayrshire Housing was asked whether it maintained that all of the information requested by Mr Hill was not environmental information. In response, Ayrshire Housing submitted that it now accepted that some of the information requested by Mr Hill was environmental information (as defined in regulation 2(1) of the EIRs) but maintained that some of it was not. Ayrshire Housing noted that it considered the environmental information to be commercially sensitive.
13. The Commissioner has considered all of the information requests made by Mr Hill. She is satisfied that requests (i) to (iv) fall under paragraphs (a) and (c) of the definition of environmental information provided in regulation 2(1) of the EIRs. Request (i) is seeking information on the ownership of land; requests (ii) and (iv) are seeking information on the charges made for maintaining the land; and request (iii) is seeking information on who is legally responsible for paying the maintenance charges. In relation to these requests, the Commissioner accepts that Mr Hill is seeking information about measures (such as activities) affecting or likely to affect the state of the elements of the environment (in this case, the landscape) as well as measures or activities designed to protect those elements.
14. The Commissioner has also considered requests (v) to (viii), but she is not satisfied that the information covered by these requests falls under the definition of environmental information in regulation 2(1) of the EIRs. These requests are essentially seeking information on the number of households who have paid, or refused to pay, land maintenance charges. The information does not relate directly to the effect on the environment of the maintenance activities, in the way that requests (i) to (iv) do. Requests (i) to (iv) were seeking information about the cost of the activities, which relates directly to the state of the elements of the environment: if the money was not paid out, the environment would be affected. However, requests (v) to (viii) relate to the legal obligations on individual owners and tenants, and measures taken in relation to non-payment of the maintenance charge. The non-payment of the maintenance charge will not affect the state of the environment, as the charge is made to cover costs already incurred by the housing association.

### *Commissioner's findings*

15. The Commissioner finds that requests (i) to (iv) are seeking environmental information and that Ayrshire Housing should have responded to these requests in accordance with the EIRs. In failing to do so, it failed to comply with regulation 5(1) of the EIRs.
16. The Commissioner requires Ayrshire Housing to review its response to parts (i) to (iv) of Mr Hill's request, in compliance with regulation 16 of the EIRs.
17. In relation to requests (v) to (viii), the Commissioner finds that these requests are not seeking environmental information, and as such, Ayrshire Housing is not required to respond to these information requests in accordance with the EIRs.

## Decision

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The Commissioner finds that Ayrshire Housing failed to comply with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by Mr Hill. The Commissioner finds that Ayrshire Housing failed to identify that some of the information which Mr Hill asked for was environmental information and it failed to comply with the requirements of regulation 5(1) and regulation 16 of the EIRs.

The Commissioner therefore requires Ayrshire Housing to undertake a review of its handling of requests (i) to (iv) by **12 December 2016**.

## Appeal

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Should either Mr Hill or Ayrshire Housing 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.

## Enforcement

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If Ayrshire Housing fails to comply with this decision, the Commissioner has the right to certify to the Court of Session that Ayrshire Housing has failed to comply. The Court has the right to inquire into the matter and may deal with Ayrshire Housing as if it had committed a contempt of court.

**Margaret Keyse**  
**Head of Enforcement**

**27 October 2016**

### 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)-

(a) shall be complied with as soon as possible and in any event no later than 20 working days after the date of receipt of the request; and

(b) is subject to regulations 6 to 12.

...

#### 16 Review by Scottish public authority

(1) Subject to paragraph (2), an applicant may make representations to a Scottish public authority if it appears to the applicant that the authority has not complied with any requirement of these Regulations in relation to the applicant's request.

...

(3) The Scottish public authority shall on receipt of such representations-

(a) consider them and any supporting evidence produced by the applicant; and

(b) review the matter and decide whether it has complied with these Regulations.

...

- (5) Where the Scottish public authority decides that it has not complied with its duty under these Regulations, it shall immediately take steps to remedy the breach of duty.

**Scottish Information Commissioner**

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