

Decision Notice



Decision 093/2012 Mr Bruce Thompson and City of Edinburgh Council

Statutory notice repairs

Reference No: 201200083
Decision Date: 11 June 2012

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Rosemary Agnew
Scottish Information Commissioner

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Summary

Mr Bruce Thompson requested from the City of Edinburgh Council (the Council) information that had been withheld within two pieces of correspondence disclosed in response to a previous information request. The Council did not respond to this request within the required timescale. Following a review, in which the Council withheld the requested information under regulations 10(4)(e) and 10(5)(b) of the Environmental Information (Scotland) Regulations 2004 (EIRs), Mr Thompson remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the Council had failed to deal with Mr Thompson's request for information in accordance with the EIRs. She found that it incorrectly applied the exceptions in regulations 10(4)(e) and 10(5)(b) of the EIRs to the requested information, and so it breached regulation 5(1) by withholding that information. The Commissioner also found that the Council had failed to respond to Mr Thompson's request within the timescale required by regulation 5(2) of the EIRs. She required the Council to provide the withheld information to Mr Thompson.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 39(2) (Health, safety and the environment)

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (Interpretation – parts (a), (b) and (c) of the definition of environmental information); 5(1) and (2) (Duty to make environmental information available on request); 10(1), (2), (4)(e) and (5)(b) (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

1. On 26 October 2011, Mr Thompson emailed the Council requesting complete versions of two pieces of correspondence which had previously been disclosed to him in redacted form. Both pieces of correspondence related to a complaint made by Mr Thompson concerning statutory notice repairs to a particular building. The Council acknowledged receipt of Mr Thompson's request on the same day.



2. On 24 November 2011, having received no response to his request, Mr Thompson emailed the Council, expressing dissatisfaction with its failure to respond, and requesting a review of its handling of his request.
3. The Council notified Mr Thompson of the outcome of its review on 22 December 2011. It apologised for its failure to respond to his request within the timescale required, and explained that this was due to the high volume of requests for information received by the relevant department. Having considered the request for information in terms of the EIRs, the Council withheld the requested information on the grounds that it was excepted from disclosure under regulations 10(4)(e) and 10(5)(b) of the EIRs.
4. On 3 January 2012, Mr Thompson wrote to the Commissioner, stating that he 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 certain specified modifications.
5. The application was validated by establishing that Mr Thompson had made a request for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its response to that request.

Investigation

6. On 13 January 2012, the Council was notified in writing that an application had been received from Mr Thompson. The information under consideration in this case was already held by the Commissioner as a result of a previous investigation, and so the case was then allocated to an investigating officer.
7. The investigating officer then wrote to the Council, giving it the 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 justify its reliance on any provisions of the EIRs it considered applicable to the information requested.
8. The Council responded with its submissions on 27 February 2012. These explained its reasoning when applying the exceptions in regulations 10(5)(b) and 10(4)(e) of the EIRs. After being asked to provide further information to inform the Commissioner's consideration of the case, the Council provided additional submissions on 21 March 2012.
9. The investigating officer also contacted Mr Thompson during the investigation, seeking his submissions on the matters to be considered in the case. Mr Thompson's submissions, along with those of the Council, are summarised and considered (where relevant) in the Commissioner's analysis and findings section below.



Commissioner's analysis and findings

10. In coming to a decision on this matter, the Commissioner has considered all of the withheld information and the submissions made to her by both Mr Thompson and the Council and is satisfied that no matter of relevance has been overlooked.

Handling under the EIRs

11. The previous Commissioner's thinking on the relationship between FOISA and the EIRs is set out in detail in *Decision 218/2007 Professor A D Hawkins and Transport Scotland*¹ and need not be repeated in full here.
12. When responding to Mr Thompson's request, and in its submissions to the Commissioner, the Council confirmed that it had considered his request under the EIRs, having judged that the information requested was environmental information, as defined in the EIRs, and so exempt from disclosure in terms of section 39(2) of FOISA.
13. For this exemption to apply, any information requested would require to be environmental information as defined in regulation 2(1) of the EIRs. The relevant parts of that definition are reproduced in the Appendix to this decision.
14. The Commissioner agrees with the Council that the information under consideration in this case is environmental information. As it concerns the condition of and repairs to a building, it relates to measures (including the works themselves and the statutory notice procedure prompting them) and activities (the operations on the site) affecting or likely to affect the elements referred to in part (a) of the definition (in particular land and the landscape) and factors (such as noise or waste) referred to in part (b) of the definition. As such, the Commissioner is satisfied that the information requested by Mr Thompson is environmental information as defined in part (c) of the definition, and that the Council was correct to consider Mr Thompson's request for this information as one made in terms of the EIRs.
15. In this case, therefore, the Commissioner accepts that the Council was entitled to apply the exemption in section 39(2) of FOISA to the withheld information, given her conclusion that it is properly considered to be environmental information. This exemption is subject to the public interest test in section 2(1)(b) of FOISA.
16. As there is a separate statutory right of access to environmental information available to the applicant in this case, the Commissioner accepts that the public interest in maintaining this exemption and dealing with the request in line with the requirements of the EIRs outweighs any public interest in disclosure of the information under FOISA. She has consequently proceeded to consider this case in what follows solely in terms of the EIRs.

¹ <http://www.itspublicknowledge.info/applicationsanddecisions/Decisions/2007/200600654.asp>



Consideration of exceptions

17. The Council has applied the exceptions in regulations 10(5)(b) and 10(4)(e) of the EIRs to all of the information withheld in response to Mr Thompson's request. The Commissioner has considered these exceptions below. However, when doing so, she has not considered the application of these exemptions to the identity of a member of the public who is named within the withheld information.
18. During the investigation, Mr Thompson accepted that this information should not be disclosed, and so agreed to the exclusion of this particular information from consideration in the Commissioner's decision. The discussion below focusses on the remaining withheld information.

Regulation 10(5)(b)

19. Regulation 10(5)(b) of the EIRs provides that a Scottish public authority may refuse to make environmental information available to the extent that its disclosure would, or would be likely to, prejudice substantially the course of justice, the ability of a person to receive a fair trial or the ability of any public authority to conduct an inquiry of a criminal or disciplinary nature.
20. Although there is no definition within the EIRs of what would constitute substantial prejudice, it is the Commissioner's view that the standard to be met in applying this test is high. The word "substantial" is important here: the harm caused, or likely to be caused, by disclosure must be of some real and demonstrable significance. The risk of harm must be real or very likely, not simply a remote or hypothetical possibility.
21. In this case, the Council submitted that disclosure of the withheld information would, or would be likely to, prejudice substantially the Council's ability to conduct an inquiry of a criminal or disciplinary nature. It explained that there was an ongoing investigation into the handling of statutory repair notices and related works, which included disciplinary hearings. The Council maintained that, if the information were disclosed into the public domain, it would be likely to prejudice substantially the outcome of such investigations, especially if criminal proceedings were to arise. It submitted that any release at the relevant point would be premature and would affect the Council's position in any future proceedings, and that disclosure could prejudice the internal or police investigations.
22. Following initial consideration of these submissions, the Council was asked to provide further comments to explain why the particular information redacted within the documents previously disclosed to Mr Thompson had been judged to be exempt. The Council was also asked to provide further background information relating to the investigations concerning statutory notices.
23. In response to this further request, the Council explained that it had taken the view that only the redacted parts of the documents contained information that may prejudice the investigation, and provided some further background information about its investigations. It added that it was important that any individuals who might be the subject of ongoing investigations were treated fairly.



24. Having considered all of the submissions received from the Council, the Commissioner recognises that investigations of a criminal and disciplinary nature are ongoing within the Council, and involving the police, in relation to matters surrounding statutory repair notices and related works. If disclosure of the information under consideration in this decision would prejudice substantially the ability of the Council or the police to conduct those inquiries, then the exception in regulation 10(5)(b) would be found to apply.
25. However, it is not sufficient to simply highlight that such investigations are ongoing. In order to accept that this exception was appropriately applied, the Commissioner must be satisfied that disclosure of the information in question would, or would be likely to, prejudice substantially those investigations. In this case, she has concluded that the Council has not demonstrated that the disclosure of the particular information withheld would, or would be likely to, have a substantially prejudicial effect. The submissions from the Council, whilst giving background, failed to specify in what way the particular information withheld would cause prejudice or would be unfair to the individuals who might be the subject of investigations.
26. In reaching this conclusion, the Commissioner has noted that the much of the withheld information constitutes factual information about the administration of statutory notices and associated repairs that would have been known to the owners of the properties concerned. This includes the identities of companies involved in those works. As such information is already known to members of the public, there is nothing to prevent it entering the public domain through means other than disclosure in response to a request made in terms of the EIRs.
27. The Commissioner has also noted that certain parts of the information that has been withheld from Mr Thompson have effectively been disclosed within other information that has been released to him. While the Commissioner recognises that the context in which particular information is communicated may be a factor relevant to the application of exemptions, the Council's communications have made no arguments in relation to why certain information could be disclosed in one context but not in another.
28. Taking account of the content of the information, the observations above and the limitations of the submissions provided by the Council, the Commissioner is unable to see how or why disclosure of any of the information withheld in this would, or would be likely to, prejudice substantially the ability of any public authority to conduct an inquiry of a criminal or disciplinary nature.
29. The Council has provided no satisfactory, reasoned explanation as to why it chose to withhold certain information, but disclose other information relating to this project, and why it reached the view that disclosure of this particular information would be likely to cause the harm claimed, despite being given two opportunities to do so.
30. Consequently, on the information she has before her, the Commissioner concludes that the Council incorrectly applied the exception in regulation 10(5)(b) of the EIRs to the information under consideration in this decision.



31. She has therefore not gone on to consider the public interest test associated with this exception.

Regulation 10(4)(e)

32. Under regulation 10(4)(e) of the EIRs, a Scottish public authority may refuse to make environmental information available to the extent that the request involves making available internal communications. For information to fall within the scope of the exception in regulation 10(4)(e), it need only be established that the information is an internal communication. However, the regulation does not expand upon what is meant by internal communications.
33. The Commissioner has considered the guidance contained in *The Aarhus Convention: An Implementation Guide*² which states:
- "The public authority may refuse to disclose... materials 'concerning internal communications,' but only when national law or customary practice exempts such materials. The Convention does not clarify what is meant by "customary practice" and this may differ according to the administrative law of an implementing Party. For example, for some Parties "customary practice" may apply only to those materials covered by evidence of established norms of administrative practice."*
34. The withheld information under consideration is located within two pieces of correspondence; one between officers of the Council, which clearly constitutes an internal communication, and the other between a Council officer and an external contractor that managed the relevant repairs.
35. In its submissions on the application of regulation 10(4)(e), the Council noted the previous Commissioner's practice when considering whether communications involving third parties can be considered "internal" is to address each case on its merits, considering such points as the nature and context of the particular relationship and the nature of the communication itself.
36. The Council went on to explain that, in this instance, the external contractor was instructed to manage statutory notice works on its behalf and so was contract administrator, acting on the Council's behalf.
37. Having considered the withheld information, the Council's submissions and the nature of its relationship with the contractor, the Commissioner accepts that the information under consideration in each case forms part of an internal communication for the purposes of the EIRs. Accordingly, she finds that that the exception in regulation 10(4)(e) applies to this information.

Consideration of the public interest

² <http://www.unece.org/env/pp/acig.pdf>



38. Having found that the Council correctly applied the exception contained within regulation 10(4)(e), the Commissioner is required to consider the public interest test required by regulation 10(1)(b) of the EIRs. The test specifies that a public authority may only withhold information to which an exception applies where, in all the circumstances, the public interest in making the information available is outweighed by the public interest in maintaining the exception.
39. In his submissions to the Commissioner, Mr Thompson highlighted that the information withheld related to his own property and a complaint that he had submitted. He noted that, after a year of waiting, he had received no reply to that complaint. He highlighted that the withheld information included responses to serious issues he had raised, and argued that it should be disclosed as the response was long overdue. He considered it unlikely that there was any criminal content in the withheld information.
40. Mr Thompson provided background information relating to the works at his property, stating that these have involved increasing costs. He commented that it was only fair that he had information directly relating to the works and to the concerns he had raised before he paid any invoice raised by the Council, or attended a proposed meeting to discuss the works.
41. Mr Thompson also expressed the opinion that the Council has in no way acted in the public interest. He said it appeared to him that the Council was seeking to avoid embarrassment and to prevent him from having the information that would enable him to understand the Council's actions and what work was done to his property.
42. The Council recognised in its submissions that the information under consideration related to the handling of a particular statutory notice and related additional works. It explained that documents in which the withheld information is contained were prepared to provide detailed information about the project in order to provide a complete response to the complaint.
43. The Council submitted that it is important that officers can discuss internally the Council's position in a particular repairs project without the fear that it may be disclosed in response to a request for information. It went on to argue that, if it was obliged to release this information, officers would be reluctant to discuss and record information of this nature, which would seriously inhibit the free and frank exchange of views for the purpose of deliberation and would have a significant impact on the ability of the Council to thoroughly investigate complaints of the applicant's nature.
44. The Council also suggested that disclosure of the information could prejudice the Council's position in any future court action, or hinder the Council's ability to defend any claim which may arise. It maintained that there is a strong public interest in ensuring that the Council can discuss privately the handling of a particular repairs project, especially where a court case is a possibility.
45. The Council appreciated that there a public interest in an open and transparent statutory repairs notice process, to ensure that investigations into the serving of notices and related works are carried out properly and without prejudice, and that complaints which are made by members of the public are addressed appropriately.



46. Overall, however, the Council concluded that the public interest was better served by ensuring that officers continue to exchange correspondence containing free and frank exchange of views, without the fear that it may be disclosed; in this regard the public interest does not favour the disclosure of the withheld information.
47. In considering the public interest test, the Commissioner accepts that there is a general public interest in making information available to the public, and in transparency and accountability in decision making, but this must be balanced against any detriment to the public interest as a consequence of disclosure.
48. The Commissioner recognises that the Council is in the process of investigating and addressing serious concerns that have been raised in relation to its Property Conservation service, regarding the statutory notice process and associated works. She recognises that this context presents significant challenges for the Council, as individuals affected by these works raise their concerns about their own properties.
49. The nature of the concerns that have become publicly known about statutory notice works means that the Commissioner recognises that there is a very substantial public interest in the disclosure of the information requested by Mr Thompson. Mr Thompson owns property in relation to which statutory notice repair works were undertaken, and he has concerns about the nature and costs of those works. The withheld information would enable him to gain greater understanding of those works, and the associated costs.
50. Disclosure would also allow him to see the answers to his complaints that were communicated within the Council. Although this would not constitute a formal response to Mr Thompson's complaint, it would give him some indication of the thinking of the Council and its agent on the points he had raised, given that more than a year has passed since his complaint has raised.
51. The Council has made no submission to suggest that its thinking on the matters raised in Mr Thompson's complaint had changed in the period between the creation of the withheld information and its handling of his information request. If the Council no longer considered the information to be accurate or valid, it was open to it to highlight to the Commissioner such limitations of the contribution the information might make to the public interest.
52. The Commissioner is satisfied that, although Mr Thompson has raised his concerns in relation to a specific property, the Council's management of statutory notices, both in general and in specific cases, is a matter of general public interest. Given the serious nature of the concerns raised, there is a strong public interest in understanding the work of the Council in this area, whether this was undertaken appropriately, and whether appropriate attention was given to the interests of the property owners within that process.



53. The Commissioner must balance this public interest against those in favour of maintaining the exception. The Commissioner recognises that there is a public interest in allowing the Council's investigations to proceed in private, particularly where this relates to disciplinary matters involving individual members of staff. She also recognises that there is a public interest in ensuring that staff within the Council are able to discuss complaints raised in a free and frank manner, and avoiding disclosure which could undermine the effectiveness of its investigations or complaint handling processes by inhibiting future discussions.
54. She accepts that disclosure in this case could have an inhibitive effect. However, given the nature of the withheld information, and the similarities of this to other information that the Council has previously disclosed to Mr Thompson, the Commissioner is not persuaded that disclosure of this information would be significantly detrimental to either the ongoing investigations or the quality of internal discussions.
55. The Commissioner recognises that disclosure of the withheld information might assist a person contemplating action against the Council in relation to its handling of the relevant statutory notice, or of statutory notices in general. However, she notes also that the Council has not claimed that the withheld information is privileged, and so inaccessible to a pursuer using court recovery procedures. Even so, the Commissioner acknowledges that if disclosure would be detrimental to the Council's position in future court actions, this is a public interest factor weighing against disclosure on administration of justice grounds.
56. The Commissioner has balanced the public interest in all the circumstances of this case and, on balance, reached the conclusion that the public interest in disclosure outweighs that in maintaining the exception. In reaching this conclusion, she has noted that the Council's submissions in this case have been expressed in very general terms, and have failed to persuade the Commissioner as to why the disclosure of the particular information withheld from Mr Thompson would cause the specific types of detriment claimed.
57. As noted above, she does not accept that disclosure would, or would be likely to, prejudice substantially any investigation. However, she does recognise that disclosure could have some impact on the Council's own ability to defend itself in future court action relating to statutory notices. She also recognises that disclosure could have some inhibitive effect on its internal communications regarding statutory notices.
58. Given the seriousness of concerns raised about the Council's management of statutory notice works, and those raised by Mr Thompson in relation to his own property (combined with the Council's failure so far to address his complaint), the Commissioner considers that any detriment to the public interest that would follow from disclosure in this case would be outweighed by the public interest in disclosure.
59. The Commissioner is therefore satisfied that the public interest in making this information available is not outweighed by that in maintaining the exception in regulation 10(4)(e).

Regulation 5(2) - Timescales for response



60. Regulation 5(2)(a) of the EIRs specifies that the duty to provide information in response to a request should 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 (subject to regulations 6 to 12 of the EIRs).
61. The Council did not provide a response to Mr Thompson's request dated 26 October 2011 until after he had submitted a request for review on 24 November 2011. Mr Thompson expressed dissatisfaction about the delay in responding to his request.
62. In its submissions, the Council acknowledged that it had failed to provide a response to Mr Thompson within the required timescale. It advised that the department concerned has now reviewed its procedures and has taken steps to ensure that information requests are dealt with timeously in the future.
63. The Commissioner notes the points made by the Council, in particular the steps taken to improve the relevant department's practices. However, she must find that the Council failed to respond to Mr Thompson's request for information within the 20 working days allowed under regulations 5(2)(a) of the EIRs. As the Council subsequently responded to Mr Thompson's requirement for review, the Commissioner does not require the Council to take any action in response to this failure.

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 Mr Bruce Thompson.

The Commissioner finds that the Council was not entitled to withhold the information requested by Mr Thompson on the basis of the exceptions in regulation 10(5)(b) and 10(4)(e) of the EIRs. By failing to provide Mr Thompson with that information, the Council breached regulation 5(1). The Council also failed to provide a response with the time period laid down in regulation 5(2)(a) of the EIRs.

The Commissioner therefore requires the Council to disclose un-redacted versions of the two pieces of correspondence requested, by Thursday 26 July 2012.

Decision 093/2012
Mr Bruce Thompson
and City of Edinburgh Council



Appeal

Should either Mr Thompson or City of Edinburgh Council wish to appeal against this decision, there is an 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 notice.

Rosemary Agnew
Scottish Information Commissioner
11 June 2012



Appendix

Relevant statutory provisions

1 General entitlement

- (1) A person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority.

...

- (6) This section is subject to sections 2, 9, 12 and 14.

2 Effect of exemptions

- (1) To information which is exempt information by virtue of any provision of Part 2, section 1 applies only to the extent that –

...

- (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

...

39 Health, safety and the environment

...

- (2) Information is exempt information if a Scottish public authority-
- (a) is obliged by regulations under section 62 to make it available to the public in accordance with the regulations; or
- (b) would be so obliged but for any exemption contained in the regulations.

...



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;
- (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in paragraph (a);
- (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.

...



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
 - ...
 - (e) the request involves making available internal communications.
- (5) A Scottish public authority may refuse to make environmental information available to the extent that its disclosure would, or would be likely to, prejudice substantially-
 - ...
 - (b) the course of justice, the ability of a person to receive a fair trial or the ability of any public authority to conduct an inquiry of a criminal or disciplinary nature;
 - ...