

# Decision Notice



Decision 029/2010 Mr Robert Hogg and the City of Edinburgh Council

Matters concerning a site at Ratho

Reference No: 200901068

Decision Date: 24 February 2010

[www.itspublicknowledge.info](http://www.itspublicknowledge.info)

**Kevin Dunion**

Scottish Information Commissioner

Kinburn Castle  
Doubledykes Road  
St Andrews KY16 9DS  
Tel: 01334 464610



## Summary

Mr Hogg requested from the City of Edinburgh Council (the Council) information relating to matters concerning a site in the Ratho area of Edinburgh. The Council responded by offering to allow Mr Hogg to have sight of some information, while also withholding other relevant information under the exemptions in sections 34(1)(b), 36(1) and 36(2) of FOISA. Following a review, Mr Hogg remained dissatisfied and applied to the Commissioner for a decision.

During the course of the investigation the Council accepted that Mr Hogg's information request should have been dealt with under the EIRs and sought to rely on the exceptions in regulations 10(4)(e), 10(5)(d), 10(5)(g) and 11(2) of the EIRs for withholding the information.

Following an investigation, the Commissioner found that the Council had dealt with Mr Hogg's request for information in accordance with the EIRs. He found that the Council had been correct to rely on the exception in regulations 10(5)(d) of the EIRs for withholding information from Mr Hogg.

## Relevant statutory provisions and other sources

---

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) (definition of environmental information); 5(1) and (2)(b) (Duty to make environmental information available on request); 9 (Duty to provide advice and assistance); 10(1), (2) and (5)(d) (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 24 April 2009, Mr Hogg wrote to the Council requesting the following information:



“The information previously withheld in respect of my original request (which was for copies of all documents and all correspondence, including e-mails, relating to a site in the Ratho area of Edinburgh) and any additional or subsequent information held by the Council in relation to the specific site in Ratho, Edinburgh.”

2. The Council responded on 1 May 2009. Within its response, the Council explained that it had removed certain information from the file it held on this matter and was relying on the exemptions in sections 34(1)(b), 36(1) and 36(2) of FOISA for withholding it. The Council did, however, offer to engage with Mr Hogg to arrange a convenient time for him to view the remaining information in the file which was relevant to his request.
3. Mr Hogg wrote to the Council on 6 May 2009 requesting a review of its decision. In particular, Mr Hogg drew the Council’s attention to the fact that his request was not solely for information in relation to the historic enforcement investigation: he had also asked for any additional or subsequent information held by the Council in respect of the site in Ratho. In his request for a review, Mr Hogg also questioned the Council’s reliance on the exemptions in section 36(1) and (2) of FOISA.
4. The Council notified Mr Hogg of the outcome of its review on 3 June 2009. In its response the Council advised that the relevant information pertaining to the site at Ratho in Edinburgh would be made available for inspection by Mr Hogg, subject to certain documents being removed. The Council upheld its original decision to rely on the exemptions in section 36(1) and (2) of FOISA for withholding certain information, advising that in addition it was now seeking to rely on the exemption in section 38(1)(b) of FOISA for withholding certain information it considered to be personal data.
5. On 8 June 2009, Mr Hogg 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.
6. The application was validated by establishing that Mr Hogg 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

---

7. On 12 June 2009, the Council was notified in writing that an application had been received from Mr Hogg and asked to provide the Commissioner with any information withheld from him. The Council responded with the information requested. Within its response the Council also explained that, having reviewed the withheld information in the file again, it was willing to release information in 25 documents to Mr Hogg (which it went on to do). Information in an additional 14 documents was released in a redacted form. The case was then allocated to an investigating officer.
8. 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. In particular, the Council was asked to comment on whether the information requested could be deemed to be environmental information for the purposes of the EIRs, and to justify its position in withholding certain information from Mr Hogg.
9. A full response was received from the Council. It confirmed that the application should be considered under the EIRs, advising that it wished to rely on the exemption in section 39(2) of FOISA. It also submitted that it wished to rely on the exceptions in regulations 10(4)(e), 10(5)(d), 10(5)(f) and 11(2) of the EIRs for withholding information from Mr Hogg.
10. Further correspondence was entered into with the Council during the course of the investigation, in which submissions were sought as to the Council's justification for its reliance on the exceptions in the EIRs it considered applicable to the withheld information. In its response to the investigating officer, the Council explained that it was now seeking to rely on the exceptions in regulations 10(4)(e), 10(5)(d), 10(5)(g) and 11(2) of the EIRs for withholding the information.
11. During the course of the investigation the Council decided to disclose some more information previously withheld from Mr Hogg. Some of this information was disclosed subject to the redaction of personal data, while other information was disclosed in full.
12. Further information was also identified during the investigation which fell within the scope of Mr Hogg's request and this was also disclosed to Mr Hogg, with some redaction of personal data.
13. Mr Hogg advised the investigating officer that he was not concerned with receiving the personal data which had been redacted from the information disclosed to him. For this reason the Commissioner will not be considering the Council's reliance on the exception in regulation 11(2) of the EIRs in this decision, although he is satisfied that what was withheld under this regulation would constitute personal data.



## Commissioner's analysis and findings

---

14. In coming to a decision on this matter, the Commissioner has considered all of the withheld information and the submissions made to him by both Mr Hogg and the Council and is satisfied that no matter of relevance has been overlooked.
15. Having considered the Council's submissions, the Commissioner is satisfied that by the conclusion of the investigation it had identified all information falling within the scope of Mr Hogg's request.

### Section 39(2) of FOISA

16. The Commissioner has set out his thinking on the relationship between FOISA and the EIRs in some detail in *Decision 218/2007 Professor A D Hawkins and Transport Scotland*. Broadly, the Commissioner's general position on the interaction between the two regimes is as follows:
  - The definition of what constitutes environmental information should not be viewed narrowly, but in line with the definition in regulation 2(1) of the EIRs.
  - There are two separate statutory frameworks for access to environmental information and an authority is required to consider any request for environmental information under both FOISA and the EIRs.
  - Any request for environmental information therefore **must** be dealt with under the EIRs.
  - In responding to any request for environmental information under FOISA, an authority may claim the exemption in section 39(2).
  - If the authority does not choose to claim the section 39(2) exemption, it must deal with the request fully under FOISA, by providing the information, withholding it under another exemption in Part 2, or claiming that it is not obliged to comply with the request by virtue of another provision in Part 1 (or a combination of these).
  - The Commissioner is entitled (and indeed obliged), where he considers a request for environmental information has not been dealt with under the EIRs, to consider how it should have been dealt with under that regime.
17. As mentioned above, the Council submitted in the course of the investigation that it would rely on the exemption in section 39(2) of FOISA in relation to the information requested by Mr Hogg. For this exemption to apply, any information requested would require to be environmental information as defined in regulation 2(1) of the EIRs.
18. Given the subject matter of the request, the Commissioner has no difficulty in agreeing with the position arrived at by the Council, i.e. that the information caught by this request would be environmental information for the purposes of the EIRs. The information relates to certain industrial works at a specific site, and involves measures (such as statutory planning measures) and activities (the operations on the site) (paragraph (c) of the definition) affecting or likely to affect the elements referred to in paragraph (a) of the definition, in particular air, atmosphere and landscape.



19. The Commissioner is therefore satisfied that the information requested is exempt under section 39(2) of FOISA. This exemption is subject to the public interest test in section 2(1)(b) of FOISA. The Commissioner's view is that, in this case, as there is a separate statutory right of access to environmental information available to Mr Hogg, the public interest in maintaining this exemption and dealing with Mr Hogg's request in line with the requirements of the EIRs, outweighs any public interest in disclosure of information under FOISA. Consequently, it would have been correct in this case to apply section 39(2) and thereafter deal with the request under the EIRs. In what follows, therefore, the Commissioner will make his decision solely in terms of the EIRs.

#### **Regulation 10(5)(d) of the EIRs – Confidentiality provided for by law**

20. The exception in regulation 10(5)(d) 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 confidentiality of the proceedings of any public authority where such confidentiality is provided for by law. The Council has submitted that all of the information it is continuing to withhold from Mr Hogg is covered by this exception.
21. In its publication *The Aarhus Convention: an implementation guide*, the Economic Commission for Europe (the United Nations agency responsible for the convention which the EIRs are designed to implement) notes at page 59 that the convention does not comprehensively define "proceedings of public authorities", but suggests that one interpretation is that these may be proceedings concerning the internal operations of a public authority rather than substantive proceedings conducted by the public authority in its area of competence. The confidentiality under this exception must be provided for under national law.
22. It is the Council's position that the information contained within the withheld documents represents legal advice or notes taken in contemplation of litigation or enforcement action. The Council states that this information is confidential information which attracts legal professional privilege, including litigation privilege. Whilst the enforcement notice relating to this matter has been served, the Council submits that the matter is still effectively live and further action could be taken or the notice challenged. Therefore, the Council argues that it would be improper for it to release the legal advice that it has received in relation to this matter.
23. The Commissioner accepts that the communications which comprise the withheld information fall within the suggested definition of "proceedings of public authorities" set out in paragraph 24 above. For the exception in regulation 10(5)(d) to apply, however, the Commissioner must be satisfied that disclosure of the information would, or would be likely to, prejudice substantially the confidentiality of those proceedings. Firstly, he must be satisfied that the proceedings are confidential, such confidentiality being provided for by law.
24. In most cases where this exception will apply, there will be a specific statutory provision prohibiting the release of the information. However, the Commissioner considers that there may also be cases where the common law of confidence will protect the confidentiality of the proceedings. An aspect of this is the law relating to confidentiality of communications, which embraces the rules and principles applying to legal professional privilege.



25. Legal professional privilege is split into two aspects, that is litigation privilege and legal advice privilege. Litigation privilege applies to documents created in contemplation of litigation, while legal advice privilege covers confidential communications between lawyers and their clients made for the purpose of seeking or giving legal advice.
26. In this case, the Council has argued that both litigation privilege and legal advice privilege apply to the withheld information. It has not, however, provided adequate submissions in support of the application of litigation privilege and the Commissioner will therefore confine himself to the arguments the Council has presented in relation to legal advice privilege.
27. Certain conditions must be fulfilled before legal advice privilege can apply to a communication. The information being withheld must relate to communications with a legal advisor (such as an advocate or a solicitor, including an in-house one). The legal advisor must be acting in their professional capacity and the communications must occur in the context of a professional relationship with the client. In addition to communications, the Commissioner is satisfied that legal advice privilege would cover any preliminary legal research or draft documentation produced with the intention that it contributes to the final legal advice to be given to the client, including records of any relevant internal deliberations among the legal advisers concerned. Having considered the withheld information, the Commissioner is satisfied that all of it falls into at least one of these categories and meets the requirements set out above.
28. There is, however, one further fundamental requirement if the exception under regulation 10(5)(d) is to apply – and, for that matter, before the information in question can be considered privileged. The withheld information must be information in respect of which a claim to confidentiality of communications (in this case in the form of legal advice privilege) could be maintained in legal proceedings. It must, therefore, have remained confidential at the time the Council dealt with Mr Hogg's information request and request for review. This will not be the case where information has at that time been made public, either in full or in a summary sufficiently detailed to have the effect of disclosing the whole.
29. In his application, Mr Hogg suggested that the Council's advice might have ceased to be confidential. In support of this, he has referred to a statement attributed to a particular Council official in a newspaper article. Having considered this statement, however, the Commissioner cannot accept that it discloses any of the withheld legal advice, fully, in summary or in any other way.
30. The Council has asked the Commissioner to consider the opinion of the Information Tribunal in *Decision EA/2007/0092 – Foreign and Commonwealth Office .v. Information Commissioner*. He has considered this decision. He acknowledges its relevance to the question of whether privilege in legal advice has been waived, but does not consider that issue to arise here. The technical legal requirements relating to waiver are complex, but the Commissioner is satisfied that the question of whether privilege has been waived in any given case can be distinguished from the rather more straightforward question which appears to him to arise in this case, which is whether the information under consideration remained confidential at the relevant time.



31. In the course of the investigation, Mr Hogg was provided with a copy of a report relating to the property he is concerned about, considered by the Council's Development Quality Sub-Committee at a meeting held on 16 August 2006. That report was, in any event, received and considered in public and has since remained in the public domain. The report reproduces almost exactly legal advice provided by the Council Solicitor in contemplation of its preparation. The Commissioner takes the view that publication in the Sub-Committee report deprived this advice of the essential quality of confidence, with the result that it ceased to be confidential. Given its public status, however, and noting its subsequent release to Mr Hogg, the Commissioner does not consider it necessary to give further consideration to the advice as it appears in that report.
32. Having considered the remainder of the withheld information, the Commissioner is satisfied that disclosure of the advice in the Sub-Committee report has not deprived any of that remaining information of its confidential status. Therefore, having considered the withheld information, the information which has been disclosed and all of the submissions made by the Council and Mr Hogg, he is satisfied that (to the extent that it had not been disclosed already in the report to the Development Quality Sub-Committee meeting held on 16 August 2006) the withheld information remained confidential – and therefore privileged – at the time the Council dealt with Mr Hogg's information request and request for review. He must, however, go on to consider whether disclosure of this information in response to Mr Hogg's information request would have prejudiced, or would have been likely to prejudice, that confidentiality substantially.
33. The Commissioner has made clear in previous decisions that the test of substantial prejudice is a high one, requiring a real risk of actual, significant harm. That said, given the content of the information and its privileged nature, the Commissioner accepts that disclosure would have caused, or would have been likely to have caused, substantial prejudice to the confidentiality of the authority's proceedings and therefore that the exception in regulation 10(5)(d) applied. He must therefore consider, as required by regulation 10(1)(b), whether the public interest in making the information available was outweighed by the public interest in maintaining that exception.

*Public interest regarding regulation 10(5)(d)*

34. The Commissioner has always acknowledged that the courts have long recognised the strong public interest in maintaining the right to confidentiality of communications between legal adviser and client on administration of justice grounds, there being many judicial comments on the fundamental nature of this confidentiality in our legal system. Many of the arguments in favour of maintaining confidentiality of such communications were discussed in *Three Rivers District Council and Others v Governor and Company of the Bank of England (2004) UK HL 48*. While the Commissioner has upheld this position in a number of his own decisions considering the application of this exception (for example, *Decision 069/2008 Robin Thompson and the Scottish Environment Protection Agency*), he will consider each case on an individual basis and therefore is likely to order disclosure of such communications in highly compelling cases only.





35. The Commissioner accepts as relevant the public interest arguments put forward by the Council in support of its decision to withhold the information. It has highlighted the importance, in discharging its statutory functions, of ensuring that it does not act *ultra vires* or in a way which would undermine its statutory enforcement role. It has argued that there will be occasions when it requires impartial legal advice to act as a mediating or judicial agent on complex planning issues that affect a number of stakeholders who hold conflicting views and may themselves subject the Council to significant legal challenge. In this context, it believes the right to obtain and consider comprehensive and frank legal advice in private to be essential if it is not to be disadvantaged in decision making that directly affects the administration of the public purse and the determination and application of policy and plans that will impact on the wider public interest. It is the Council's view that there is no wider general public interest in the release of legal information relating to this case, and given that the notice is still extant and could still be enforced, release of the opinion in this case would potentially jeopardise the Council's ability to protect the relevant environment and uphold the regulations for the protection of the community.
36. In his application to the Commissioner, Mr Hogg has provided some arguments as to why he considers it to be in the public interest that he should be provided with the withheld information. Having considered these, the Commissioner accepts that there is a public interest in the public having confidence in the planning process and knowing whether or not Council officials told the truth and acted appropriately in discharging their functions (and in knowing how the authority is dealing with the matter if they did not). On balance, however, he does not accept in this case that these arguments are substantial enough to outweigh the strong public interest in maintaining the confidentiality of communications, as outlined above. Consequently, he is satisfied that the public interest in making the withheld information available is outweighed by that in maintaining the exception in regulation 10(5)(d) of the EIRs.
37. As the Commissioner is satisfied that the information was correctly withheld under the exception in regulation 10(5)(d) of the EIRs, he is not required to go on to consider the application of the other exceptions cited by the Council.

## DECISION

The Commissioner finds that the City of Edinburgh Council (the Council) complied with the Freedom of Information (Scotland) Act 2002 (FOISA) and the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by Mr Hogg. In particular, he finds that the Council was entitled to rely on the exemption in section 39(2) of FOISA and the exception in regulation 10(5)(d) of the EIRs in withholding information from Mr Hogg.



## **Appeal**

---

Should either Mr Hogg or the 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.

**Kevin Dunion**  
**Scottish Information Commissioner**  
**24 February 2010**



## Appendix

---

### Relevant statutory provisions

#### Freedom of Information (Scotland) Act 2002

##### 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 291) 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;

...

- (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.

...

## **9 Duty to provide advice and assistance**

- (1) A Scottish public authority shall provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to applicants and prospective applicants.

- (2) Where a request has been formulated in too general a manner, the authority shall-

- (a) ask the applicant as soon as possible, and in any event no later than 20 working days after the date of receipt of request, to provide more particulars in relation to the request; and

- (b) assist the applicant in providing those particulars.

...



**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.

...

- (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-

...

- (d) the confidentiality of the proceedings of any public authority where such confidentiality is provided for by law;

...