

Decision Notice



Decision 053/2014 Mrs Frances Thompson and City of Edinburgh Council

Resolution Complaints Panel reports

Reference No: 201302169
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www.itspublicknowledge.info

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Summary

On 4 July 2013, Mrs Thompson asked for a copy of Resolution Complaints Panel reports prepared by the City of Edinburgh Council (the Council). The Council decided that the information in the reports was entirely excepted from disclosure under the EIRs.

During the investigation, the Council disclosed a redacted version of the reports to Mrs Thompson.

The Commissioner found that the Council was entitled to withhold the redacted information, given that its disclosure would prejudice substantially the course of justice or would breach the data protection principles. The Commissioner also found that the information provided to Mrs Thompson during the investigation should have been disclosed at an earlier stage.

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) (paragraphs (a), (b) and (c) of definition of "environmental information"); 5(1) and (2)(b) (Duty to make available environmental information on request); 10(1), (2), (3) and (5)(b) (Exceptions from duty to make environmental information available); 11(1), (2), (3)(a)(i) and (b) (Personal data)

Data Protection Act 1998 (the DPA) sections 1(1) (Basic interpretative provisions) (definition of "personal data"), Schedules 1 (The data protection principles, Part 1: the principles) (the first data protection principle), 2 (Conditions relevant for purposes of the first principle: processing of any personal data) (Condition 6)

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 4 July 2013, Mrs Thompson asked the Council for copies of Resolution Complaints Panel reports (the reports) concerning a property which she owned along with other proprietors. The complaint concerned the manner in which the Council's Property Conservation service had exercised its powers in relation to repairs carried out under statutory notices in a specific shared building.
2. The Council responded on 4 August 2013, withholding the reports under regulations 10(4)(e) and 10(5)(b) of the EIRs.
3. On 7 August 2013, Mrs Thompson wrote to the Council, requesting a review of its decision. Mrs Thompson did not accept that the information she sought was "environmental", or the exceptions relied upon to withhold the reports from her.
4. The Council notified Mrs Thompson of the outcome of its review on 6 September 2013, upholding its previous decision without modification.
5. On 13 September 2013, Mrs Thompson 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 Mrs Thompson 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.

Investigation

7. The Council was notified in writing that an application had been received from Mrs Thompson and was asked to provide the Commissioner with the information withheld from her. The Council provided the information and the case was 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 justify its reliance on any provisions of FOISA or the EIRs it considered applicable to the information requested.
9. The Council disclosed information during the investigation. This will be considered further below.



Commissioner's analysis and findings

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 Mrs Thompson and the Council. She is satisfied that no matter of relevance has been overlooked.

FOISA or the EIRs?

11. The Council considered that the information requested was environmental information, as defined in regulation 2(1) of the EIRs. It concerned an investigation into the Council's use of statutory notices and associated building repairs. Since that investigation could have led to further building works or modifications to the built environment, the Commissioner accepts that the information in the reports covers measures likely to affect the state of the elements of the environment (including land and built structures), and factors (such as noise and waste) affecting or likely to affect those elements. Consequently, she is satisfied that the requested information falls within the definition of environmental information set out in regulation 2(1) of the EIRs, specifically paragraphs (b) and (c) of that definition.

Section 39(2) of FOISA – environmental information

12. The exemption in section 39(2) of FOISA provides, in effect, that environmental information (as defined by regulation 2(1) of the EIRs) is exempt from disclosure under FOISA, thereby allowing any such information to be considered solely in terms of the EIRs. In this case, the Commissioner accepts that the Council was entitled to apply the exemption to the withheld information, given her conclusion that it is properly classified as environmental information.
13. As there is a separate statutory right of access to environmental information available to Mrs Thompson in this case, the Commissioner accepts that in this case the public interest in maintaining this exemption and in dealing with the request in line with the requirements of the EIRs outweighs any public interest in disclosing the information under FOISA.

The information withheld

14. As noted above, the Council disclosed information during the investigation. Following the issue by the Commissioner of *Decision 186/2013 Mr Tim Quelch and Mr Donald Keith and the City of Edinburgh Council*¹, which dealt with a similar request for information, it accepted that it had incorrectly withheld parts of the reports when responding to Mrs Thompson's request. It disclosed this information to Mrs Thompson on 19 December 2013.
15. The Commissioner welcomes the Council's decision to disclose information it withheld previously, but must conclude that in failing to provide information it later acknowledged should not have been withheld, the Council failed to comply with regulation 5(1) of the EIRs.

¹ http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2013/201202445_201202476.aspx



16. The Council withheld the remaining information in the reports under regulations 10(5)(b), 11(1) and 11(2) of the EIRs. It no longer sought to rely on regulation 10(4)(e). The Commissioner will first consider whether information is exempt under regulations 11(1) and 11(2), before considering the applicability of regulation 10(5)(b).

Regulation 11(1) – personal data of the applicant

17. The Council considered that information relating Mrs Thompson's complaint and her property constituted her own personal data and should be excepted under regulation 11(1) of the EIRs.
18. Regulation 11(1) contains an absolute exception (i.e. one that is not subject to the public interest test) in relation to personal data of which the applicant is the data subject. This exception exists under the EIRs because individuals have a separate right to make a request for their own personal data under section 7 of the DPA (commonly known as a subject access request). The DPA will therefore usually determine whether a person has a right to information about themselves. The effect of the exception in regulation 11(1) is not to deny individuals a right of access to information about themselves, but to ensure that the right is exercised under the appropriate legislation.

Is the information under consideration Mrs Thompson's own personal data?

19. "Personal data" are defined in section 1(1) of the DPA as "data which relate to a living individual who can be identified from those data, or from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller, and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual."
20. Having reviewed the information withheld in terms of regulation 11(1) of FOISA, the Commissioner is satisfied that the information withheld under this regulation is the personal data of Mrs Thompson. Mrs Thompson can be identified from the information and, in the context in which it is held, the Commissioner accepts that the information can be said to relate to her. Therefore, it is the Commissioner's view that this information is absolutely excepted from disclosure under regulation 11(1) of the EIRs: as such, this information was correctly withheld by the Council.

Regulation 11(2) – personal data of other people

21. The Council argued that other personal data in the reports were excepted from disclosure under regulation 11(2) of the EIRs. Regulation 11(2) excepts personal data of which the applicant is not the data subject, where either "the first condition" (set out in regulation 11(3)) or "the second condition" (set out in regulation 11(4)) applies.
22. The Commissioner has considered the withheld information and the context in which it is held. She is satisfied that the information is personal data in line with section 1(1) of the DPA – it clearly relates to the individuals concerned, who can be identified from the information.



23. The Council argued that the exception in regulation 11(2) applied because disclosure of the personal data would contravene the first data protection principle. In other words, it considered “the first condition” (see paragraph 21 above) to apply.

Would disclosure of the information breach the first data protection principle?

24. The first data protection principle requires that personal data shall be processed fairly and lawfully and, in particular, shall not be processed (in this case, disclosed into the public domain) unless at least one of the conditions in Schedule 2 to the DPA is met and, in the case of sensitive personal data (as defined by section 2 of the DPA), at least one of the conditions in Schedule 3 to the DPA is also met.
25. The Commissioner has considered the definition of sensitive personal data in section 2 of the DPA and is satisfied that the personal data under consideration in this case do not fall into any of the categories set out in that definition. Therefore, it is not necessary to consider the conditions in Schedule 3 in this case.
26. There are three separate aspects to the first data protection principle: (i) fairness, (ii) lawfulness and (iii) the conditions in the schedules. However, these three aspects are interlinked. For example, if there is a specific condition which permits the personal data to be disclosed, it is likely that disclosure would also be fair and lawful.
27. The Commissioner must now go on to consider whether there are any conditions in Schedule 2 to the DPA which would permit the personal data to be disclosed. Where a Schedule 2 condition can be met, she will then go on to consider whether disclosure of the personal data would otherwise be fair and lawful.
28. When considering the conditions in Schedule 2, the Commissioner has noted Lord Hope's comment in the case of *Common Services Agency v Scottish Information Commissioner* [2008] UKHL 47² that the conditions require careful treatment in the context of a request for information under FOISA, given that they were not designed to facilitate the release of information, but rather to protect personal data from being processed in a way that might prejudice the rights, freedoms or legitimate interests of the data subject.

Can any of the conditions in Schedule 2 of the DPA be met?

29. The Commissioner considers that the only condition in Schedule 2 to the DPA which might apply in this case is condition 6. In any event, neither Mrs Thompson nor the Council has argued that any other condition would be relevant. Condition 6 allows personal data to be processed if that processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.

² <http://www.publications.parliament.uk/pa/ld200708/ldjudgmt/jd080709/comm-1.htm>



30. There are, therefore, a number of different tests which must be satisfied before condition 6 can be met. These are:
- Is Mrs Thompson pursuing a legitimate interest or interests?
 - If yes, is the processing involved necessary for the purposes of those interest(s)? In other words, is the disclosure proportionate as a means and fairly balanced as to ends, or could the legitimate interest(s) be achieved by means which interfere less with the privacy of the data subject(s) (i.e. the individual(s) to whom the data relate)?
 - Even if the processing is necessary for the purposes of Mrs Thompson's legitimate interest(s), is the processing unwarranted in this case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject(s)? This will involve a balancing exercise between the legitimate interests of Mrs Thompson and those of the data subject(s). Only if (or to the extent that) the legitimate interests of Mrs Thompson outweigh those of the data subject(s) can the personal data be made available.
31. There is no definition within the DPA of what constitutes a “legitimate interest”, but the Commissioner takes the view that the term indicates that matters in which an individual properly has an interest should be distinguished from matters about which he or she is simply inquisitive. In the Commissioner’s published guidance on regulation 11(2) of FOISA³, it states:
- In some cases, the legitimate interest might be personal to the applicant – e.g. he or she might want the information in order to bring legal proceedings. With most requests, however, there are likely to be wider legitimate interest, such as the scrutiny of the actions of public bodies or public safety.*
32. Having considered all relevant submissions she has received on this point, along with the withheld personal data, the Commissioner accepts that Mrs Thompson – as a complainant - may have a legitimate interest in the resolution process and whether that process has been conducted fairly. However, given the nature of the data under consideration and the lack of any submissions from Mrs Thompson on this point, she does not accept that seeking the personal data under consideration in this case would amount to pursuing that legitimate interest: she does not consider the data to be of sufficient relevance to engage Mrs Thompson’s legitimate interest.
33. Given this conclusion, the Commissioner finds that there is no condition in Schedule 2 which would permit disclosure of the personal data under consideration. In the absence of a condition permitting disclosure, that disclosure would be unlawful. Consequently, the Commissioner finds that disclosure would breach the first data protection principle and that the information is therefore excepted from disclosure (and properly withheld) under regulation 11(2) of the EIRs.

³ <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section38/Section38.aspx>



Regulation 10(5)(b) of the EIRs

34. 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 an individual to receive a fair trial or the ability of any public authority to conduct an inquiry of a criminal or disciplinary nature. As with all of the exceptions in regulation 10, it is subject to the public interest test in regulation 10(1)(b) and, in line with regulation 10(1)(a), must be interpreted in a restrictive way, with a presumption in favour of disclosure.
35. In relation to the statutory repairs carried out at Mrs Thompson's property, the Council explained that it was acting under sections 24(1) and 26 of the City of Edinburgh District Council Order Confirmation Act 1991 (the 1991 Act). The 1991 Act enables the Council to act where owners cannot or will not agree on a course of action. The Council described the process involved.
36. The Council highlighted the continuing potential for legal proceedings in relation to these works, and argued that disclosing the remaining information redacted under regulation 10(5)(b) would deprive it of the opportunity to prepare its case in private, in advance of any judicial hearing. The building blocks of any defence of the Council's actions would be removed before the court could take a view.
37. The Council also submitted that if the owners were provided with this information in advance of any judicial decision, the opportunity for the Council to recover expenses incurred in the project would be significantly diminished, and the owners would have been advantaged at the Council's significant expense. The Council also considered that if one of the elements in the statutory process had not been complied with, any defence the Council might have in relation to a dispute would be substantially prejudiced by the release of any view from within the Council accepting non-compliance.
38. The Council considered the situation in *Decision 186/2013* was similar to that arising here, and referred to paragraph 73 of that decision to support its reasoning for withholding the remaining information:
... the Commissioner recognises that the report does contain details of the Council's likely position, should it have to raise or defend any court proceedings arising from this dispute. She accepts that disclosure of such information would impact on the fairness of these proceedings, substantially prejudicing the Council's position in defending any litigation.
39. In its submissions, the Council provided specific reasons for withholding each piece of information in the reports. Given that these submissions focussed on the actual content of the withheld information, the Commissioner cannot describe them here. However, the Commissioner has considered these submissions in detail.



40. The Commissioner accepts that disclosure of the remaining information withheld under regulation 10(5)(b) would be likely to prejudice substantially the Council's ability to pursue or defend its position in any future court proceedings. She therefore accepts that the Council was entitled to withhold this information under regulation 10(5)(b). Being satisfied that the exception is engaged in relation to such information, the Commissioner must go on to consider the public interest.

Public interest test

41. Having found that the Council correctly applied the exception in regulation 10(5)(b) to this information, the Commissioner is required to consider the public interest test in regulation 10(1)(b) of the EIRs. This specifies that a public authority may only withhold information to which an exception applied where, in all the circumstances, the public interest in making the information available is outweighed by the public interest in maintaining the exception.
42. In her correspondence with the Commissioner, Mrs Thompson argued that it was in the public interest that the information be provided to ensure that decisions reached by the Council were done on the basis of fairness, honesty, accurate reporting and lack of self-interest. She submitted that disclosure was necessary to demonstrate that procedures were being conducted in a fair and open manner.
43. The Commissioner recognises (and the Council has acknowledged) that there has been widespread public concern surrounding the statutory repair process in Edinburgh. She considers that, given the scale of public concern, there is an identifiable public interest in disclosing information that would show how the Council is investigating residents' complaints about the works carried out under statutory notice. She takes the view that the Council's decision (during the investigation) to disclose part of the reports goes some way towards satisfying this public interest.
44. The Commissioner recognises that the Council is in the process of investigating and addressing serious concerns raised in relation to its Property Conservation service, and specifically regarding the statutory notice process and associated works. She is aware that individuals affected by these works have raised concerns about works on their own properties, and that this presents significant challenges for the Council. She takes the view that where complaints have been made about the way in which work has been carried out by the Council or by contractors acting on its behalf, it is in the public interest for the Council to be able to carry out comprehensive, balanced and robust investigations into those complaints, pursuing these matters (and defending its own position) through court proceedings where necessary.



45. On balance, having weighed up the arguments advanced by Mrs Thompson and the Council, the Commissioner finds that, in all the circumstances of this case, the public interest in making the remaining withheld information available to Mrs Thompson is outweighed by that in maintaining the exception in regulation 10(5)(b) of the EIRs. The Commissioner finds that the acknowledged public interest in transparency and accountability, in relation to the actions and decisions of the Council, is outweighed by the public interest in ensuring that any future court action relating to the statutory works is not prejudiced by disclosure of information which would show the Council's likely position in such legal proceedings. Therefore, although there are good reasons why disclosure of the information might be in the public interest, the Commissioner accepts that, on balance and having considered the information in question, there is a greater public interest in the information being withheld.
46. The Commissioner therefore finds that the Council was correct in continuing to withhold information under regulation 10(5)(b) of the EIRs.

Additional areas of concern

47. In her application and ongoing correspondence with the Commissioner, Mrs Thompson raised a number of concerns about the accuracy of the information supplied to her and how the Council had handled her complaint regarding her property.
48. As explained during the investigation, the Commissioner cannot comment on the content of the information supplied (except to the extent that it is relevant to the information being withheld under the EIRs) or on the Council's handling of Mrs Thompson's wider complaint, which forms the subject matter of her information request.

DECISION

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

The Commissioner finds that the Council was entitled to withhold information within the reports under regulations 11(1), 11(2) and 10(5)(b) of the EIRs.

However, by withholding information which was later disclosed, and which the Council acknowledged should not have been withheld, the Council failed to comply with regulation 5(1) of the EIRs.

Given that the information which was wrongly withheld was disclosed to Mrs Thompson during the investigation, the Commissioner does not require the Council to take any action in relation to this breach.



Appeal

Should either Mrs Thompson 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
4th March 2014



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 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)–

...

(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.
- (3) Where the environmental information requested includes personal data, the authority shall not make those personal data available otherwise than in accordance with regulation 11.
- ...
- (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;

11 Personal data

- (1) To the extent that environmental information requested includes personal data of which the applicant is the data subject then the duty under regulation 5(1) to make it available shall not apply to those personal data.
- (2) To the extent that environmental information requested includes personal data of which the applicant is not the data subject and in relation to which either the first or second condition set out in paragraphs (3) and (4) is satisfied, a Scottish public authority shall not make the personal data available.
- (3) The first condition is-
 - (a) in a case where the information falls within paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998^[6] that making the information available otherwise than under these Regulations would contravene-
 - (i) any of the data protection principles; or
 - ...
 - (b) in any other case, that making the information available otherwise than under these Regulations would contravene any of the data protection principles if the



exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.

Data Protection Act 1998

1 Basic interpretative provisions

(1) In this Act, unless the context otherwise requires –

...

“personal data” means data which relate to a living individual who can be identified –

(a) from those data, or

(b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,

and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual;

...

Schedule 1 – The data protection principles

Part I – The principles

1. Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –

(a) at least one of the conditions in Schedule 2 is met, and

(b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.

...

Schedule 2 – Conditions relevant for purposes of the first principle: processing of any personal data

...

6. (1) The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.