

# Decision Notice



Decision 085/2013 Mr Walter Zayachkivsky and City of Edinburgh Council

Case reviews – statutory repairs

Reference No: 201202179  
Decision Date: 10 May 2013

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## Summary

On 25 July 2012, Mr Zayachkivsky asked City of Edinburgh Council (the Council) for information concerning case reviews in relation to two statutory repair cases. Following a review, the Council released some information to Mr Zayachkivsky. It withheld other information under various exemptions in the Freedom of Information (Scotland) Act 2002 (FOISA).

During the Commissioner's investigation, the Council acknowledged that it should have dealt with Mr Zayachkivsky's request in line with the Environmental Information (Scotland) Regulations 2004 (the EIRs): it withheld information under exceptions in the EIRs. Following the investigation, the Commissioner was satisfied that the Council was entitled to withhold some of the information, but ordered the Council to disclose other information to Mr Zayachkivsky.

## Relevant statutory provisions

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

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (Interpretation) (definitions (a), (b) and (c) of "environmental information"); 5(1) and 2(b) (Duty to make available environmental information on request); 10(1), (2), (3), (4)(d) and (5)(b) (Exceptions from duty to make environmental information available); 11(2) and (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) and 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

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1. Work was carried out on properties owned by Mr Zayachkivsky as part of the statutory notice scheme operated by the Council. Following complaints about the necessity and cost of the work, the Council's Resolution Team was asked to carry out a case review and report on this.



2. On 25 July 2012, Mr Zayachkivsky wrote to the Council requesting the following information in relation to the case reviews (one request for each of two addresses):
  - i. A full list of all members of the Stage 1 Review Panel, titles and appropriate qualifications.
  - ii. A copy of the Resolution Team report presented to the Stage 1 Review Panel for each project.
  - iii. A copy of all documents made available to the Stage 1 Review Panel (first part) and confirmation that all documents were fully considered and incorporated into the outcome report presented to owners without favour or grace (second part).
3. The Council acknowledged Mr Zayachkivsky's information requests on 27 July 2012.
4. Having received no response to his requests, Mr Zayachkivsky wrote to the Council on 6 September 2012, requesting a review in respect of its failure to respond.
5. Having received no response to his request for review, Mr Zayachkivsky applied to the Commissioner for a decision on 8 October 2012. This led to an investigation, with the result that the Council responded to Mr Zayachkivsky on 17 October 2012.
6. In its response to Mr Zayachkivsky's request for review, the Council disclosed some information addressing part i the request. The Council withheld information as to the qualifications of the staff, and the name of one member of the panel, as personal data under section 38(1)(b) (of FOISA).
7. The Council also withheld information which would address parts ii and iii [first part] of the request, under various exemptions in FOISA. It notified Mr Zayachkivsky, in line with section 17 of FOISA, that it did not hold any information which would address the second part of part iii.
8. On 24 October 2012, Mr Zayachkivsky 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.
9. The application was validated by establishing that Mr Zayachkivsky made requests 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 those requests.



## Investigation

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10. On 3 December 2012, the Council was notified in writing that an application had been received from Mr Zayachkivsky and was asked to provide the Commissioner with any information withheld from him.
11. 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. The Council was asked to consider whether the information requested was environmental information, as defined in the EIRs (as the Commissioner believed it was). If it agreed with the Commissioner on this point, the Council was asked to explain which provisions of the EIRs it was relying on to withhold information.
12. The Council accepted that the withheld information was environmental information and applied section 39(2) of FOISA. It also applied the exceptions in regulations 10(4)(e), 10(5)(b) and 11(2) of the EIRs.
13. Following further communication with the investigating officer, the Council identified information falling within scope of the first part of part iii of Mr Zayachkivsky's request. It withheld this under regulation 10(4)(d) of the EIRs.
14. During the investigation, the Council disclosed the qualifications of the review panel members to Mr Zayachkivsky. It also disclosed information which fell within the scope of the first part of part iii of Mr Zayachkivsky's request. The disclosed information will not be considered any further in this decision.
15. As Mr Zayachkivsky did not ask the Commissioner to consider the Council's handling of the second part of part iii of his request, this will not be considered in the decision.
16. Further submissions were obtained from both parties during the investigation. All relevant submissions received from both the Council and Mr Zayachkivsky will be considered fully in the Commissioner's analysis and findings below.

## Commissioner's analysis and findings

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17. 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 the Council and Mr Zayachkivsky. She is satisfied that no matter of relevance has been overlooked.



## FOISA v EIRs

18. The Commissioner's thinking on the relationship between FOISA and the EIRs was set out in some detail in *Decision 218/2007 Professor A D Hawkins and Transport Scotland*<sup>1</sup>, and need not be repeated in full here. The central point is that when a person requests information which would fall within the definition of environmental information set out in regulation 2(1) of the EIRs, that request should be considered and responded to in line with the EIRs (although it must also be dealt with in accordance with FOISA).
19. Where information falls within the definition of environmental information, it is exempt from disclosure under section 39(2) of FOISA, allowing its consideration solely in terms of the EIRs.
20. In this case, the Council initially handled Mr Zayachkivsky's requests for information in terms of FOISA. During the investigation, the Council accepted that the information requested by Mr Zayachkivsky was environmental information.
21. Given the subject matter of the information covered by these requests (case reviews of building repair work under the statutory notice scheme), the Commissioner is satisfied the requested information would meet the definition of environmental information in paragraph (c) of regulation 2(1) of the EIRs (see Appendix).
22. While the Commissioner is pleased that the Council accepted this during the investigation, she must note that it did not do so (and act accordingly under the EIRs) when dealing with Mr Zayachkivsky's information requests and subsequent requirement for review. In this respect, the Commissioner finds that the Council failed to comply with regulation 5(1) of the EIRs.

## Section 39(2) of FOISA – environmental information

23. The exemption in section 39(2) of FOISA provides 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. This exemption is subject to the public interest test in section 2(1)(b) of FOISA.
24. In relation to Mr Zayachkivsky's requests for information, the Commissioner finds that the Council was entitled to apply this exemption to the relevant information, given her conclusion that it is properly considered to be environmental information. She notes that the Council applied the exemption during the investigation.
25. As there is a separate statutory right of access to environmental information available to the applicant in this case, the Commissioner also 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. The Commissioner has consequently proceeded to consider this case in what follows solely in terms of the EIRs.

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



## Regulation 11(2) of the EIRs

26. The Council relied on regulation 11(2) of the EIRs for withholding the name of one member of the Stage 1 Review Panel. It argued that making this name available would contravene the first data protection principle.
27. Regulation 10(3) of the EIRs requires that any personal data included in environmental information shall not be made available, in response to a request for the information, otherwise than in accordance with regulation 11. Regulation 11(2) prohibits disclosure of 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 to the information. The first condition will be satisfied where making the information available would contravene any of the data protection principles.
28. In order for the Council to be able to rely on regulation 11(2), therefore, it must show (i) that the withheld information is personal data for the purposes of the DPA, and (ii) that making the information available would contravene at least one of the data protection principles laid down in Schedule 1 to the DPA.

### *Is the information under consideration personal data?*

29. Personal data is defined in section 1(1) of the DPA as 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 (the full definition is set out in the Appendix).
30. In this case, the Commissioner is satisfied that the withheld information is the personal data of one of the members of the Stage 1 Review Panel. The information (the individual’s name) identifies the individual, and in the circumstances the Commissioner is satisfied that it relates to that individual: taken in context, it can be considered to be biographical about, and to focus on, them.

### *Would disclosure breach the first data protection principle?*

31. As noted above, the Council has argued that making the information available would breach the first data protection principle. This states that personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless at least one of the conditions in Schedule 2 to the DPA is met and, in the case of sensitive personal data, at least one of the conditions in Schedule 3 of the DPA is also met. The processing in this case would be making the information available in response to Mr Zayachivsky’s requests.
32. The Commissioner has considered the definition of sensitive personal data set out 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 contained in that definition. It is therefore not necessary to consider the conditions in Schedule 3 in this case.





33. There are three separate aspects to the first principle: (i) fairness, (ii) lawfulness and (iii) the conditions in the schedules. 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 the disclosure will also be fair and lawful.

*Can any Schedule 2 condition be met?*

34. The Council explained that it had considered the conditions in Schedule 2 to the DPA but had been unable to identify a condition that would be satisfied in order to make the processing lawful. The individual had not consented to disclosure, so condition 1 could not apply. Only condition 6 might be relevant and the Council did not consider it to apply here. The Council also argued that it would be unfair to make the name available.
35. 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 47*<sup>2</sup>) that the conditions require careful treatment in the context of a request for information, 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 subjects.
36. As the Council has noted, condition 6 in Schedule 2 would appear to be the only one which might permit disclosure to Mr Zayachkivsky in the circumstances of this case. Condition 6 allows personal data to be processed if 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 processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject (in this case, the individual whose name has been withheld).
37. As explained in the Commissioner's guidance on personal information<sup>3</sup> there are a number of different tests which must be satisfied before condition 6 can be met. These are:
- Does Mr Zayachkivsky have a legitimate interest in obtaining the personal data?
  - If yes, is disclosure necessary to achieve these legitimate interests? In other words, is the disclosure proportionate as a means and fairly balanced to its ends, or could these legitimate aims be achieved by means which interfere less with the privacy of the data subject?
  - Even if the processing is necessary for Mr Zayachkivsky's legitimate interests, would disclosure nevertheless cause unwarranted prejudice to the rights and freedoms or legitimate interests of the data subject?

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

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



38. There is no presumption in favour of making personal data available under the general obligation created by the EIRs. Accordingly, the legitimate interests of Mr Zayachkivsky must outweigh the rights and freedoms or legitimate interests of the data subject before condition 6 will permit the personal data to be made available. If the two are evenly balanced, the Commissioner must find that the Council was correct to refuse to make the personal data available.

*Does Mr Zayachkivsky have a legitimate interest?*

39. There is no definition within the DPA of what constitutes a “legitimate interest”, but the Commissioner takes the view that matters in which an individual properly has an interest should be distinguished from matters about which he or she is simply inquisitive. The Commissioner’s published guidance on personal information 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 interests, such as the scrutiny of the actions of public bodies or public safety.*
40. Mr Zayachkivsky was invited to comment on what he believed to be his legitimate interest, to inform the Commissioner’s consideration of condition 6(1). He indicated that he considered it important for him, and others affected by the relevant statutory notices, to be satisfied that the Council had appointed appropriate people to the Review Panel. This, he explained, would enable them to be assured that matters had been thoroughly investigated by individuals with the correct qualifications, knowledge and experience.
41. The Council acknowledged that that it was important for staff in particular posts to have appropriate experience and qualifications. It did not believe this extended to a legitimate interest in the withheld name.
42. The Commissioner has considered these comments carefully. In the circumstances, she accepts that Mr Zayachkivsky, and others affected by the statutory notices concerned, have a legitimate interest in ensuring that the members of the Review Panel are suitably qualified and experienced individuals.

*Is disclosure of the personal data necessary for Mr Zayachkivsky’s legitimate interests?*

43. The Commissioner must now consider whether disclosure is necessary for those legitimate interests. When considering this, the Commissioner must also consider whether these interests might reasonably be met by any alternative means, which would interfere less with the privacy of the individual whose name has been withheld.
44. In response to Mr Zayachkivsky’s request for review, he was provided with the job title of each member of the Review Panel. During the investigation, the Council also provided him with details of the qualifications held by each member of the Panel.





45. The Commissioner accepts that, without the name of this individual, Mr Zayachkivsky will be unable to identify who the individual is. However, she does not believe it follows that he requires the name to meet his legitimate interest. In fact, given that the job title and qualifications of the individual have been disclosed to Mr Zayachkivsky, she does not consider that provision of the name would contribute in any way to understanding whether the individual was suitably qualified and experienced.
46. In the circumstances, the Commissioner has concluded that it is not necessary for the name of the individual to be made available to Mr Zayachkivsky.
47. As the Commissioner has concluded that it is not necessary for the name to be made available, she finds that condition 6 of Schedule 2 could not be met in relation to that disclosure. In the absence of a condition permitting processing, it would not be either fair or lawful to make the information available. The Commissioner therefore accepts that the information was properly withheld under regulation 11(2) of FOISA.
48. The Commissioner understands from Mr Zayachkivsky that he now knows the name of the individual in question. However, this does not mean that it would now be fair and lawful to disclose the individual's name into the public domain, which would be the effect of disclosing the name under FOISA. In any event, the Commissioner must consider the position as at October 2012, when this name was not known to Mr Zayachkivsky.

### **Regulation 10(5)(b) of the EIRs**

49. 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.
50. Although there is no definition in 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 real and demonstrable significance. The risk of harm must be real or very likely, not simply a remote or hypothetical possibility.
51. The Council has relied on this exception for withholding the information falling within the scope of part ii, and also information covered by part iii, of Mr Zayachkivsky's request. (The Commissioner is satisfied that, with the exception of the information dealt with under this regulation, and below under regulation 10(4)(d), all information held by the Council and falling within the first part of request iii has now been made available to Mr Zayachkivsky.)
52. The Council explained that this information had been prepared in contemplation of litigation.



53. The Commissioner notes that, unlike section 36(1) of FOISA, the wording of regulation 10(5)(b) does not explicitly except from disclosure information in relation to which a claim to confidentiality of communications could be maintained in legal proceedings. Nonetheless, in the Commissioner's view, this particular exception may be applicable to information which is covered by legal professional privilege, especially litigation privilege (also known as communications *post litem motam*).
54. Communications *post litem motam* are granted confidentiality in order to ensure that any person or organisation involved in or contemplating a court action can prepare their case as fully as possible, without the risk that their opponent(s) or prospective opponent(s) will benefit from the material generated by their preparations. The privilege covers communications at the stage when litigation is pending or in contemplation. Whether a particular document was prepared in contemplation of litigation will be a question of fact, the key question generally being whether litigation was actually in contemplation at a particular time.
55. Litigation privilege will apply to documents created by the party to the potential litigation, expert reports prepared on their behalf and legal advice given in relation to the potential litigation. The communication need not involve a lawyer to qualify. The litigation contemplated need never actually happen for the privilege to apply, and it will continue to apply after any litigation has been concluded.
56. The Commissioner recognises that the course of justice requires that parties to litigation (including public authorities) are able to prepare fully for a case. The principle, derived from the adversarial nature of litigation, is that no party can recover material which another party has made in preparing its case.
57. Disclosure of information covered by litigation privilege will in many cases lead to substantial prejudice, as required by the exception in regulation 10(5)(b).
58. The Council explained that the withheld information was prepared following numerous complaints from owners of property at addresses covered by the information requests. The complaints related to building work carried out at these addresses under the statutory notice regime. The Council believed there was more than a mere possibility that the owners were, and were likely to, seek redress through the courts in the event that they disagreed with the outcome of the resolution process. The Commissioner was provided with reasons why the Council reached this view.
59. The Council therefore considered it reasonable in these circumstances to prepare the withheld information in the likelihood that litigation would occur.
60. Having considered the withheld information and the circumstances which led to it being prepared by the Council, the Commissioner accepts that it was reasonable, in the circumstances, for the Council to believe there was a genuine risk that residents and owners of the properties concerned would raise court action against them in relation to the statutory notices. The Commissioner therefore accepts that this information was prepared in contemplation of litigation.



61. The Commissioner notes that where information is subject to litigation privilege, an authority must be satisfied that making it available would, or would be likely to, cause substantial prejudice to the course of justice before relying on regulation 10(5)(b). Whether relevant harm is likely to occur will depend on the circumstances of the particular case under consideration, and the likelihood that disclosure would (or would be likely to) cause such prejudice may fade over time.
62. The Council explained that disclosure of the information had the potential to prejudice its ability to prepare thoroughly, and in private, as it was entitled to do in raising or defending any court proceedings arising from these disputes. Such disclosure would, the Council submitted, impact on the fairness of these proceedings, undermining its position in defending any litigation.
63. The Commissioner recognises that the dispute surrounding the statutory notices covered by these requests is still ongoing. She also accepts the Council's submissions regarding the impact of making the information available on any subsequent proceedings. She accepts that this would be likely, in turn, to prejudice the course of justice substantially.
64. The Commissioner is therefore satisfied that the Council was entitled to apply the exception in regulation 10(5)(b) of the EIRs to this information.
65. In its submissions on the application of regulation 10(5)(b), the Council also argued that making this information available would substantially prejudice its ability to conduct an inquiry of a criminal or disciplinary nature. As the Commissioner is satisfied that disclosure of this information would substantially prejudice the course of justice, she has not gone on to consider these other arguments from the Council.

#### *Public interest test*

66. The exception in regulation 10(5)(b) is subject to the public interest test in regulation 10(1)(b) of the EIRs (see the Appendix).
67. As the Commissioner has noted in a number of previous decisions, the courts have long recognised the strong public interest in maintaining the right to confidentiality of communications on administration of justice grounds. Many of the arguments in favour of maintaining confidentiality of communications were discussed in a House of Lords case, *Three Rivers District Court and others v the Governor and Company of the Bank of England (2004) UKHL 48*<sup>4</sup> and the Commissioner will apply the same reasoning to communications attracting legal professional privilege generally.
68. The Council acknowledges that there is a genuine public interest in statutory repair notices, and appreciates the public concern surrounding the investigations into these. The Council also recognises that the statutory repair system should be open and transparent.

<sup>4</sup> <http://www.publications.parliament.uk/pa/ld200304/ldjudgmt/jd041111/riv-1.htm>



69. Nevertheless, the Council considers that there is a strong public interest in ensuring that it can discuss matters privately, and keep relevant records, especially where a court case is a possibility.
70. Mr Zayachkivsky explained the lack of information available to him and others affected by these statutory notices. Given the costs involved, and the time taken, he considered the information to be of considerable interest to both those directly affected and the wider public of Edinburgh.
71. Having taken into account the submissions from both parties on the public interest, the Commissioner recognises that there is a substantial public interest in the disclosure of information about the statutory repair notices scandal, particularly for Council Tax payers in the Edinburgh area. This is particularly so given the amount of time and money that has been (and is being) spent in investigating disputes over work carried out under the statutory notice regime.
72. Making the withheld information available would inform the general public of the actions being taken by the Council to address complaints about the nature and standard of work carried out under the terms of these statutory notices. It would also help the residents and owners of the properties concerned to understand what decisions have been reached by the Council, and why.
73. Against the public interest in disclosure, the Commissioner recognises that there are, as indicated above, substantial public interest arguments which favour maintaining the exception in regulation 10(5)(b). In this case, the Commissioner has identified a stronger public interest in protecting the ability of the Council to prepare for potential litigation in confidence.
74. On balance, therefore, the Commissioner is satisfied, in all the circumstances of this case, that the public interest in disclosure of the withheld information is outweighed by the public interest in maintaining the exemption in regulation 10(5)(b).
75. As the Commissioner is satisfied that the Council was entitled to withhold this information under regulation 10(5)(b) of the EIRs, she is not required to (and will not) go on to consider the application to the information of the exception in regulation 10(4)(e) of the EIRs.

#### **Regulation 10(4)(d) of the EIRs**

76. Regulation 10(4)(d) of the EIRs provides an exception from the duty to make environmental information available where the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data. Where a Scottish public authority refuses to make information available on this basis, it must state the time by which the information will be finished or completed (regulation 13(d)).



77. The Council has relied on this exception for information contained in two documents falling within the scope of part iii of Mr Zayachkivsky's request. The Commissioner notes that one of these documents was created after the date of receipt Mr Zayachkivsky's request and so does not fall within the scope of his request. Part of the second document contains personal information that Mr Zayachkivsky says he does not want: therefore, this information will not be considered any further here.
78. In support of its reliance on regulation 10(4)(d), the Council explained that the information was in draft form.
79. The Aarhus Convention Implementation Guide<sup>5</sup> (produced by the United Nations Economic Commission for Europe as guidance on the international convention from which the EIRs are derived) provides guidance as to the type of material this exception is intended to cover. It states that the mere status of something as a draft alone does not automatically bring it within the exception. It indicates that the use of the term "materials in the course of completion" (the Convention does not refer to "unfinished documents") suggests individual documents that are actively being worked on by the public authority. Once those documents are no longer "in the course of completion" they may be released, even if they are still unfinished and even if the decision to which they pertain has not yet been resolved.
80. The Guidance goes on to say that "in the course of completion" suggests that a document will have more work done on it in a reasonable time-frame. It also notes that other articles of the Convention (concerning public participation) require certain draft documents to be accessible for public review.
81. In its submissions, the Council informed the Commissioner that the document was last worked on in April 2012. It provided no evidence to suggest that any further work was due to be carried out on it in future.
82. The Commissioner considers that the Council was incorrect in its application of the exception in regulation 10(4)(d). Although the notes are in a draft form, and were used to assist in the preparation of other information, they are complete in themselves and are not (and were not at the time the Council dealt with Mr Zayachkivsky's request) actively being worked on.
83. For these reasons the Commissioner does not accept that the exception in regulation 10(4)(d) has been engaged in this case. She therefore requires the information withheld under this exception (and falling within the scope of Mr Zayachkivsky's request) to be made available to Mr Zayachkivsky.

<sup>5</sup> <http://www.unece.org/fileadmin/DAM/env/pp/acig.pdf>



## DECISION

The Commissioner finds that 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 Mr Zayachkivsky.

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

In failing to identify the information requested as environmental information, and deal with the request accordingly under the EIRs, the Council failed to comply with regulation 5(1) of the EIRs.

The Commissioner finds that the Council was wrong to rely on the exception in regulation 10(4)(d) of the EIRs for withholding information from Mr Zayachkivsky. This was also a breach of regulation 5(1).

The Commissioner therefore requires the Council to disclose the information in pages 4 to 12 inclusive, withheld under regulation 10(4)(d), by 24 June 2013.

## Appeal

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Should either Mr Zayachkivsky 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**  
**10 May 2013**





## Appendix

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### 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.
- (4) A Scottish public authority may refuse to make environmental information available to the extent that
  - ...
  - (d) the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data; or
  - ...
- (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

...

- (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<sup>[6]</sup> 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

...

### 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.

...