

Decision Notice



Decision 094/2012 Mr Craig Beveridge and City of Edinburgh Council

Whether staff are under investigation or have been suspended

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www.itspublicknowledge.info

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Summary

Mr Craig Beveridge requested from the City of Edinburgh Council (the Council) information as to whether anyone who is being investigated or has been suspended in connection with investigations relating to statutory notice repairs had been involved in making decisions regarding the service of a statutory notice on a particular property. The Council responded by applying the exception in regulation 10(5)(b) of the Environmental Information (Scotland) Regulations 2004 (the EIRs) on the basis that if the information was disclosed it would, or would be likely to, substantially prejudice the ability of the Council to conduct an inquiry of a criminal or disciplinary nature. Following a review, Mr Beveridge remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the Council had dealt with Mr Beveridge's request for information in accordance with the EIRs by withholding the requested information in terms of regulation 10(5)(b) of the EIRs.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and 1(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) (definition (a) and (f) of "environmental information"); 5(1) and (2)(b) (Duty to make available environmental information on request); 10(1), (2) and 5(b) (Exceptions from duty to make environmental information available).

The full text of each of the statutory provisions cited above is reproduced in the Appendix to this decision. The Appendix forms part of this decision.

Background

1. On 10 May 2011, Mr Beveridge wrote to the Council to request information in the following terms:

"I would like to know with the recent scandal surrounding the Statutory Notice Repairs if anyone who is being investigated or suspended has been involved in the process of making decisions regarding the Statutory Notice served upon [a particular property]. Also, this should include those not employed by the Council, but contracted by them."



2. The Council responded on 11 May 2011, indicating that it had dealt with Mr Beveridge's request under the EIRs. It refused to supply the information requested on the basis that it was excepted from disclosure under regulation 10(5)(b) of the EIRs. This exception applies where disclosure of the information under consideration would or would be likely to prejudice substantially the course of justice, the ability of any person to receive a fair trial, or the ability of a public authority to conduct an investigation of a criminal or disciplinary nature. The Council commented that it was conducting an investigation into allegations of misconduct concerning its Property Conservation service, and it considered that release of such information would seriously jeopardise the outcome of that investigation.
3. On 15 June 2011, Mr Beveridge wrote to the Council requesting a review of its decision. In particular, Mr Beveridge noted that he was not asking for the names or details of the person(s) involved, and he questioned why his request could be deemed to be likely to interfere with the course of justice, or that it would inhibit the ability of the Council to conduct a full and frank investigation. He commented that a number of persons had been suspended from the Property Conservation service and he felt that it was very important that he should know if such person(s) were involved in the statutory notice concerning the property of interest to him.
4. The Council notified Mr Beveridge of the outcome of its review on 13 July 2011. The Council upheld its decision to apply the exception in regulation 10(5)(b) of the EIRs to the information requested. In addition, it maintained that the request could be refused in terms of regulation 11(3)(a)(i) of the EIRs, as disclosure of the requested information would result in the identification of third parties in a manner which would be incompatible with the Data Protection Act 1998.
5. The Council also responded to Mr Beveridge's point that he was not asking for the names of the person(s) involved. The Council commented that were it to release the information requested in this case, then it would be obliged to release that information in relation to every statutory notice issued across the city. The Council explained that as it had never sought to anonymise members of staff responsible for works carried out under the statutory notice, it would be relatively easy, through the release of this information, to cross reference statutory notices in order to establish which employees might have been suspended in connection with the investigation. As such, the Council advised that employees could rightly or wrongly be identified as having been suspended.
6. On 3 October 2011, Mr Beveridge 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.
7. The application was validated by establishing that Mr Beveridge 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

8. On 9 November 2011, the Council was notified in writing that an application had been received from Mr Beveridge and was asked to provide the Commissioner with any information withheld from him. The Council responded with the information requested and the case was then allocated to an investigating officer.
9. The investigating officer subsequently contacted the Council on 29 November 2011, 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 and the EIRs it considered applicable to the information requested, with particular reference to regulations 10(5)(b) and 11(3)(a)(i) of the EIRs.
10. In its response, received on 13 February 2012 (the Council was asked to provide any submissions by 21 December 2011), the Council provided submissions to justify its reliance on the exception in regulation 10(5)(b) and on regulation 11(3)(a)(i) of the EIRs for withholding the information that would address Mr Beveridge's request.
11. The Council subsequently provided further comments on its handling of Mr Beveridge's information request in response to additional questions from the investigating officer.
12. During the course of the investigation, submissions were sought, and received, from Mr Beveridge, on why he considered that the public interest lay in release of the information covered by his request.
13. The submissions received from both the Council and Mr Beveridge will be considered fully in the Commissioner's analysis and findings below.

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 her by both Mr Beveridge and the Council and is satisfied that no matter of relevance has been overlooked.

Handling under the EIRs

15. In this case, the Council responded to Mr Beveridge's information request solely in terms of the EIRs. In its submissions to the Commissioner, the Council confirmed that it did so having judged that the information requested was environmental information, as defined in the EIRs, and so exempt from disclosure in terms of section 39(2) of FOISA.



16. For this exemption to apply, the information under consideration must be environmental information as defined in regulation 2(1) of the EIRs. The relevant parts of that definition are reproduced in the Appendix to this decision.
17. The Commissioner has not departed from the thinking of the previous Commissioner who set out his views on the relationship between FOISA and the EIRs in detail in *Decision 218/2007 Professor A D Hawkins and Transport Scotland*¹. It need not be repeated in full here.
18. The Commissioner agrees with the Council that the information under consideration in this case is environmental information. The information concerns an investigation in relation to the Council's statutory notice procedure and associated repairs. Since that investigation could lead to further building works or modifications to the built environment, the Commissioner considers it is a measure that is likely to affect the state of the elements of the environment (including land and built structures), or factors (such as noise, and waste) that affect or are likely to affect those elements. As such, she considers that the information requested by Mr Beveridge is environmental information as defined in part (c) of the definition in regulation 2(1) of the EIRs.
19. In this case, therefore, the Commissioner accepts that the Council was entitled to apply the exemption in section 39(2) of FOISA to the withheld information, given her conclusion that it is properly considered to be environmental information. This exemption is subject to the public interest test in section 2(1)(b) of FOISA.
20. As there is a separate statutory right of access to environmental information available to the applicant in this case, the Commissioner accepts that the public interest in maintaining this exemption and dealing with the request in line with the requirements of the EIRs outweighs any public interest in disclosure of the information under FOISA. She has consequently proceeded to consider this case in what follows solely in terms of the EIRs.

Regulation 10(5)(b) of the EIRs

21. 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. As with all exceptions in regulation 10, this one is subject to the public interest test in regulation 10(1)(b).
22. The Council has explained that it applied this exception to the information withheld in this case because it considered that release of this information would, or would be likely to substantially prejudice the ability of the Council to conduct an inquiry of a criminal or disciplinary nature.

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



23. The Council highlighted that there is currently an on-going investigation into the handling of statutory repair notices and related works, which includes on-going disciplinary hearings. It went on to state that if the requested information were to be disclosed into the public domain then this may substantially prejudice the outcome of such investigations. It maintained that release of the requested information in response to Mr Beveridge's request for review would be premature and would affect the Council's position in any future proceedings which may arise.
24. The Council also advised that a police investigation is also on-going into the same matters and it is the Council's contention that release of the requested information could also prejudice that investigation, particularly if criminal proceedings were to arise.
25. The Council maintained that just the confirmation that an employee who is being investigated or who has been suspended as part of the on-going investigation was involved in a particular statutory notice would prejudice the police and Council investigations because such release would or would be likely to prejudice substantially the rights of those individuals to receive fair treatment.
26. The Council also referred to the comments made in its response to Mr Beveridge's request for review. As noted above, it explained since it has never sought to anonymise members of staff responsible for works carried out under the statutory notice procedure, in the circumstances, it considered that it would be relatively easy to cross reference statutory notices in order to establish which employees might potentially have been suspended in connection with the investigation, if the requested information and similar information in relation to other statutory notices were disclosed,. This could, the Council advised, lead to Council employees being rightly or wrongly identified as having been suspended.
27. In his submissions, Mr Beveridge noted what the Council said about cross referencing different FOI requests, but commented that he had only submitted FOI requests in relation to his own property.
28. It is worth noting here that when consideration is being given to whether a Scottish public authority has handled a request under FOISA or the EIRs correctly, the Commissioner must consider whether the Council was correct to apply this exception under the EIRs at the time that it responded to Mr Beveridge's requirement for review.
29. The Commissioner recognises that the situation with the investigation into the Property Conservation service by the Council and the Police may have moved on since then. However, the Commissioner must consider and make a determination on whether the exception in regulation 10(5)(b) of the EIRs was applicable to the requested information at the time of the Council's response to Mr Beveridge's requirement for review in July 2011.
30. Having considered carefully the submissions from both the Council and Mr Beveridge, together with the withheld information, the Commissioner accepts that this information was at that time excepted from disclosure under regulation 10(5)(b) of the EIRs, on the basis that disclosure would, or would be likely to prejudice substantially the ability of the Council to conduct an inquiry of a criminal or disciplinary nature.



31. In reaching this conclusion, the Commissioner recognises that at the time of Mr Beveridge's request and requirement for review an investigation was on-going into the concerns surrounding the Council's Property Conservation service's statutory repairs system, and that any relevant information which would address Mr Beveridge's request would have been a product of that investigation. The Commissioner also recognises that this investigation had already led to the Council invoking its disciplinary process, which included the suspension of some staff.
32. The Commissioner is aware that Mr Beveridge's request did not ask the Council to identify any individuals who were under investigation or had been suspended, and that his request related to a single building. However, if such information were to be disclosed in relation to one building, it would make it most likely that the Council would be required to disclose similar information in relation to other statutory notices.
33. There would also be nothing to prevent individuals holding information about statutory notices from sharing information about the identities of individuals involved with particular statutory notices, and whether any of those individuals were under investigation or had been suspended. Comparison of such information in relation to a range of statutory notices would make the identification of individuals under investigation or who had been suspended likely.
34. The Council's submissions made clear that, although certain staff were the subject of investigation and suspension at the time when it notified Mr Beveridge of the outcome of its review, these suspensions were precautionary. Disclosure of information of the type sought by Mr Beveridge could therefore lead to the public identification of individuals against whom no action had yet been taken, and against whom there may be no evidence of wrongdoing.
35. In these circumstances, the Commissioner is satisfied that release of the requested information, would, or would be likely to substantially prejudice the right of those individuals to receive fair treatment within the Council and Police's on-going investigations, and any disciplinary or other proceedings arising from them. If disclosure led to unfair treatment of those individuals, the Commissioner considers that disclosure would be likely also to undermine the position of the Council in relation to any disciplinary proceedings arising from its investigations, and the chance of a successful prosecution being brought in relation to any criminal offence.
36. The Commissioner is consequently satisfied that disclosure would, or would be likely to prejudice substantially the ability of the Council and the police to conduct investigations of a criminal or disciplinary nature. The Commissioner is therefore satisfied that, at the relevant time, the exception in regulation 10(5)(b) of the EIRs was applicable to the information requested by Mr Beveridge.

Public interest test

37. Having found that the Council correctly applied the exception contained within regulation 10(5)(b), the Commissioner is required to consider the public interest test required by regulation 10(1)(b) of the EIRs.



38. The test specifies that a public authority may only withhold information to which an exception applies where, in all the circumstances, the public interest in making the information available is outweighed by the public interest in maintaining the exception.
39. The Council acknowledged that there is a public interest in an open and transparent statutory repair notice process, and to ensure that investigations into the serving of notices and related works are carried out properly and without prejudice. It also recognised that a public interest also exists in ensuring that complaints which are made by members of the public are addressed appropriately.
40. However, the Council considered it contrary to the public interest for an investigation of this type to be prejudiced as a result of the release of the information and evidence prior to the conclusion of the investigation.
41. In his submissions, Mr Beveridge explained that his reasons for requesting the withheld information were simply to find out if the statutory notice that was served on the property belonging to him had been fair, well managed and free from any possible wrong doing on the part of either Council staff or contractors.
42. Mr Beveridge described his experience as a consequence of the service of a statutory notice on his property, and indicated that, in light of the allegations of corruption within the department dealing with this matter, he simply wanted to know from the outset if the decision making process concerning this notice had been fair, honest and open.
43. Mr Beveridge expressed the view that the Council's decision to withhold the information he requested at all costs suggests that there is something amiss with the statutory notice concerned, and he considers that he has a right to receive this information as he still has outstanding money to pay for the works done.
44. The Commissioner has considered the submissions from both Mr Beveridge and the Council regarding the public interest arguments in relation to the information that has been withheld.
45. In considering the public interest test, she accepts that there is a general public interest in making information available to the public, and in transparency and accountability in decision making, but this must be balanced against any detriment to the public interest as a consequence of disclosure.
46. The Commissioner recognises that the Council is in the process of investigating and addressing serious concerns that have been raised in relation to its Property Conservation service, regarding the statutory notice process and associated works. She is aware that this context presents significant challenges for the Council, as individuals affected by these works raise their concerns about their own properties.



47. Having taken into account the submissions from Mr Beveridge, along with background information about the current investigation into the Council's Property Conservation service, the Commissioner recognises that the concern surrounding the statutory notice repairs system in the Council is one which has raised the widespread and keen interest of the public, not just with those property owners who have had statutory notices served on their properties.
48. Disclosure of the withheld information (or equivalent information in relation to other statutory notices) would assist people in understanding whether the administration of statutory notices and the associated works had been fair, honest and transparent, or had prompted investigation by the Council, and concerns about the activity of staff. Across the Council as a whole, disclosure of the type of information requested by Mr Beveridge would contribute to understanding the extent of the concerns with respect to the Property Conservation service, and the number of buildings and statutory notices that are potentially affected.
49. However, the Commissioner has to weigh this public interest favouring disclosure against that favouring the maintenance of the exception in regulation 10(5)(b).
50. The Commissioner accepts that where complaints arise about the way in which work has been done by the Council or contractors acting on its behalf, there is a public interest in the Council being able to carry out comprehensive, balanced and robust investigations into those complaints. This is in an effort to ensure that complaints are thoroughly examined and suitable conclusions are reached about the way in which public resources are used. This interest should be considered in the context of the timing of the investigations and of the particular facts of the case.
51. Where investigations involve consideration of staff conduct, there is a significant public interest in ensuring that individuals whose actions are under scrutiny are treated with fairness and dignity. Identification of individuals who have been suspended, or whose actions are under investigation could prompt speculation about the actions of those individuals prior to any investigation being concluded, or formal action being taken. There is also a significant public interest in the investigation bodies being able to complete their investigations independently and objectively.
52. The Commissioner accepts that disclosure of the information withheld from Mr Beveridge could contribute to the identification of such individuals. The Commissioner considers that:
 - a. the need to ensure the right of those individuals to privacy while investigations remain on-going, and to receive a fair hearing in any future disciplinary or criminal proceedings, and
 - b. the need for the investigating bodies to complete their investigations,are factors weighing heavily in favour of maintaining the exception in this case.



53. On balance, having weighed up the arguments advanced by Mr Beveridge and the Council, the Commissioner finds that in all the circumstances of the case and at the time when the Council notified Mr Beveridge of the outcome of its review, the public interest in making the requested information available to Mr Beveridge was outweighed by that in maintaining the exception in regulation 10(5)(b) of the EIRs.

DECISION

The Commissioner finds that the City of Edinburgh Council (the Council) complied with the Environmental Information (Scotland) Regulations (the EIRs) in responding to the information request. In particular, the Commissioner finds that the Council was entitled to withhold the information requested by Mr Beveridge in terms of the exception in regulation 10(5)(b) of the EIRs.

Appeal

Should either Mr Beveridge 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.

Rosemary Agnew
Scottish Information Commissioner
11 June 2012



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....
- (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;...