

# Decision Notice

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## **Decision 188/2015: Ms Rosy Barnes and the City of Edinburgh Council**

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### **Correspondence and documentation about Friends of Craighouse**

Reference No: 201501031

Decision Date: 9 December 2015



Scottish Information  
Commissioner

## Summary

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On 14 January 2015, Ms Barnes asked the City of Edinburgh Council (the Council) for information about the Friends of Craighouse, including information containing references to named individuals, from July 2012 onwards. The Council informed Ms Barnes that her request was manifestly unreasonable and a response would not be provided.

Following an investigation, the Commissioner accepted that the request was manifestly unreasonable because of the burden that responding would place on the Council and, as a result, the Council was entitled to refuse to make the information available to Ms Barnes.

## 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); 39(2) (Health, safety and the environment)

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (definitions (a) and (c) of "environmental information"); 5(1) and (2)(b) (Duty to make available environmental information on request); 9 (Duty to provide advice and assistance); 10(1), (2) and (4)(b) (Exceptions from duty to make environmental information available)

The full text of each of the statutory provisions cited above is reproduced in Appendix 1 to this decision. The Appendix forms part of this decision.

## Background

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1. On 14 January 2015, Ms Barnes made a request for information to the Council. (This was a narrowed version of a request made on 4 November 2014.) The information requested was:
  - (i) All emails and correspondence or documentation to or from the Council and the Craighouse Partnership, or any representative of them including Sundial Properties, Invicta PA, Mountgrange, Napier University and/or Montagu Evans or others that mention the Friends of Craighouse or mention individuals [person A] and [person B] from 1st July 2012 up to the present day.
  - (ii) All emails and correspondence to or from Neil Cuthbert (of Invicta PA) about Craighouse, or that mention the Friends of Craighouse or individuals [person A] and [person B] from July 2012 to the present day.
2. The Council responded on 6 February 2015. It informed Ms Barnes that it would cost in excess of £600 to provide a response and, in terms of section 12(1) of FOISA, the Council was not required to comply with her request. The Council provided Ms Barnes with a breakdown of the estimated cost of fulfilling the request and the contact details of the respondent if she wanted to discuss refining her request.
3. On 6 February 2015, Ms Barnes emailed the Council requesting a review of its decision on the basis that she considered that the Council had overestimated the number of emails falling within scope of the request.

4. The Council notified Ms Barnes of the outcome of its review on 6 March 2015. The Council noted that Ms Barnes was requesting environmental information and acknowledged that it should have issued its response in line with the EIRs, which it now did. The Council considered the request manifestly unreasonable and that the exception in regulation 10(4)(b) of the EIRs applied.
5. On 3 June 2015, Ms Barnes applied 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. Ms Barnes stated she was dissatisfied with the outcome of the Council's review because she did not accept that her request was manifestly unreasonable, and because the Council had not provided her with assistance in narrowing the scope of her request.

## **Investigation**

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6. The application was accepted as valid. The Commissioner confirmed that Ms Barnes made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to her for a decision.
7. On 22 June 2015, the Council was notified in writing that Ms Barnes had made a valid application and the case was allocated to an investigating officer.
8. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. On 29 June 2015, the Council was invited to comment on this application and answer specific questions including justifying its reliance on any provisions of the EIRs it considered applicable to the information requested. The Council responded on 29 July 2015.
9. The Council was asked to provide samples of the searches it had conducted when identifying the information requested by Ms Barnes, and it did so on 4 August 2015.
10. The investigating officer provided Ms Barnes with an indication of the volume of information that fell within scope of her request. Ms Barnes commented that the Council had overestimated the amount of information falling within scope of her request and that it had not provided her with advice and guidance to help her narrow the scope of her request.
11. The Council was provided with a summary of Ms Barnes' comments and was asked if it wished to respond: it did so on 23 October 2015.
12. On 11 November 2015, the Council and Ms Barnes were asked for further comments about their submissions. The Council responded on 19 November 2015. Ms Barnes responded on 7 December 2015.

## **Commissioner's analysis and findings**

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13. In coming to a decision on this matter, the Commissioner considered a sample of the withheld information and the relevant submissions, or parts of submissions, made to her by both Ms Barnes and the Council. She is satisfied that no matter of relevance has been overlooked.

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

14. The Council responded to Ms Barnes' request for review in terms of the EIRs, having concluded that the information requested was environmental information, as defined in regulation 2(1) of the EIRs. During the investigation, the Council provided further submissions

to support its position that the requested information was environmental information, and confirmed its reliance on section 39(2) of FOISA.

15. The Council explained that it had been guided by the briefings and decisions of the Commissioner, in reaching its decision to respond to Ms Barnes' request under the EIRs, and made reference to *Decision 218/2007 Professor A D Hawkins and Transport Scotland*<sup>1</sup>, which sets out the Commissioner's thinking on the relationship between FOISA and the EIRs in some detail. The key points from *Decision 218/2007* are summarised as follows:
  - (a) The definition of what constitutes environmental information should not be viewed narrowly, but in line with the definition of environmental information in the EIRs.
  - (b) There are two separate statutory frameworks for access to environmental information and an authority is required to consider any request for environmental information under both FOISA and the EIRs.
  - (c) Any request for environmental information therefore must be dealt with under the EIRs.
  - (d) In responding to a request for environmental information under FOISA, an authority may claim the exemption in section 39(2).
16. The information requested by Ms Barnes relates to the development of the land at Craighouse. The Council considered that the development of the Craighouse project would inevitably have a significant environmental impact. The Council was satisfied that the information held in relation to the development would fall within the paragraphs (a) and (c) of the definition of "environmental information" in regulation 2 of the EIRs.
17. In her submissions, Ms Barnes disputed that the information was environmental information and that her request should be considered in terms of the EIRs. She wanted the Council to reassess the cost and time estimates for her request under FOISA. Ms Barnes did not accept that the Commissioner was required to consider her request under the EIRs.
18. The Commissioner has noted all of Ms Barnes' comments, and she recognises that her view on the extent of what constitutes environmental information may well be shared widely, as many people might think in terms of environmental protection only. However, the definition of environmental information within the EIRs is wide-ranging and includes a range of information that goes beyond information about environmental conditions, impacts and protection.
19. As set out in *Decision 218/2007*, if a request is for environmental information (as defined in regulation 2 of the EIRs), it must be considered under both FOISA and the EIRs. Any request for environmental information must therefore be considered under the EIRs. If the public authority chooses to apply the exemption in section 39(2) of FOISA, then it may respond to the request solely in terms of the EIRs.
20. The Commissioner acknowledges that it may be frustrating for an applicant if, at the review stage, a request that has previously been considered under FOISA is identified stage as one seeking environmental information, and therefore requiring consideration under the EIRs, particularly as the authority's ability to charge for information is different under the two regimes.
21. In this case, the Commissioner agrees with the Council that the requested information is environmental information in terms of parts (a) and (c) of the definition in regulation 2 of the

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<sup>1</sup> <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2007/200600654.aspx>

EIRs. Part (a) refers to the definition of environmental information (as information on the state of the elements of the environment), whilst part (c) refers to measures, including administrative measures, such as policies, plans, programmes, environmental agreements and activities, affecting or likely to affect the state of the elements of the environment or factors affecting these. The Commissioner considers the development at Craighouse to be an activity affecting the state of the elements of the environment.

22. As the Commissioner is satisfied that the requested information is environmental information, she finds that Ms Barnes' request was correctly considered under the EIRs by the Council.
23. 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 such information to be considered solely in terms of the EIRs. As the Commissioner accepts that the requested information is environmental and must be considered under the EIRs, she is satisfied that the Council was entitled to apply the exemption in section 39(2) of FOISA to the requested information.
24. This exemption is subject to the public interest test in section 2(1)(b) of FOISA. As there is a separate statutory right of access to environmental information available to Ms Barnes in this case, the Commissioner also finds 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 will consider this case in what follows solely in terms of the EIRs.

#### **Regulation 10(4)(b) - manifestly unreasonable**

25. Under regulation 10(4)(b) of the EIRs, a Scottish public authority may refuse to make environmental information available if the request is manifestly unreasonable.

#### *The Council's submissions*

26. The Council considered that Ms Barnes' request was manifestly unreasonable because of the considerable cost (in terms of staff time) which would be incurred in providing the information. It argued that the amount of staff time required to provide the information would impose a significant burden on the Council.
27. Through key word searches of emails held by 18 members of staff, the Council identified 995 emails which might be covered by Ms Barnes' request and which would need to be reviewed. The Council explained that, based on the sample it had reviewed, it would take at least five minutes to review each of these emails to determine if they fell within the scope of the request, and to make any necessary redactions of excepted information.
28. The Council noted that while most of the relevant correspondence was by email, there might also be hard copy correspondence to and from the 18 members of staff and the individuals detailed in the request, which would further increase the potential workload.
29. The Council explained that to ensure consistency in the identification of the information and the application of the necessary exceptions prior to release, it would be necessary for a single planning officer, who had knowledge of the development, to coordinate with a single solicitor from the Council's legal team. The Council explained that this approach would be required due to the legal concerns arising from the ongoing planning application at the Craighouse development. It considered that it would "severely disadvantage the Council's planning legal resources".

30. The Council noted that the staff member who coordinated the Craighouse development works part-time. The Council submitted that redirecting this staff member to focus on the delivery of Ms Barnes' information request would have direct consequences for the delivery of major developments in Edinburgh and its economic recovery. The Council acknowledged that this staff member worked in a team of other senior planning officers, but they were involved in dealing with a range of multi-million pound projects and were currently working to full capacity.
31. The Council estimated that on the basis of the number of emails identified (excluding any paper records), it would require at least 82.92 hours of Council staff time (995 emails x 5 minutes) to comply with the request. The Council calculated that it would take an individual staff member at least two full weeks' work in order to respond to Ms Barnes' request. It considered this would be "significantly disproportionate", and would place an unreasonable burden on both the Planning team and Legal Services.
32. The Council also submitted that the reviewing solicitor would rely upon the assistance of colleagues in several other Council teams to provide clarification on points of technical knowledge. Again, due to the volume of correspondence, this would place an increased work load burden on a number of small teams across the Council. The Council stated that the major development team covering the City Centre and surrounding areas in Planning and Building Standards service were already facing an increased workload.
33. The Council was asked to explain how it had calculated the likely cost of responding to the request, and provided details of the staff who would be involved, their hourly rate of pay, and the time it was likely to take them (based on the sample search which the Council had carried out).

#### *Ms Barnes' submissions*

34. Ms Barnes submitted that the Council's decision to treat her request as "manifestly unreasonable" was based on cost and time alone, and argued that this was "explicitly disallowed". She asked for the Council to reassess its cost and time estimates, without including the time taken for redaction of excepted information. She noted that, under the EIRs, there is no cost limit for complying with a request for environmental information.
35. Elsewhere in her correspondence to the Commissioner, Ms Barnes complained that "cost and volume" was the basis for the Council's decision to refuse her request as manifestly unreasonable. She argued that volume and complexity cannot be used as a reason for refusing a request as manifestly unreasonable, and made reference to the Commissioner's briefing on section 14 of FOISA<sup>2</sup>, which states:

"The EIRs do not define the term 'manifestly unreasonable', and neither does the Directive. However, the Aarhus Convention Implementation Guide makes it clear that volume and complexity alone do not make a request 'manifestly unreasonable'."
36. Ms Barnes also referred to a decision from the (UK) Information Commissioner (the ICO)<sup>3</sup>, which states (at paragraph 82):

"There is a clear importance in the public, where they have made a request for information which has been refused, having access to sufficient details of the information to allow them to

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<sup>2</sup> <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/Section14/Section14Overview.aspx>

<sup>3</sup> [https://ico.org.uk/media/action-weve-taken/decision-notices/2007/391538/DECISION\\_NOTICE\\_FS50078600.pdf](https://ico.org.uk/media/action-weve-taken/decision-notices/2007/391538/DECISION_NOTICE_FS50078600.pdf)

form a judgement as to whether they believe the decision is a correct one and therefore being able to make an informed decision as to whether to seek an internal review or to appeal to the Commissioner".

Ms Barnes did not consider that she had been provided with sufficient details to allow her to form a judgement as to whether the Council's decision was correct.

### *The Commissioner's findings*

37. There is no definition of "manifestly unreasonable" in the EIRs, or in Directive 2003/4/EC<sup>4</sup> from which they are derived. The Commissioner's view is that "manifestly" implies that a request should be obviously or clearly unreasonable and she notes the opinion of the Information Tribunal in *Dr Kaye Little v Information Commissioner and Welsh Assembly Government (EA/2010/0072)*<sup>5</sup>, which considers the equivalent regulation to 10(4)(b) of the Environmental Information Regulations 2004, and states:

"From the ordinary meaning of the words "manifestly unreasonable", it is clear that the expression means something more than just "unreasonable". The word "manifestly" imports a quality of obviousness. What is in issue, therefore, is a request that is plainly or clearly unreasonable. It is a more stringent test than simply "unreasonable".

38. This view was confirmed in the Appeal Court decision *Dransfield & Anor v The Information Commissioner & Anor* [2015] EWCA Civ 4546 (Dransfield) which comments:

"The word "manifestly...means of course the unreasonableness must be clearly shown. This saves the authority from having to make any detailed investigation into matters which it does not know or are not in the public domain."

39. The Commissioner has noted Ms Barnes' strong assertion that a request could not be considered "manifestly unreasonable" on cost and volume alone. The Commissioner does not accept that this view is supported by the Aarhus Convention Implementation Guide. The Guide states that "volume and complexity alone do not make a request manifestly unreasonable"<sup>7</sup>, not volume and cost. The Commissioner considers that sometimes the time required and the cost incurred in complying with a request for a large volume of information will be the deciding factors in determining whether a request is manifestly unreasonable, as these are relevant considerations in assessing the burdensome effect of the request. In many cases, the cost of complying with a request will represent the amount of staff time required, which may well have an impact on other areas of work.
40. Whether a request is manifestly unreasonable will depend on the facts of each case. It may apply where it can be demonstrated that a request is vexatious, or where compliance would incur unreasonable costs for the public authority or an unreasonable diversion of public resources.

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<sup>4</sup> <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32003L0004:EN:HTML>

<sup>5</sup> [http://www.informationtribunal.gov.uk/DBFiles/Decision/i475/%5b2010%5dUKFTT\\_EA20100072\\_\(GRC\)\\_20101230.pdf](http://www.informationtribunal.gov.uk/DBFiles/Decision/i475/%5b2010%5dUKFTT_EA20100072_(GRC)_20101230.pdf)

<sup>6</sup> <http://www.bailii.org/ew/cases/EWCA/Civ/2015/454.html>

<sup>7</sup> Page 84,

[http://www.unece.org/fileadmin/DAM/env/pp/Publications/Aarhus\\_Implementation\\_Guide\\_interactive\\_eng.pdf](http://www.unece.org/fileadmin/DAM/env/pp/Publications/Aarhus_Implementation_Guide_interactive_eng.pdf)

41. *Decision 024/2010 Mr N and the Scottish Ministers*<sup>8</sup> established that the Commissioner was likely to take into account the same kinds of considerations in deciding whether a request was manifestly unreasonable under the EIRs as in reaching a decision as to whether a request was vexatious in terms of section 14(1) of FOISA. In *Dransfield*, Lady Justice Arden commented that while “manifestly unreasonable” differs on its face from “vexatious” (section 14(1) of FOISA), the difference between the two phrases is “vanishingly small”, if the approach to section 14 is objective and takes as its starting point the approach that “vexatious” means without any reasonable foundation for thinking that the information sought would be of value to the requester or the public.
42. In this case, the Council’s submissions to the Commissioner appear to focus on the burden of compliance and the effect on those who would be required to comply. The Council also referred to the cost of compliance, in terms of staff time. In *Dransfield*, Lady Justice Arden commented that while there was no provision in the (UK) Environmental Information Regulations 2004 which would prevent an authority from taking the costs of compliance into account, in considering whether the request was manifestly unreasonable, those costs would have to be balanced against the benefits of disclosure in terms of the public interest test (equivalent to the public interest test in regulation 10(1)(b) of the EIRs).
43. The Commissioner considers the following factors to be relevant to a finding that a request (which may be the latest in a series of requests or other related correspondence) is manifestly unreasonable:
- it would impose a significant burden on the public authority;
  - it does not have a serious purpose or value;
  - it is designed to cause disruption or annoyance to the public authority;
  - it has the effect of harassing the public authority;
  - it would otherwise, in the opinion of a reasonable person, be considered to be manifestly unreasonable or disproportionate.<sup>9</sup>
44. This is not an exhaustive list and it is not necessary for all of the above criteria to be met. Other factors may be relevant, depending on the circumstances, taken with some or all of the above or separately. Some arguments may naturally fall under more than one heading. The Commissioner acknowledges the relevance of *The Aarhus Convention: An Implementation Guide* to which reference has already been made.
45. The Commissioner considers that there may be circumstances where the burden of responding (in terms of its impact on the public authority’s core functions) is sufficient justification for deeming a request to be manifestly unreasonable.
46. Although there is no cost ceiling as to what is deemed to be an excessive cost for compliance under the EIRs as there is in FOISA (under FOISA, public authorities do not have to comply with a request if the cost of compliance exceeds £600), the Commissioner recognises that there may be cases where the time and expense involved in complying with a request for environmental information mean that any reasonable person would regard them as excessive. The Council has argued that such a case can be made in relation to Ms Barnes’ request. In

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<sup>8</sup> <http://www.itspublicknowledge.info/applicationsanddecisions/Decisions/2010/200900461.asp>

<sup>9</sup> See the Commissioner’s briefing on vexatious or repeated requests at <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/Section14/Section14Overview.aspx>



this case, the Council has also argued that the burden of responding to Ms Barnes' request would fall to two key staff members, who would rely on support from other Council teams in relation to technical matters. The Council has argued that the burden would be disproportionate, in terms of the effect it would have on the other work responsibilities of these members of staff.

47. Responding to information requests is a statutory duty for the Council, and one which must be properly resourced. The Commissioner acknowledges that, in common with all other Scottish public authorities, the Council has many demands on its time and resources, in addition to complying with requests for information under FOISA and the EIRs. Compliance with such requests should, however, be considered as an element of the authority's core business, being a statutory requirement. The Commissioner will not accept lightly arguments that compliance, in any given case, represents an unreasonable diversion from compliance with other statutory responsibilities.
48. However, the Commissioner accepts that some information requests (such as the one currently under consideration) require specialist knowledge or expertise which only one or two staff members are likely to have, and in such situations, the burden of the request must be assessed by considering the impact on those individuals rather than on the Council as a whole.
49. The Council has explained what would be involved in providing the information requested by Ms Barnes. The Commissioner accepts that this is a reasonable assessment of the process, given that the Craighouse development has been the subject of discussion and debate since the planning application was first submitted in 2011 and approved in 2014<sup>10</sup>. She therefore accepts that the task of responding to Ms Barnes' request would involve reviewing a vast number of emails.
50. The Council has provided estimates of time that it would take the planning officer to complete the work and the estimated cost of a junior member of staff completing the initial coordination and collation. On either measure, the burden of complying with the request would be significant, incurring staff time costs well above the £600 limit at which a request considered under FOISA could be refused.
51. The Commissioner has challenged certain parts of the Council's cost estimates, asking whether all of the identified emails fall within scope of Ms Barnes' request or (as Ms Barnes has submitted) whether some of the information is already in the public domain and could be discounted. Having asked the relevant staff to check their records, the Council confirmed that 52 of 995 emails were published correspondence.
52. The Commissioner recognises that there would still be a staff time cost involved in establishing that these 52 emails were published information, and that excluding them from the information requiring to be provided in response to Ms Barnes' request would not significantly reduce the overall staff time costs.
53. The Commissioner notes that Ms Barnes has requested that the Council issue her with a fees notice and may be willing to pay the estimated cost of complying with her request, although it is likely to be high. However, the key issue in this case is not **only** the level of the estimated costs. Consideration an also be given to whether the Council is required to comply with the request, regardless of the fee it would be entitled to charge, taking into account the resource

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<sup>10</sup> <http://www.bbc.co.uk/news/uk-scotland-edinburgh-east-fife-29061388>

and time burden this would create for the Council. The Commissioner must decide whether compliance with Ms Barnes' request would create such a burden for the Council that the request could be justifiably viewed as manifestly unreasonable, in terms of regulation 10(4)(b) of the EIRs.

54. The Commissioner accepts that the burden of providing the information would fall on a small team of people with the technical knowledge required to identify information covered by the request. Given the volume of information covered by Ms Barnes' request, the Commissioner accepts that complying with the request would involve significant staff resources being diverted for a substantial period of time when the Council is involved in major regeneration projects in Edinburgh.
55. In all the circumstances, the Commissioner accepts that Ms Barnes' request was manifestly unreasonable. As such, she finds that the Council correctly applied the exception in regulation 10(4)(b) in this case.

### **Consideration of the public interest test**

56. In common with all the other exceptions in the EIRs, regulation 10(4)(b) is subject to the public interest test set out in regulation 10(1)(b). Consequently, information can be withheld under the exception only where, in all the circumstances, the public interest in making the information available is outweighed by that in maintaining the exception.

#### *The Council's submissions*

57. The Council considered that there is a clear public interest in promoting transparency and accountability through the disclosure of information relating to the Craighouse development, which has generated significant public discussion. The Council considered disclosing the information which Ms Barnes had requested would demonstrate that it was ensuring compliance with the relevant legislation and would address Ms Barnes' concerns regarding the nature and details of the relations between the Council and the Craighouse partnership.
58. However, on the basis of the diversion of staff time and resources required to fulfil this request (as discussed above), the Council argued that disclosure would be against the public interest.
59. On balance, therefore, the Council concluded that while there are certainly strong public interest arguments in favour of disclosure of the information covered by the request, these are outweighed by the public interest in preventing disproportionate levels of disruption to the Council's functions by diverting the resources required to deal with Ms Barnes' request.

#### *Ms Barnes' submissions*

60. Ms Barnes provided comments as to why she considered that it was in the public interest for the requested information to be disclosed. She explained that she was the Chair of the Friends of Craighouse which represents the views of thousands of people in her local community.
61. Ms Barnes considered that disclosure would allow public oversight of the way commercial lobbying operates within the planning system, and allow misleading claims to be corrected. She explained that one of the lobbying firms in the Craighouse development had incorrectly presented information as written by herself, and had refused to correct it. She argued that disclosure of the information would allow for the correction of misinformation, which is not possible any other way.

62. Ms Barnes considered that, in terms of fairness, individual comments on the planning application sent by members of the public are made public and displayed for all to see, including the developer. However, comments made by the developer or lobbyist are not. She argued that this is unfair and does not allow for fairness in relation to applications, complaints or enable the correction of misleading claims.
63. Ms Barnes considered that disclosure was in the public interest as it would reveal the extent of private lobbying undertaken by those with financial interests in planning, and how community representatives had been presented to “influencers”, including Councillors and Council officials. She argued that disclosure of the information would contribute to the public debate on lobbying (and the extent to which it should be regulated) that is currently taking place in relation to the Lobbying (Scotland) Bill.

#### *The Commissioner’s conclusion*

64. In the Commissioner's view, there is an inherent public interest in disclosure of information that would ensure that an authority is transparent about the nature and extent of the information that it holds, and would permit adequate public scrutiny of its actions. In this case, there is a clear public interest in the disclosure of information which would permit scrutiny of the steps and decisions taken by the Council in the controversial development of the Craighouse area.
65. On the other hand, there is also a strong public interest in a Scottish public authority being able to carry out its statutory functions without unreasonable disruption. In this case, the Commissioner is satisfied that if the Council was required to respond to this request it would place a significant burden on staff responsible for some functions of the Council, in terms of the time commitment that would be required. Even taking into consideration the overall size of the Council as an organisation, and the resources available within it, the Commissioner accepts that providing the extensive volume of information requested by Ms Barnes would, to a disproportionate extent, divert resources currently deployed in the redevelopment of Edinburgh.
66. The Commissioner considers there is a public interest in protecting the integrity of the EIRs and ensuring that they are used responsibly. While public authorities are encouraged to act in a transparent and accountable way, which benefits the public as a whole, it is not the intention of the legislation to require public authorities to devote excessive or disproportionate amounts of time to one particular request, at the expense of other areas of work. The Council has a responsibility to respond to other requests it receives, as well as carrying out its other statutory functions, and there is a public interest in ensuring resources are not diverted away from this.
67. The Commissioner notes that the Council has already made some information about the Craighouse development available, in relation to the planning application<sup>11</sup>.
68. On balance, therefore, while there are certainly public interest arguments in favour of disclosure of the information covered by Ms Barnes’ request, the Commissioner accepts that, in the circumstances of this case, these are outweighed by the public interest in preventing the disproportionate levels of disruption to the Council’s statutory functions that would result if the necessary staff resources were diverted to provide all the information requested by Ms Barnes. The Commissioner therefore concludes that the Council was entitled to withhold the requested information under the exception in regulation 10(4)(b) of the EIRs.

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<sup>11</sup> Planning application reference 12/04007/FUL: <https://citydev-portal.edinburgh.gov.uk/idoxpa-web/simpleSearchResults.do?action=firstPage>

## Regulation 9(1) – advice and assistance

69. Regulation 9(1) of the EIRs provides that a Scottish public authority must, so far as it would be reasonable to expect it to do so, provide advice and assistance to applicants and potential applicants. Regulation 9(3) provides that a Scottish public authority which conforms to the relevant Code of Practice is to be taken to have complied with this duty.
70. The Scottish Ministers' Code of Practice on the discharge of functions by Scottish public authorities under FOISA and the EIRs (the Section 60 Code<sup>12</sup>) states (at paragraph 5.1 in Part 2), that authorities should offer advice and assistance at all stages of a request. This can be given before a request is made, whilst the authority is handling the request, or after it has responded.

### *Ms Barnes' submissions*

71. Ms Barnes complained that she was not given any help or assistance by the Council, and that the Council had not entered into dialogue over how to assist her in her request. Ms Barnes complained that she was not given the option of paying a fee for the information she required.
72. Ms Barnes noted that in the Scottish Ministers' Code of Practice<sup>13</sup> it states that, where a request is not reasonably clear, appropriate assistance could include:
- (i) providing an outline of the different kinds of information that might meet the terms of the request;
  - (ii) providing access to detailed catalogues and indexes, where available, to help the applicant ascertain the nature and extent of the information held by the authority;
  - (iii) providing a general response to the request setting out options for further information that could be provided on request;
  - (iv) contacting the applicant to discuss what information the applicant wants.
73. Ms Barnes considered that she was not offered any of the above forms of advice and assistance by the Council: she was offered no advice on how to break up the request into reasonable requests, and she was not given a breakdown of the information available so that she could narrow her request down. For example, she was not told which parts of the information came from sources already in the public domain so that she could make a request focusing on non-public information.
74. Ms Barnes noted that she had submitted an earlier request in November 2014 for information about Craighouse, which she was advised would cost over £4,000 to respond to, so she had reduced the scope of the request under consideration in this decision, but it was also refused.
75. Ms Barnes noted that the Commissioner's briefing on section 14 (paragraph 32) briefing states:
- "There is a duty on an authority under section 15 of FOISA to provide reasonable advice and assistance to requesters. If processing a request is likely to impose a significant burden on an authority, a requester should be consulted to help them refine their request in order to make it

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<sup>12</sup> <http://www.gov.scot/About/Information/FOI/Section60Code/s60codeofpractice>

<sup>13</sup> Paragraph 5.3.3 <http://www.gov.scot/Resource/0046/00465757.pdf>

more manageable. How this is done will depend on the circumstances of each case, but the Commissioner would expect to see evidence of the authority's actions."

Ms Barnes considered that there is no such evidence, as the Council had not provided her with reasonable advice.

#### *The Council's submissions*

76. The Council recognised that Ms Barnes was dissatisfied with the responses she had received. The Council provided a summary of the advice and assistance it had offered Ms Barnes in its responses to her request and request for review.
77. The Council noted that, in its original reply to Ms Barnes, it advised that the cost of complying with the request might be reduced if the request was refined or narrowed. The Council had invited Ms Barnes to contact it for further advice on refining her request.
78. The Council stated that its Information Compliance Officer had spoken to Ms Barnes on 13 February 2015, and that it was apparent that a major point of her dissatisfaction was the advice given to her following the first request (November 2014) (i.e. advice that she should narrow her request). Although Ms Barnes had narrowed her request (to the request currently under consideration), the Council had responded with the same fees notice it had sent in response to her broader request.
79. The Council has accepted that it miscalculated the cost of complying with Ms Barnes' request of February 2015, and had wrongly told her that the cost would be the same as the cost of complying with her earlier, broader request of November 2014. The reduced figure of £1,243.80 was identified as the cost of producing the information Ms Barnes had requested on 14 January 2015.
80. The Information Compliance Officer also noted that Ms Barnes had concerns about the email systems that the Council was using, which did not allow the Council to easily search the emails it held to determine which emails fell within the scope of her request.

#### *The Commissioner's view*

81. The Commissioner notes that, in its initial response, the Council provided contact details of an officer whom Ms Barnes could contact to discuss how to reduce the cost of her request, but that no further written advice or assistance was provided to Ms Barnes.
82. In its initial response and review response, the Council provided an estimate of the number of emails that fell within scope of the request, the time that would be required to fulfil the request, and the cost in terms of staff time.
83. If resolution is to be reached in cases where a substantial number of documents fall within scope of the request, it is incumbent upon both the authority and the requester to engage with each other to reduce the volume of information to a more manageable level. If the requester does not indicate the specific information in which they are interested, then the Commissioner considers that the public authority is not required to speculate as to which are the most relevant documents. Equally, the Commissioner is aware that requesters often face difficulties in wording their requests effectively when they have no detailed knowledge of the information held by the public authority.
84. The Commissioner recognises the challenges faced by Ms Barnes in trying to access information about the Craighouse development and notes that she has been pursuing the matter for some considerable time. However, Ms Barnes has not indicated her specific area of

interest in connection with the Craighouse development, so the Commissioner accepts it has been difficult for the Council to suggest how the request can be narrowed and made less costly in terms of staff time.

85. During the investigation, it was suggested to Ms Barnes that she could submit a request for correspondence involving a single named member of staff over a very short time period (for example one month). Ms Barnes declined to pursue this suggestion, and stated that the Council should be able to provide her with the information she had asked for.
86. The Commissioner has concluded that, in the circumstances of this case, the Council could not have provided any specific guidance to Ms Barnes, as to do so would require it to reach its own view (possibly incorrectly) of the key information she was seeking.
87. The Commissioner accepts that the Council made reasonable efforts, in the circumstances of this case, to provide Ms Barnes with advice and assistance and that the Council complied with regulation 9(1) of the EIRs in this regard.

## Decision

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

## Appeal

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Should either Ms Barnes 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.

**Rosemary Agnew**  
**Scottish Information Commissioner**

**9 December 2015**

### 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;

..

(c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in paragraphs (a) and (b) as well as measures or activities designed to protect those elements;

...

## 5 Duty to make available environmental information on request

(1) Subject to paragraph (2), a Scottish public authority that holds environmental information shall make it available when requested to do so by any applicant.

(2) The duty under paragraph (1)-

...

(b) is subject to regulations 6 to 12.

...

## 9 Duty to provide advice and assistance

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

...

(3) To the extent that a Scottish public authority conforms to a code of practice under regulation 18 in relation to the provision of advice and assistance in a particular case, it shall be taken to have complied with the duty imposed by paragraph (1) in relation to that case.

...



## 10 Exceptions from duty to make environmental information available–

- (1) A Scottish public authority may refuse a request to make environmental information available if-
  - (a) there is an exception to disclosure under paragraphs (4) or (5); and
  - (b) in all the circumstances, the public interest in making the information available is outweighed by that in maintaining the exception.
- (2) In considering the application of the exceptions referred to in paragraphs (4) and (5), a Scottish public authority shall-
  - (a) interpret those paragraphs in a restrictive way; and
  - (b) apply a presumption in favour of disclosure.

...

- (4) A Scottish public authority may refuse to make environmental information available to the extent that

...

- (b) the request for information is manifestly unreasonable;

...

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