

# Decision Notice



Decision 217/2011 Mr Bruce Thompson and City of Edinburgh Council

Repairs to a named property

Reference No: 201101171

Decision Date: 31 October 2011

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**Kevin Dunion**

Scottish Information Commissioner

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## Summary

Mr Bruce Thompson requested from the City of Edinburgh Council (the Council) a range of information regarding the repair work undertaken on a named property. The Council did not respond to the initial request. Following a review, in which the Council withheld all of the requested information under regulations 10(5)(b) and 11(1) and (2) of the Environmental Information (Scotland) Regulations 2004 (EIRs), Mr Thompson remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, during which the Council disclosed a considerable volume of information (which went considerably beyond that originally requested by Mr Thompson), the Commissioner found that the Council had partially failed to deal with Mr Thompson's request for information in accordance with the EIRs.

The Commissioner concluded that the Council was entitled to refuse parts 3, 4, 5 and 7 of Mr Thompson's requests on the grounds that it did not hold the requested information. However, he concluded that the Council had breached regulation 5(1) by refusing to supply information sought by parts 1, 2 and 6 of Mr Thompson's information request, and which was disclosed to him by the Council during the investigation.

The Commissioner also concluded that the Council failed to respond to Mr Thompson's initial request in line with regulation 5(2) of the EIRs.

As the Council identified and disclosed the information falling within scope of the request to Mr Thomson during the investigation, the Commissioner did not require the Council to take any further action in response to this decision.

## Relevant statutory provisions and other sources

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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 – parts (a), (b) and (c) of the definition of environmental information); 5(1) and (2)(a) (Duty to make environmental information available on request) and 10(1), (2) and (4)(a) (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

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1. On 23 March 2011, Mr Thompson emailed the City of Edinburgh Council (the Council) with the following information request, in relation to statutory notice roof repairs at a specified address:
  - (1) *All the photographs taken of the rear elevation of the property. The surveyors in charge of the works have confirmed in writing that photographs were taken before work was done on the back elevation (part of dilapidation survey). A general photograph showing the original pointing of the back elevation of the building would be appreciated. I would like a colour copy of these photographs either on A4 paper or preferably a pdf file e-mailed to me [...].*
  - (2) *The photographs taken of the front and rear chimneys of the property (these two chimneys were rebuilt). The surveyors in charge of the works have confirmed in writing that they have photographs. I would like a colour copy of these photographs either on A4 paper or preferably a pdf file e-mailed to me [...].*
  - (3) *A copy of the detailed report condemning the front chimney (pdf file or A4 paper).*
  - (4) *A copy of the detailed report condemning the rear chimney (pdf file or A4 paper).*
  - (5) *The record of cores taken from the front and rear chimneys (pdf file or A4 paper).*
  - (6) *The name of the body that made an award for the work carried out to the rear elevation (this can be e-mailed to me or posted).*
  - (7) *A copy of the detailed report condemning all the pointing on the back wall and classifying it as an emergency (pdf file or A4 paper).*
2. The Council acknowledged receipt of this request, but did not provide any further response.
3. On 16 May 2011, Mr Thompson emailed the Council requesting a review of its handling of his request. Mr Thompson noted that the Council had not provided a response to his request and advised that he still required the requested information.
4. The Council notified Mr Thompson of the outcome of its review on 6 June 2011. The Council advised Mr Thompson that his request had been handled in terms of the EIRs, since it considered information regarding statutory repair notices to be environmental information. It informed Mr Thompson that the requested information was being withheld under regulation 10(5)(b) on the basis that disclosure would or would be likely to prejudice substantially the ability of the Council to conduct an inquiry of a disciplinary nature. It also indicated that the information was exempted from disclosure under regulations 11(1) and 11(2) of the EIRs, on the basis that it was personal data, relating both to Mr Thompson and to third parties.



5. On 30 June 2011, Mr Thompson wrote to the Commissioner, stating that he was dissatisfied with the outcome of the Council's review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA. By virtue of regulation 17 of the EIRs, Part 4 of FOISA applies to the enforcement of the EIRs as it applies to the enforcement of FOISA, subject to certain specified modifications.
6. The application was validated by establishing that Mr Thompson 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

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7. On 6 July 2011, the Council was notified in writing that an application had been received from Mr Thompson and was asked to provide the Commissioner with any information withheld from him.
8. On 25 July 2011, the Council disclosed to Mr Thompson two files of information (with some of it redacted) relating to the relevant works. The Council provided the Commissioner's office with copies of the redacted and un-redacted versions of this information.
9. On 1 August 2011, Mr Thompson confirmed that he had received this information, although he was dissatisfied with the extent of redactions, and the quality of the hard copies of photographs provided to him.
10. On 1 August 2011, the Council provided a further set of four files (one version redacted, one complete) which had been retrieved from a third party which had been holding information on behalf of the Council. Following receipt of this information, the Commissioner's office took steps to clarify with the Council whether this information was considered to be excepted from disclosure or had been released to Mr Thompson. The Council was unsure as to the extent to which the information had been disclosed.
11. At this stage, the case was allocated to an investigating officer for full consideration. On 9 September 2011, the investigating officer wrote to the Council, noting that the information provided to the Commissioner included a wide range of information concerning the relevant works, the majority of which fell outwith the scope of Mr Thompson's information request. The Council was asked to identify the particular information requested by Mr Thompson.
12. The Council was also asked to confirm whether this particular information was still being withheld from Mr Thompson and, if so, which exemptions or exceptions were being applied. The Council was also asked whether the photographs could be supplied to Mr Thompson in electronic form, as he had requested.



13. On 15 September 2011, the Council provided the investigating officer with copies of the requested photographs in electronic form and four documents that it considered fell within scope of Mr Thompson's request. The investigating officer enquired whether the Council would be willing to provide this information to Mr Thompson and, in particular, to provide electronic versions of the requested photographs.
14. On 27 September 2011, the Council provided Mr Thompson with the information detailed in paragraph 13. In its covering letter, the Council apologised for the "delay and inefficient way" in which it had handled Mr Thompson's information request. The Council provided colour copies of the photographs sought by parts 1 and 2 of Mr Thompson's request, along with a CD containing electronic versions. It advised Mr Thompson that the information requested in parts 3, 4, 5 and 7 of his request did not exist (and was not held by the Council) and provided a copy of email correspondence between the consultant surveyor and contractor to support this claim. In relation to part 6 of Mr Thompson's request, the Council supplied a copy of a letter confirming the identity of the organisation awarding the work on behalf of the Council. The Council also notified Mr Thompson that some third party personal information had been withheld within the disclosed information under regulation 11(2) of the EIRs.
15. The investigating officer contacted Mr Thompson regarding the Council's disclosure of information and Mr Thompson confirmed that he was now satisfied that the requested information had been provided to him by the Council. Mr Thompson requested that the Commissioner should still come to a decision, noting in particular the Council's handling of his request and considering whether it held any information in relation to parts 3, 4, 5 and 7 of his request. Mr Thompson advised that he did not require the Commissioner to come to a decision on whether the Council had been entitled to withhold personal information under regulation 11(2) of the EIRs, as he already had majority of this information as a result of other disclosures of information made by the Council.
16. The investigating officer contacted the Council, giving it an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking it to respond to specific questions. In particular, the Council was asked to evidence that it did not hold any information in relation to parts 3, 4, 5 and 7 of Mr Thompson's request and to comment on its handling of this request.
17. The Council responded to the investigating officer's request, confirming that it still considered the requested information to be environmental information, and so applying the exemption in section 39(2) of FOISA to that information. The Council also confirmed that it now considered the exception in regulation 10(4)(a) of the EIRs to apply, on the basis that it did not hold any information in relation to parts 3, 4, 5 and 7 of Mr Thompson's request. The Council also provided comments on its handling of Mr Thompson's request.
18. The submissions provided by both parties will be considered in the Commissioner's analysis and findings below.



## Commissioner's analysis and findings

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19. In coming to a decision on this matter, the Commissioner has considered all of the submissions made to him by both Mr Thompson and the Council and is satisfied that no matter of relevance has been overlooked.

### Handling in terms of the EIRs

20. Following its review, the Council dealt with Mr Thompson's information request in terms of the EIRs, having concluded that the request was for environmental information, as defined in regulation 2(1) of the EIRs (the relevant parts of the definition are reproduced in the Appendix to this decision). Where information falls within the scope of this definition, a person has a right to access it under the EIRs, subject to the various restrictions and exceptions contained in the EIRs.
21. The Council noted that it treats requests for information regarding statutory repair notices under the EIRs because this is information regarding the condition of built structures in as much as they are affected by the state of the elements of the environment and factors, such as releases into the environment, affecting or likely to affect the elements of the environment.
22. The Commissioner agrees with the Council that the information under consideration in this case is environmental information. As the information requested by Mr Thompson concerns condition of and repairs to a named property, it relates to measures (including the works themselves and the statutory notice procedure prompting these) and activities (the operations on the site) affecting or likely to affect the elements referred to in part (a) of the definition (in particular land and the landscape) or factors (such as noise or waste) referred to in part (b) of the definition. As such, the Commissioner is satisfied that the information requested by Mr Thompson is environmental information as defined in part (c) of the definition, and the Council was correct to consider Mr Thompson's request for this information as one made in terms of the EIRs

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

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, with a view to any such information being considered solely in terms of the EIRs. In this case, the Commissioner accepts that the Council was entitled to apply this exemption to the withheld information, given his conclusion that it is environmental information as defined by regulation 2(1).
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 Mr Thompson 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. The Commissioner has consequently proceeded to consider this case in what follows solely in terms of the EIRs.





### **Regulation 5(1) – Information withheld**

25. Regulation 5(1) of the EIRs provides that a Scottish public authority that holds environmental information shall make it available when requested to do so by any applicant. This obligation can be disappplied in limited circumstances (including where the requested information is excepted from disclosure) detailed in regulations 6 to 12 of the EIRs.
26. Following its review, the Council notified Mr Thompson that it was withholding all of the information he had requested on the basis that it was excepted from disclosure under regulations 10(5)(b), 11(2) and 11(3) of FOISA.
27. However, once the investigation commenced, the Council disclosed all of the information that it held, and which fell within the scope of Mr Thompson's request, subject to the redaction of some third party personal data. As noted above, Mr Thompson has accepted these redactions and so the redacted information has not been considered in this decision.
28. At no stage in the investigation has the Council sought to defend its previous refusal to release the information now disclosed to Mr Thompson. It has provided no submissions justifying its previous application of exceptions to this information.
29. In the circumstances, the Commissioner must find that the Council breached regulation 5(1) of the EIRs by failing, at the time of its review, to disclose the information falling within the scope of Mr Thompson's information request which was disclosed during the investigation.

### **Regulation 10(4)(a) – information not held – parts 3, 4, 5 and 7**

30. The Council's response to Mr Thompson's request for review suggested that all of the requested information was being withheld, giving the impression that it was held by the Council. However, when asked to consider the specific terms of Mr Thompson's request, the Council identified that it did not hold some of the information he had requested.
31. The Council advised Mr Thompson in its letter dated 27 September 2011 that it did not hold the information he had requested in parts 3, 4, 5 and 7 of his request, and its submissions to the investigating officer confirmed that it now considered regulation 10(4)(a) of the EIRs to apply to these parts of Mr Thompson's request.
32. Regulation 10(4)(a) of the EIRs states that a Scottish public authority may refuse to make environmental information available to the extent that it does not hold that information when an applicant's request is received.
33. In its submissions, the Council advised that the department concerned had carried out extensive searches of the electronic and manual record keeping systems and it had also contacted the external contractor to clarify if it held any information. It stated that these searches had not identified any information falling within scope of parts 3, 4, 5 and 7 of Mr Thompson's request.



34. Although the files provided to this office contained a substantial volume of information about the named property, the investigating officer could not identify any of the reports requested in parts 3, 4 and 7, or records of cores taken from the chimneys as sought by part 5 of Mr Thompson's request in the files. Mr Thompson also confirmed that he could not find any of the reports or record of cores in the information that had been disclosed to him.
35. Having considered the Council's submissions, the comments from Mr Thompson, and the large volume of information about the works on the relevant property available to inform his investigation, the Commissioner is satisfied that, on balance of probabilities, the Council does not hold the reports and records sought by parts 3, 4, 5 and 7 of Mr Thompson's request. .
36. The Commissioner therefore accepts that the exception in regulation 10(4)(a) applies to this information (and did so also at the time of the Council's review).

#### *Public interest test*

37. The exception set out in regulation 10(4)(a) is subject to the public interest test in regulation 10(1)(b) of the EIRs. Therefore, a Scottish public authority may only withhold information to which the 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. In this case, the Commissioner is satisfied that the Council does not hold the information in question, and did not hold it at the time it received Mr Thompson's request. Consequently, he does not consider there to be any conceivable public interest in requiring that the information be made available.
38. The Commissioner therefore concludes that, in all the circumstances of this case, the public interest in making the requested information available is outweighed by that in maintaining the exception in regulation 10(4)(a) of the EIRs. Given this conclusion, he is satisfied that the Council was entitled to refuse parts 3, 4, 5 and 7 of Mr Thompson's request in terms of regulation 10(4)(a).

#### **Regulation 5(2) - Timescales for response**

39. Regulation 5(2)(a) of the EIRs specifies that the duty to provide information in response to a request should be complied with as soon as possible, and in any event no later than 20 working days after the date of receipt of the request (subject to regulations 6 to 12 of the EIRs).
40. The Council did not provide a response to Mr Thompson's request dated 23 March 2011 and so he submitted a request for review on 16 May 2011.
41. In its submissions, the Council acknowledged that it had failed to provide a response to Mr Thompson due to a breakdown in inter-departmental communication. The Council advised that the department concerned has now reviewed its procedures and has taken steps to ensure that information requests are dealt with timeously in the future.





42. The Commissioner notes the points made by the Council, in particular the steps taken to improve the relevant department's practices. However, he must find that the Council failed to respond to Mr Thompson's request for information within the 20 working days allowed under regulations 5(2)(a) of the EIRs.

### **Council's handling of the request**

43. Having drawn his formal conclusions, the Commissioner considers it appropriate in this case to comment on the Council's handling of Mr Thompson's information request. It appears that the response provided by the Council in relation to Mr Thompson's request for review (following its failure to provide any response following his initial request) had been prepared without reference to the actual content of the request.
44. Having initially refused to disclose *any* information, the Council, during the investigation, disclosed large volumes of information regarding the relevant repair works, which went far beyond the scope of Mr Thompson's information request. The Council also provided this information to the Commissioner, apparently having considered the request to be seeking all information relating to the relevant repairs.
45. The Commissioner recognises that the Council has received significant numbers of information requests regarding statutory repairs after concerns were raised about such works, and that it has been challenging for the Council to manage these. He also recognises that, in this case, by providing information to Mr Thompson, the Council was attempting to be helpful by releasing information of interest to him.
46. However, the Commissioner considers that the Council's very wide reading of this information request, and the disclosure of significant volumes of information falling outside the scope of the request, caused confusion both to Mr Thompson and to his staff, and caused delays in the resolution of Mr Thompson's application. He would encourage the Council in future to take care to consider the actual information requested by applicants, and ensure that its response properly identifies and addresses that information.
47. The Council has acknowledged the lack of clarity in its responses to Mr Thompson, has apologised for this confusion and has advised that it will review its procedures to avoid a similar situation occurring in the future. The Commissioner also notes that the Council worked positively with the investigating officer and quickly identified the information relevant to Mr Thompson's request and provided a considered response to his request. The Commissioner recognises that this action facilitated the resolution of this case.



## DECISION

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

The Commissioner finds that the Council was entitled to refuse parts 3, 4, 5 and 7 of Mr Thompson's request in terms of regulation 10(4)(a) of the EIRs on the basis that it did not hold the information requested.

However, the Commissioner finds that the Council breached regulation 5(1) of the EIRs in withholding the information sought in parts 1, 2 and 6 of the request until during the investigation.

In addition, the Commissioner finds that, by failing to respond to Mr Thompson's initial request, the Council breached regulation 5(2)(a) of the EIRs.

The Commissioner is satisfied, by the end of the investigation, that Mr Thompson had been provided with (or was content with the redaction of) all the information held by the Council which fell within the scope of his request. Consequently, he does not require the Council to take action in respect of the failures he has identified.

## Appeal

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Should either Mr Thompson or the 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.

**Margaret Keyse**  
**Head of Enforcement**  
**31 October 2011**



## Appendix

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### Relevant statutory provisions

#### 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

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- (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)-

- (a) shall be complied with as soon as possible and in any event no later than 20 working days after the date of receipt of the request; and

...

...



**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
  - (a) it does not hold that information when an applicant's request is received;
- ...