

# Decision Notice



Decision 127/2010 Mr X and Highland Council

Land access dispute

Reference No: 200902098  
Decision Date: 15 July 2010

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**Kevin Dunion**  
Scottish Information Commissioner

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## Summary

Mr X requested from Highland Council (the Council) information pertaining to a land access dispute. The Council responded by providing the information to Mr X, but with the names, addresses and identifying factors of members of the public redacted in terms of section 38(1)(b) of FOISA. Following a review, Mr X remained dissatisfied and applied to the Commissioner for a decision.

During the investigation, the Commissioner took the view that the information comprised environmental information and asked the Council to comment on whether the request should have been dealt with under the EIRs. The Council accepted that the information was environmental and as such wished to rely on section 39(2) of FOISA and on regulation 11(2) of the EIRs.

Following an investigation, the Commissioner found that the Council had been correct to refuse to disclose the information it had withheld from Mr X on the basis that the information comprised personal data, the disclosure of which would breach at least one of the data protection principles set out in the Data Protection Act 1998 (the DPA). The information was therefore excepted from disclosure under regulation 11(2) of the EIRs.

## 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)

Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (Interpretation) (definition of “environmental information”); 5(1) and (2)(b) (Duty to make available environmental information on request); 10(3) (Exceptions from duty to make environmental information available); 11(2), (3)(a)(i) and (b) (Personal data)

Data Protection Act 1998 (the DPA) section 1(1) (Basic interpretative provisions) (definition of “personal data”); Schedules 1 (The data protection principles) (the first principle) and 2 (Conditions relevant for purposes of the first principle: processing of any personal data) (Condition 6(1))

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 10 June 2009, Mr X wrote to the Council requesting information relating to a dispute over the gated access situated on his property. He requested the information as follows:
  1. All information contained on the files of Highland Council relating to third parties' communications with the Council in connection with this access.

Mr X requested full details of complaints from members of the public referred to in previous correspondence, together with full details of all other communications about this access.
  2. Copies of all Minutes of all meetings at which this access has been on the agenda or has been discussed.

Mr X indicated that he was referring to meetings which have taken place under the auspices of the Highland Council, including all meetings of the Local Access Forum.
  3. All other information relevant to this site contained on the files of the Highland Council.
2. The Council responded on 26 June 2009, by releasing the requested information to Mr X, subject to the redaction of private email addresses, telephone numbers, names, addresses and other information identifying third parties. The Council indicated that it considered this information to be exempt from disclosure in terms of the exemption in section 38(1)(b) of FOISA.
3. On 7 August 2009, Mr X wrote to the Council requesting a review of its decision, stating that he was of the view that the Council was not entitled to withhold the redacted information from him. He also noted that productions to and from a Council legal advisor appeared to have been excluded from the information provided to him.
4. The Council notified Mr X of the outcome of its review on 25 August 2009. It upheld its previous decision to withhold the information that would identify third parties. The Council provided no response with respect to Mr Coomb's comments about the omitted productions.
5. On 7 December 2009, Mr X 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 X 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. Mr X's application to the Commissioner solely expressed dissatisfaction with the redaction of the information from the disclosed documents, and so only this matter has been considered in the Commissioner's investigation and decision in this case.
8. On 8 January 2010, the Council was notified in writing that an application had been received from Mr X 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 then contacted the Council, giving it an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA which, in line with regulation 17 of the EIRs, applies for the purposes of the EIRs as it applies for the purposes of FOISA) and asking it to respond to specific questions. The Council was advised that the Commissioner may take the view that the information fell under the definition of environmental information as defined in regulation 2(1) of the EIRs. The Council was asked to comment on this point and to provide submissions on whether it considered the withheld information to be exempted from disclosure under regulation 11(2) of the EIRs (which mirrors section 38(1)(b) of FOISA). The Council was also asked if it wished to rely on section 39(2) of FOISA, which allows Scottish public authorities to exempt information from disclosure under FOISA if it is environmental information which the authority is obliged to make available to the public in accordance with the EIRs.
10. In its response, the Council accepted that the data held by it in this matter fell under the definition of environmental information, and so was exempt in terms of section 39(2) of FOISA. The Council stated that it also wished to rely on the exception contained in regulation 11(2) of the EIRs in relation to the withheld information, and provided submissions in support of its application of this exception which are summarised, where relevant, in the Commissioner's analysis and findings section below.
11. The investigating officer subsequently contacted Mr X and invited him to provide submissions on his legitimate interests, in terms of condition 6 of schedule 2 of the DPA, in the withheld information. Mr X's submissions are also summarised, where relevant, below.

## Commissioner's analysis and findings

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



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

13. The Commissioner has set out his thinking on the relationship between FOISA and the EIRs in some detail in *Decision 218/2007 Professor A D Hawkins and Transport Scotland* and need not repeat it in full here.
14. As noted above, after being advised that the Commissioner might consider the information under consideration in this case to be environmental information for the purposes of the EIRs, the Council agreed that the nature of the information was likely to fall under the definition of environmental information. It also agreed that the exemption in section 39(2) of FOISA was therefore applicable.
15. Environmental information is defined in regulation 2(1) of the EIRs (the definition is reproduced in full in the Appendix). Where information falls within the scope of this definition, a person has a right to access it under the EIRs, subject to various restrictions and exceptions contained in the EIRs.
16. The information requested by Mr X related to correspondence from third parties, and other information concerning public access rights on particular land. As such, it is information on measures (including legislation, activities and programmes) affecting, or likely to affect the elements of the environment listed in paragraph (a) of the definition of environmental information (particularly, land, soil, landscape and natural sites). As such, the Commissioner considers that the information requested by Mr X is entirely environmental information contained as defined in regulation 2(1)(c) of the EIRs.
17. The exemption in section 39(2) of FOISA provides in effect that environmental information as defined by regulation 2(1) of the EIRs is exempt from disclosure under FOISA (thereby allowing any such information to be considered solely in terms of the EIRs). As the Commissioner considers that the information requested by Mr X is entirely environmental information, he also therefore considers that it was exempt from disclosure under section 39(2) of FOISA.
18. This exemption is subject to the public interest test in section 2(1)(b) of FOISA. The Commissioner's view is that, in this case, as there is a separate statutory right of access to environmental information available to Mr X, the public interest in maintaining this exemption and dealing with the requests in line with the requirements of the EIRs outweighs any public interest in disclosure of information under FOISA. In what follows, the Commissioner has therefore made his decision solely in terms of the EIRs.

### Regulation 11(2) of the EIRs – third party personal information

19. The Council stated that it maintained that the information redacted from the information supplied in response to Mr X's request was excepted from disclosure under regulation 11(2) of the EIRs.



20. Regulation 11(2) excepts third party personal data from release if either "the first condition" (set out in regulation 11(3)) or "the second condition" (set out in regulation 11(4)) applies to the information.
21. As the Council's arguments relate to "the first condition" and, in particular, the parts of the first condition which consider whether disclosure of the information would breach the data protection principles (regulation 11(2) read in conjunction with either regulation 11(3)(a)(i) or (b)), this is what the Commissioner will focus on in this decision.
22. In order for a public authority to rely on this exception, it must show firstly that the information under consideration is personal data for the purposes of the DPA and secondly that disclosure of the information would contravene at least one of the data protection principles laid down in the DPA.

*Is the information under consideration personal data?*

23. Personal data is defined in section 1(1) of the DPA as data which relate to a living individual who can be identified from those data, or from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller (the definition is set out in full in the Appendix).
24. The Council submitted that it obtained the details in question during an investigation as to whether there is a right of access under law across Mr X's land. It argued that the information, comprising of identities, contact details and biographical information, was personal data.
25. The Commissioner is satisfied that the withheld information relates to living individuals who can be identified from that information and other information in the possession of the Council. He is therefore satisfied that this information is the personal data of the individuals concerned.

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

26. The first data protection principle states that the processing of personal data (here, processing being the disclosure of the data in response to a request made under the EIRs) must be fair and lawful and, in particular, that personal data shall not be processed unless at least one of the conditions in Schedule 2 (to the DPA) is met and, in the case of sensitive personal data, at least one of the conditions in Schedule 3 to the DPA is also met. (The Commissioner has considered the definition of sensitive personal data set out in section 2 of the DPA, and he is satisfied that the personal data in this case does not fall into this category. It is therefore not necessary to consider the conditions in Schedule 3 of the DPA in this case.)
27. There are three separate aspects to the first data protection principle: (i) fairness, (ii) lawfulness and (iii) the conditions in the schedules. However, these three aspects are interlinked. For example, if there is a specific condition which permits the personal data to be disclosed, it is likely that the disclosure will also be fair and lawful.



28. The Commissioner will now go on to consider whether there are any conditions in Schedule 2 to the DPA which would permit the personal data to be disclosed. If any of these conditions can be met, he must then consider whether the disclosure of this personal data would be fair and lawful.

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

29. The Council submitted arguments in relation to condition 6 of Schedule 2 of the DPA in this instance.
30. The Commissioner has considered all of the conditions in Schedule 2 of the DPA, and is of the view that condition 6(1) of Schedule 2 of the DPA is the only condition which might be considered potentially to apply in this case.
31. Condition 6(1) allows personal data to be processed if the processing is necessary for the purposes of legitimate interests pursued by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.
32. There are, therefore, a number of different tests which must be satisfied before condition 6 can be met. These are:
- a. Does the applicant (Mr X) have a legitimate interest in obtaining this personal data?
  - b. If yes, is the disclosure necessary to achieve these legitimate aims? In other words, is the disclosure proportionate as a means and fairly balanced as to ends, or could these legitimate aims be achieved by means which interfere less with the privacy of the data subjects?
  - c. Even if the disclosure is necessary for the legitimate purposes of the applicant, would the disclosure nevertheless cause unwarranted prejudice to the rights and freedoms or legitimate interests of the data subjects? This will involve a balancing exercise between the legitimate interests of the applicant and those of the data subjects. Only if (or to the extent that) the legitimate interests of the applicant outweigh those of the data subjects can the personal data be disclosed.

*Does the applicant have a legitimate interest?*

33. In correspondence with the Commissioner, Mr. X submitted that the information should be made available as it concerns a right of way dispute over his land. He stated that he wished to be able to put forward a fair and reasonable defence against any accusations made against him by the individuals who are the data subjects. He argued that to do this he requires to know the identities of the individuals concerned. Mr X submitted that it was essential for him to be able to communicate with those who seek equestrian access over his land to enable him to manage his property, and to do this he required to know the identities of those in question.





34. Having considered the submissions made by Mr X, the Commissioner accepts that he has a legitimate interest in gaining access to the identities of the individuals in question. The disclosure of this information would inform Mr X in responding to any accusations made against him by individuals currently anonymous to him.

*Is disclosure of the information necessary to achieve those legitimate interests?*

35. The Commissioner must now consider whether disclosure is necessary for Mr X's legitimate interests and in doing so he must consider whether these interests might reasonably be met by any alternative means.
36. The Commissioner has concluded that disclosure is necessary as there is no other way in which Mr X could achieve the pursue the legitimate interests he has identified without access to the information he has requested, or while interfering less with the privacy of the data subjects concerned.

*Would disclosure cause unwarranted prejudice to the legitimate interests of the data subjects?*

37. The Commissioner must now consider whether disclosure would nevertheless cause unwarranted prejudice to the rights, freedoms and legitimate interests of the data subjects concerned. As noted above, this will involve a balancing exercise between the legitimate interests of Mr X and those of the data subjects. Only if the legitimate interests of Mr X outweigh those of the data subjects can the information be disclosed without breaching the first data protection principle.
38. The Commissioner has issued guidance on the interpretation of the exceptions in section 11<sup>1</sup>, and notes a number of factors which should be taken into account in carrying out this balancing exercise. These include:
- a whether the information relates to the individual's public life (i.e. their work as a public official or employee) or their private life (i.e. their home, family, social life or finances)
  - b the potential harm or distress that may be caused by the disclosure
  - c whether the individual has objected to the disclosure
  - d the reasonable expectations of the individuals as to whether the information would be disclosed
39. In its submissions, the Council stated that the information relates to the private lives of the data subjects in that it relates to their recreational pursuits of walking and horse riding on the land in question. The Council argued that the identity of any member of the public who wished to use this land is irrelevant as public access would be a right open to all.

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<sup>1</sup> "Personal information"- <http://www.itspublicknowledge.info/nmsruntime/saveasdialog.asp?IID=3085&sID=1333>





40. The Council further submitted that, given the circumstances in which the information was obtained, the data subjects had no expectation that their identities, contact details or any biographical information provided by them to the Council would be made public.
41. When asked by the Commissioner whether it had contacted the individuals in question for their permission to disclose their personal information, the Council stated that it had not and that it was Council policy not to disclose such information unless such disclosure was necessary to enable a complaint to be investigated and to take the case to court. The Council submitted that this was in line with an individual's right to respect for their correspondence as provided by Article 8 of the European Convention on Human Rights.
42. The Commissioner has also considered Mr X's submissions. Mr X has stated that he wished to make direct contact with those individuals whom he believes have made complaints relating to the land access dispute. Mr X stated that he wished to make commercial arrangements with such individuals and also discourage further "vandalism" to his property.
43. Given the nature of the dispute and the fact that the data subjects chose to discuss the matter with the Council rather than Mr X, the Commissioner has concerns that there is real potential for distress being suffered by the data subjects should they be contacted directly by Mr X in relation to the matter.
44. The Commissioner is of the view that the data subjects would not have any reasonable expectation that their personal details would be publicly disclosed in the context of the information requested by Mr X, which is the effect of the disclosure of information under FOISA. He accepts that the information pertains to the data subjects' personal rather than public lives and that there is the potential for distress to be caused to them by disclosure, should they be contacted directly by Mr X.
45. On balance, while the Commissioner accepts that disclosure of the withheld information would be necessary to fulfill Mr X's legitimate interests, he does not agree that this outweighs the prejudice that would be caused to the data subjects' rights, freedoms and legitimate interests and he considers that such prejudice would be unwarranted in this case. The Commissioner is therefore satisfied that Condition 6 of Schedule 2 is not met in this case.
46. Having concluded that disclosure of the withheld information would lead to unwarranted prejudice to the rights, freedoms and legitimate interests of the data subjects, the Commissioner must also conclude that disclosure would be unfair. As condition 6 cannot be met, he would also regard disclosure as unlawful. In all the circumstances, therefore, he finds that disclosure would breach the first data protection principle and that the information was therefore properly withheld under regulation 11(2) of the EIRs.



## **DECISION**

The Commissioner finds that Highland Council complied with Part 1 of the Freedom of Information (Scotland) Act 2002 and with the Environmental Information (Scotland) Regulations 2004 in responding to the information request made by Mr X.

## **Appeal**

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Should either Mr X or Highland 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**  
**15 July 2010**



## Appendix

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### Relevant statutory provisions

#### Freedom of Information (Scotland) Act 2002

##### 1 General entitlement

- (1) A person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority.
- ...
- (6) This section is subject to sections 2, 9, 12 and 14.

##### 2 Effect of exemptions

- (1) To information which is exempt information by virtue of any provision of Part 2, section 1 applies only to the extent that –
  - ...
  - (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

##### 39 Health, safety and the environment

- ...
- (2) Information is exempt information if a Scottish public authority-
  - (a) is obliged by regulations under section 62 to make it available to the public in accordance with the regulations; or
  - (b) would be so obliged but for any exemption contained in the regulations.
- ...



## The Environmental Information (Scotland) Regulations 2004

### 2 Interpretation

(1) In these Regulations –

...

"environmental information" has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on -

- (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
- (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in paragraph (a);
- (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in paragraphs (a) and (b) as well as measures or activities designed to protect those elements;
- (d) reports on the implementation of environmental legislation;
- (e) costs benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in paragraph (c); and
- (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in paragraph (a) or, through those elements, by any of the matters referred to in paragraphs (b) and (c);

...



## 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-

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

## 11 Personal data

- ....
- (2) To the extent that environmental information requested includes personal data of which the applicant is not the data subject and in relation to which either the first or second condition set out in paragraphs (3) and (4) is satisfied, a Scottish public authority shall not make the personal data available.
  - (3) The first condition is-
    - (a) in a case where the information falls within paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998<sup>[6]</sup> that making the information available otherwise than under these Regulations would contravene-
      - (i) any of the data protection principles; or  
...
    - (b) in any other case, that making the information available otherwise than under these Regulations would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.



## Data Protection Act 1998

### 1 Basic interpretative provisions

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

...

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

(a) from those data, or

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

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

...

## Schedule 1 – The data protection principles

### Part I – The principles

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

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

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

...

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

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

...