

Decision Notice



Decision 188/2012 Mr Peter Julien and City of Edinburgh Council

Old Drylaw House

Reference No: 201102074

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www.itspublicknowledge.info

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Summary

Mr Julien asked the City of Edinburgh Council (the Council) for information about Old Drylaw House. The Council (which dealt with the request under the Environmental Information (Scotland) Regulations 2004 (the EIRs)) provided some information and advised that other information was already publicly available.

By the conclusion of the Commissioner's investigation, the Council had released more information, but decided that some should be withheld under exceptions in the EIRs. The Commissioner found that while most of the information was correctly withheld, the exceptions had been wrongly applied to certain information, and she required it to be disclosed.

Relevant statutory provisions and other sources

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) (Interpretation) (definitions (a), (c) and (f) of "environmental information"); 5(1) and (2)(b) (Duty to make available environmental information on request); 10(1), (2), (3), (4)(e) and (5)(d) (Exceptions from duty to make environmental information available); 11(2), (3)(a)(i) and (b) (Personal data)

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

The full text of each of the statutory provisions cited above is reproduced in the Appendix to this decision. Both Appendices 1 and 2 form part of this decision.



Background

1. Old Drylaw House, a listed building, was owned by Mr Julien. In 1991, the Council served a repairs notice on Mr Julien, allowing two months for compliance. Mr Julien did not comply within the specified period, and the house became the subject of a Compulsory Purchase Order in 1992. The Council did not carry out the repairs, and the house was allowed to deteriorate into a ruinous state before being sold to a private buyer in 2003.
2. On 6 June 2011, Mr Julien wrote to ask the Council for all recorded information relating to the CPO, including all recorded decisions leading up to the CPO; the granting of the CPO; and “the requirements of the vested authority up to, during, and after the sale of the land to a third party”.
3. On 6 July 2011, the Council responded to Mr Julien’s request. It provided details of some reports available through the Council’s website, relating to the sale of Old Drylaw House. It provided reference numbers for four planning applications relating to the property, and provided a web address by which they could be accessed. The Council advised that the CPO would have been considered by Edinburgh District Council (its statutory predecessor), and that the minutes of the District Council meetings were available from the City Council Archives. It considered this information to be excepted from disclosure under regulation 6 of the EIRs, because “the information is already publicly available and easily accessible”.
4. The Council provided a number of documents from files in its Legal and Administrative Services department. It advised that it might hold other documents relating to its purchase of the property from Mr Julien or his more recent correspondence. The Council took the view that such information was Mr Julien’s own personal data, which he should request under the DPA. The Council did not cite any exceptions from the EIRs in relation to this refusal.
5. On 3 August 2011, Mr Julien asked for a review of the Council’s response. He had already sent an email advising that he had been unable to find the documents he needed on the Council’s website, and had asked the Council to provide printed copies. The Council acknowledged receipt of Mr Julien’s request for review on 9 August 2011.
6. On 20 September 2011, Mr Julien wrote to the Commissioner to advise that he had not had any response to his request for review, and asked the Commissioner to intervene.
7. On 21 September 2011, Mr Julien complained to the Council that he had not received any response to his request for review. In his email he provided details of nine examples of the type of detailed information he believed he should have received in response to his request. On 22 September 2011, the Council advised Mr Julien that a review was underway.
8. On 1 November 2011, the Council provided Mr Julien with a response to his request for review. The response dealt only with the nine examples in his request for review, and concluded that the Council did not hold most of the information. One document was provided, with personal data redacted under regulation 11(2) of the EIRs.



9. On 2 November 2011, Mr Julien wrote to the Commissioner, expressing his dissatisfaction 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.)
10. The application was validated by establishing that Mr Julien 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

11. On 21 November 2011, the Council was notified in writing that an application had been received from Mr Julien and was asked to provide the Commissioner with any information withheld from him. One document was provided on 5 December 2011. The case was then allocated to an investigating officer.
12. The investigating officer subsequently contacted the Council, giving it an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking it to respond to specific questions.
13. The Council was asked to note that Mr Julien's request for information was expressed in very broad terms, and was asked to consider whether the searches it had carried out were broad enough to retrieve all information covered by his request, or whether the Council had taken the view that it was only required to search for the particular information Mr Julien had listed in his request for review. The Council was reminded that regulation 6 of the EIRs applies only where the information is easily accessible to the applicant.
14. Following receipt of this letter, the Council decided to withdraw its reliance on regulation 11(2) in relation to the document referred to in paragraph 11 above, and provided Mr Julien with a full copy of the document in question.
15. On 19 January 2012, the Council provided its submission on Mr Julien's case. The Council confirmed that it had understood Mr Julien's request for review to indicate that he was narrowing his request to cover only the nine examples of information listed in that letter. It stated that the cost of providing all information covered by Mr Julien's request would be at least £3,990, given the amount of information involved and the likelihood that some of it would be exempted from disclosure. The Council continued to rely on regulation 6 of the EIRs in relation to certain documents available on its website or from its archives.
16. After discussion with Mr Julien and the Council, it was agreed that an attempt would be made to exclude some information from the scope of his request. On 22 January 2012, Mr Julien wrote to the Commissioner to explain what he considered to be the "fundamental issues" relating to the CPO.



17. The investigating officer then visited the Council offices to examine the withheld information. Following this, the investigating officer prepared a list of the key documents and sets of information found in the files, and with the Council's agreement, sent this to Mr Julien to give him a better understanding of the range of information in the files and to establish whether any of it could be disregarded. Mr Julien confirmed that certain entries on the list were not required, or represented information which he already possessed. He confirmed that he wanted to receive the information covered by the remaining entries on the list.
18. On 30 April 2012, the Council provided information covered by four of the entries selected by Mr Julien. The Council advised him that the remaining information was exempt from disclosure under regulation 10(4)(e) or regulation 11(2) of the EIRs.
19. The Council was asked to provide the remaining withheld information to the Commissioner, but argued that this was impractical because of the quantity of documents.
20. The investigating officer again visited the Council on 14 June 2012, this time to review the withheld information against the exceptions the Council had applied. The Council was then asked to provide the Commissioner with copies of certain documents, along with any additional arguments it wished to put forward in relation to the exceptions it had applied.
21. The Council provided the requested copies on 3 July 2012. In a letter to Mr Julien, copied to the Commissioner, it advised that one of the documents was already in the public domain and could be provided, but all remaining information was considered to consist of internal communications exempt from disclosure under regulation 10(4)(e) of the EIRs. The Council also applied the exception in regulation 10(5)(d) to some of the information.
22. During the investigation, the Council decided that some additional information could be released, and provided this to Mr Julien. The Council provided the Commissioner with further submissions on its decision to withhold information under regulations 10(4)(e) and 10(5)(d) of the EIRs.
23. The submissions from both Mr Julien and the Council (where relevant to the decision) are summarised and considered in the Commissioner's analysis and findings section below.

Commissioner's analysis and findings

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



Section 39(2) of FOISA – environmental information

25. The Council dealt with Mr Julien's request under the EIRs, as it considered that the information covered by his request was environmental information as defined in regulation 2(1). The information in question relates to the fate of a listed building which was subject to a CPO on the grounds that the owner had not complied with a repairs notice. The Commissioner is satisfied that the information falls within the definition in paragraphs (a), (c) or (f) of regulation 2(1), being information on the state of the elements of the environment; or on measures and activities affecting or likely to affect those elements as well as measures or activities designed to protect those elements; or conditions of cultural sites and built structures inasmuch as they are or may be affected by the elements of the environment or the measures and activities in paragraph (c). The relevant definitions are reproduced in full in Appendix 1.
26. In its review response of 1 November 2011, the Council advised that it was applying the exemption in section 39(2) of FOISA, which provides, in effect, that such environmental information is exempt from disclosure under FOISA, thereby allowing Mr Julien's request to be considered solely in terms of the EIRs.
27. The Commissioner accepts that the Council was entitled to apply the exemption in section 39(2) of FOISA to the withheld information, given her conclusion that it was properly classified as environmental information.
28. As there is a separate statutory right of access to environmental information available to Mr Julien in this case, the Commissioner also accepts that the public interest in maintaining this exemption and in dealing with the request in line with the requirements of the EIRs outweighs any public interest in disclosing the information under FOISA.

Regulation 10(4)(e) – internal communications

29. The Council applied the exception in regulation 10(4)(e) to all information withheld from Mr Julien.
30. Under regulation 10(4)(e) of the EIRs, a Scottish public authority may refuse to make environmental information available to the extent that the request involves making available internal communications. It need only be established that the information is an internal communication for it to fall within the scope of the exception in regulation 10(4)(e). The EIRs do not define what is meant by internal communications.
31. However, it would be wrong to conclude that information can be withheld simply because it is an internal communication. Regulation 10(2) of the EIRs requires the authority to interpret the exceptions in a restrictive way and to apply a presumption in favour of disclosure. For example, the authority may recognise that whilst the request involves making available internal communications, no real harm would come of that and (given the requirements of regulation 10(2)) it should disclose the information without claiming the exception.



32. The exception in regulation 10(4)(e) is also subject to the public interest test in regulation 10(1)(b). In other words, even if the information is an internal communication, it can only be withheld if, in all the circumstances, the public interest in making the information available is outweighed by that in maintaining the exception.
33. Some of the withheld documents and information were exchanged between officers of the Council and are unquestionably internal communications. The Commissioner accepts that documents exchanged with legal Counsel retained by the Council should also be treated as internal communications. The Commissioner accepts that the exception can apply to all the information in groups 1, 2, 3, 4, 5, all information in group 10 (documents 2, 3, 6, 7 and 8) and some information in group 11 (documents 4, 5, 9, 10, 11, 12, 14, 16, 19 and 20), as listed in Appendix 2.
34. The Commissioner does not accept that the exception can apply to some of the information withheld under regulation 10(4)(e): for example, correspondence with external third parties or their legal representatives. In relation to the schedule of documents found in Appendix 2 of this decision, the Commissioner finds that the exception in regulation 10(4)(e) cannot be upheld in relation to groups 6, 7 (with the exception of document 1), 8, 9 and 12, as this information does not consist of internal communications. The same applies in relation to document 13 from group 11, and documents 21 and 22 (group 12). Where the exceptions in regulations 10(5)(d) and 11(2) have also been applied to this information, the Commissioner has considered later in this decision whether these exceptions should be upheld.
35. Where the Commissioner has found that the exception in regulation 10(4)(e) has been applied to information which comprises internal communications, she is required to consider whether the public interest in making the information available is outweighed by that in maintaining the exception.

Regulation 10(4)(e) – the public interest test

36. From correspondence and discussion with Mr Julien, it is evident that he perceives a strong public interest in the disclosure of any information relating to the events surrounding the compulsory purchase of Old Drylaw House, the associated claim for compensation, the actions (or lack of action) by the Council which led to a listed building falling into a ruinous state, and its eventual sale to a private buyer. Mr Julien and the Council have been in correspondence for many years over this matter, which has also led to a Lands Tribunal case and a public inquiry.



37. The Council has argued that some of the withheld information consisted of correspondence protected by legal professional privilege, being communications requesting or providing legal advice. The Council cited a previous decision from the Commissioner which concluded that legal advice fell within the definition of internal communications.¹ The Council argued that a public authority should be able to seek legal advice to allow it to consider matters in private. It stated that legal advice, by its nature, examined all aspects of a matter, including any strengths or weaknesses associated with a particular stance. The Council did not consider it to be in the public interest for such information to be released upon request, as authorities needed to be able to seek comprehensive and frank legal advice and to consider it in private.
38. In relation to documents containing information about the CPO, the Council considered it important for officers to be able to discuss the Council's position without fear that their views would be disclosed in response to an FOI request. It argued that, if it were obliged to release this information, officers would be reluctant to discuss and record information of this nature in future, which in turn would seriously inhibit the free and frank exchange of views for the purpose of deliberation. The Council argued that this was not desirable from the point of view of ensuring an audit trail, and that there was a strong public interest in ensuring that the Council could discuss private issues relating to a CPO, "especially where a court case is a possibility".
39. In considering the public interest test, the Commissioner accepts that there is a general public interest in making information available to the public, especially where this helps to ensure a transparent and accountable decision-making process in Scottish public authorities, but this benefit must be balanced against any detriment to the public interest as a consequence of disclosure.
40. As noted previously, some of the internal communications consist of information exchanged between the Council's solicitors and Council officials, either requesting or providing legal advice. In previous decisions, the Commissioner has consistently concluded that there will always be a strong public interest in maintaining the right to confidentiality of communications between a legal adviser and their client. This conclusion is supported by the fact that the courts have long recognised the strong public interest in maintaining the right to confidentiality of communications between legal adviser and client on administration of justice grounds.
41. In this case, the Commissioner recognises the significant passage of time which has elapsed since the communications between legal adviser and client took place. However, she notes that the Council considers further court action possible, and in the circumstances she accepts that there is still a strong public interest in maintaining the confidentiality of these communications, to enable the proper administration of justice. She also accepts that disclosure of legal advice in this case would be likely to inhibit the future provision of legal advice on a proper, fully informed basis, communicated to clients in a full and frank manner.

¹ Decision 056/2008 Mr Rob Edwards and the Scottish Ministers



42. Therefore, although disclosure of some of the information under discussion would enable greater public understanding of the Council's involvement in the events affecting Old Drylaw House (which saw a listed building in Council ownership falling into a ruinous state), the Commissioner finds that, on balance, the public interest in achieving this understanding is outweighed by the public interest in maintaining the confidentiality of communications between a legal adviser and their client.
43. The Commissioner therefore finds that the exception in regulation 10(4)(e) was correctly applied to the information in groups 1 and 2 as listed in Appendix 2.
44. Some of the information withheld under regulation 10(4)(e) did not comprise communications between a legal adviser and their client, but rather notes or minutes of meetings between Council officers, in some cases chaired by a Councillor (groups 5 and 10, and document 1 from group 7). The Council stated that these documents contained information about issues relating to a CPO, which were discussed at internal meetings.
45. The Council argued that it was important that it could discuss its position internally without fear of disclosure under an FOI request. It considered that if it was obliged to release the information in the notes and minutes, officers would be reluctant to discuss and record information of this nature in future, and the free and frank exchange of views for the purpose of deliberation would be seriously inhibited. This was not desirable in relation to maintaining an audit trail, nor was it in the public interest, which lay in ensuring that the Council could discuss privately issues relating to a CPO, especially where a court case remained a possibility.
46. The Commissioner does not accept that the focus of these particular meetings was the CPO itself; rather, the minutes record discussions about possible uses for Old Drylaw House after it passed into the Council's ownership. These meetings took place in 1993 and 1994. Similarly, document 1 from group 7 records a discussion about the future of the property, from 1992. Since that time, Old Drylaw House has become a ruin and has been sold by the Council. It therefore seems reasonable to accept that, with the passage of time, any sensitivity associated with the discussions recorded in the minutes would have diminished substantially by the time Mr Julien made his information request.
47. In these circumstances, the Commissioner does not accept that disclosure of this information would inhibit future discussions of Council officers to the degree anticipated by the Council. Once again, the Commissioner wishes to make it clear to Scottish public authorities that any decision to withhold or disclose information must be taken after considering the particular circumstances of the case, and the decision will not necessarily create a precedent to be followed in other cases where the circumstances may be different.
48. The Commissioner has considered the public interest in understanding more fully the Council's role in relation to the decline of Old Drylaw House, particularly in the years following its compulsory purchase from Mr Julien in 1992 and before it was sold on in 2003. The Commissioner finds that the public interest in making available information which would permit better understanding of the Council's decision-making process in relation to this listed building outweighs any public interest there might be in withholding the information.



49. The Commissioner therefore finds that the Council wrongly applied the exception in regulation 10(4)(e) to the information in groups 5 and 10 and document 1 from group 7. As the information in group 5 (documents 17 & 18) and group 10 (documents 2, 3, 6, 7 and 8) was not withheld under any other exception, it should now be provided to Mr Julien. Document 1 from group 7, and documents 23 and 24 (group 12) were also withheld under regulation 10(5)(d), which is considered later in this decision.
50. Group 3 contains internal correspondence and file notes concerning questions relating to access rights for Old Drylaw House, and other issues potentially affecting future planning consent. Group 11 contains a mixture of internal and external correspondence broadly concerned with the future use or development of Old Drylaw House, the valuation of the site and issues relating to access rights and planning permission. In relation to the internal correspondence withheld under regulation 10(4)(e), the Council employed similar arguments to those outlined in paragraphs 38 and 45, stating that it was important for officers to be able to discuss internally the Council's position without the fear that it might be disclosed under an FOI request. The Council considered that there was a strong public interest in ensuring that the Council could discuss any issues privately, including those concerning the future of Old Drylaw House and any routine administrative matters.
51. The Commissioner has considered whether the public interest in disclosure of the internal communications in groups 3 and 11, in the interests of openness and accountability, would outweigh the public interest in maintaining the exception. The Commissioner does not accept that disclosure of any information about the Council's views or position is likely, in all the circumstances, to seriously inhibit its officers from exchanging free and frank views in future. The Council has not given any reason why this would be the case, and nor has it explained why disclosure of the internal communications in groups 3 and 11, in particular, would have this effect.
52. The Commissioner accepts that some of the matters covered in the correspondence and file notes in group 3 later became the subject of legal advice from the Council solicitors, and accordingly gained some sensitivity from this context. In these circumstances, the Commissioner finds that the public interest in disclosure of the information in group 3, which is not strong, is outweighed by the public interest in maintaining the exception in regulation 10(4)(e) and in withholding the information. The Commissioner has also concluded that the public interest in withholding document 19 from group 11 outweighs the public interest in its disclosure, for the same reasons.
53. However, for the reasons outlined in paragraph 48, the Commissioner finds that the public interest in disclosure of information which would increase public understanding of the Council's actions and decisions in relation to Old Drylaw House outweighs the public interest in maintaining the exception in regulation 10(4)(e) in relation to documents 4, 5, 9, 10, 11, 12, 14, 16, 20, 23 and 24 from group 11.



54. Group 4 in Appendix 2 consists of internal correspondence on administrative matters which required to be dealt with by the Council following the Lands Tribunal proceedings. The information concerns routine administrative processes (for example, arranging payment of accounts) rather than any of the key concerns raised by Mr Julien in his correspondence. The Commissioner identified no public interest in the disclosure of this information other than the general public interest in access to information held by Scottish public authorities. After discussion with Mr Julien, she has concluded that this information was inadvertently included within the scope of his request because of a lack of descriptive detail when Mr Julien was asked to identify the information which he wished the Commissioner to consider (see paragraph 17 above). The Commissioner has therefore excluded this information from her decision on Mr Julien's case.
55. Group 12 (documents 21 and 22) consists of information about the valuation of Old Drylaw House. Again, given the passage of time since the creation of these documents, and the events which have taken place during that period, the Commissioner does not accept that disclosure in response to Mr Julien's request would or would have been likely to inhibit the recording of such discussions in future. The Commissioner finds that there is little identifiable public interest in withholding this information, and the public interest in disclosure, which will promote transparency and accountability in relation to the Council's decisions and actions in this matter, outweighs the public interest in maintaining the exception. The information was wrongly withheld under regulation 10(4)(e) of the EIRs and therefore should now be provided to Mr Julien.

Regulation 10(5)(d) - confidentiality

56. The Council advised that, in addition to regulation 10(4)(e), it wished to rely on the exception in regulation 10(5)(d) of the EIRs in relation to the following information (respectively, groups 6, 7, 8 and 9 in Appendix 2):
- Correspondence about a third party's claim for compensation due under a standard security previously granted;
 - Correspondence relating to issue of whether planning permission was in place at the time of the CPO;
 - Correspondence relating to the conclusion of the Lands Tribunal proceedings;
 - Correspondence with parties affected by the CPO.
57. The exception in regulation 10(5)(d) has also been applied to information in document 13 from group 11 and documents 23 and 24 (group 12).
58. Regulation 10(5)(d) provides that a Scottish public authority may refuse to make environmental information available to the extent that its disclosure would, or would be likely to, prejudice substantially the confidentiality of the proceedings of any public authority where such confidentiality is provided for by law.



59. The first matter to be addressed by the Commissioner is whether the information relates to proceedings where confidentiality is protected by law. She must then consider whether disclosure of the information would, or would be likely to, prejudice substantially the confidentiality of those proceedings.
60. In its publication "The Aarhus Convention: an implementation guide"², the Economic Commission for Europe (the United Nations agency responsible for the convention which the EIRs are designed to implement) notes at page 59 that the convention does not comprehensively define "proceedings of public authorities", but suggests that one interpretation is that these may be proceedings concerning the internal operations of a public authority rather than substantive proceedings conducted by the public authority in its area of competence. The confidentiality under this exception must be provided for under national law.
61. The Council submitted that disclosure of the information in question would result in an actionable breach of confidence, as a result of the obligation of confidentiality arising at common law. The Council did not state who would be entitled to bring an action for breach of confidence if the information were disclosed, but it is understood to be the third parties involved in the correspondence.
62. There is no need, under the exception in regulation 10(5)(d), for the information to have been obtained by the public authority from another person; in that respect, the exception differs from the "confidentiality" exemption in section 36(2) of FOISA. The exception in regulation 10(5)(d) can therefore cover information created by the public authority and provided to another party, or to information jointly created or agreed between the public authority and a third party, in addition to information supplied to the public authority by another party.
63. The Council also advised that correspondence with solicitors (including the solicitors acting for third parties) would attract legal professional privilege. The Council argued that the correspondence contained information in the pursuance of settling a case, which was not expected to be released to a third party (that being the essence of negotiations between solicitors).
64. The Commissioner takes the view that a claim for confidentiality of communications could be maintained in legal proceedings in respect of most of the withheld information covered by groups 6, 7, 8 and 9, document 13 from group 11. For the most part, the information consists of correspondence with third parties or their legal representatives on matters under negotiation with the Council. The Commissioner accepts that parties entering into such correspondence would do so with an expectation of confidentiality.
65. The Commissioner accepts that such negotiations and correspondence fall within the suggested definition of "proceedings of public authorities" set out in paragraph 60 above. For the exception in regulation 10(5)(d) to apply, however, the Commissioner must be satisfied that disclosure of the information would, or would be likely to, prejudice substantially the confidentiality of those proceedings. Firstly, she must be satisfied that the proceedings are confidential, such confidentiality being provided for by law.

² <http://www.unece.org/fileadmin/DAM/env/pp/acig.pdf>



66. The Commissioner considers that the confidentiality imposed on any person under the common law duty of confidence, under a contractual obligation, or by statute, is confidentiality protected by law. In many cases where this exception applies, there exists a specific statutory provision prohibiting the release of the information. However, the Commissioner considers that there may also be cases where the common law of confidence will protect the confidentiality of the proceedings, and has concluded that this is such a case.
67. One aspect of the common law of confidence is the law relating to confidentiality of communications, which embraces the rules and principles applying to legal professional privilege. Legal professional privilege is split into two aspects, that is litigation privilege and legal advice privilege. Litigation privilege applies to documents created in contemplation of litigation, while legal advice privilege covers confidential communications between lawyers and their clients made for the purpose of seeking or giving legal advice.
68. The Commissioner does not accept that all the information withheld under groups 6 to 9 fulfills the requirements for legal advice privilege to apply, but she accepts that the correspondence would have taken place with a general expectation of confidentiality, given that it involved negotiations (on matters private to the other party) or personal transactions with the Council. She finds that the information in groups 6 to 9, and document 13 from group 11, had the necessary quality of confidence and was the subject of at least an implicit obligation of confidentiality.
69. While a certain amount of information about matters relating to Old Drylaw House is now in the public domain (in Council minutes and reports, the findings of the Lands Tribunal and the public inquiry), the Commissioner accepts that the confidentiality of the correspondence covered by groups 6 to 9, and document 13 from group 11, has not been affected. In the circumstances, she accepts that the information (and the proceedings to which it relates) were properly considered confidential under common law.
70. The Commissioner has also considered whether disclosure of the information in groups 6 to 9, and document 13 from group 11, would, or would be likely to, prejudice substantially the confidentiality of the proceedings she has identified. In this context, she has taken into consideration the Council's arguments that disclosure in this case would have an impact on any future negotiations in cases involving pursuance of settlement and might hinder any possibility of settlement. The Commissioner accepts that disclosure of the information would substantially prejudice such proceedings, in removing the expectation that such correspondence would be treated confidentially, and creating a deterrent for third parties entering into such negotiations with the Council.
71. The Commissioner therefore accepts that, for the most part, substantial prejudice to the confidentiality of the relevant proceedings of the Council would be likely to result from disclosure of the information, and finds that the exception in regulation 10(5)(d) of the EIRs applies to all of the information in groups 6, 8 and 9, to most of the information in group 7 (with the exception of document 1), and document 13 from group 11.



72. Before going on to consider the public interest test, the Commissioner must make it clear that she does not accept that the arguments outlined above apply in relation to one document in group 7 (document 1) and documents 23 and 24 (group 12). Document 1 is a note of a phone call between two Council officers, and as such is of a different nature from the correspondence with external third parties which makes up the greater part of the file. Documents 23 and 24 are internal valuation reports. The Commissioner does not accept that the information in any of these documents relates to proceedings where confidentiality is protected by law, and finds that the exception in regulation 10(5)(d) was wrongly applied to this information. The Commissioner has already decided that the exception in regulation 10(4)(e) should not be upheld in relation to this information. She will consider later in this decision whether the information is excepted from disclosure under regulation 11(2) of the EIRs.

Regulation 10(5)(d) – public interest test

73. The Commissioner must consider the application of the public interest test in regulation 10(1)(b) in relation to all of the information to which the exception in regulation 10(5)(d) has been found to apply.
74. The Council provided brief arguments on the public interest test, in which it acknowledged a public interest in access to the communications (without going into further detail about the nature of that public interest), but found this to be outweighed by the public interest in maintaining confidentiality of such communications, especially where a court case is a possibility; and by the public interest in enabling the Council to have free and frank exchange of views with third parties, particularly when negotiating a settlement of compensation or a sale of property.
75. As mentioned previously in this decision, the Commissioner has consistently acknowledged the strong public interest recognised by the courts in maintaining the confidentiality of communications between legal adviser and client. More generally, she considers there to be a strong public interest, also recognised by the courts, in the maintenance of confidences.
76. The Commissioner accepts that it may, on occasion, be in the public interest to require the disclosure of confidential material where it would make a significant contribution to debate on a matter of public interest or the scrutiny of the decision making processes of a Scottish public authority. In this context, she has taken into account the submissions received from Mr Julien. While Mr Julien clearly has a very strong personal interest in this matter, the Commissioner has not identified a compelling public interest in the information covered by groups 6 to 9, and in document 13 from group 11. On the other hand, there is clearly a strong public interest in enabling public authorities to undertake their proceedings in confidence where this is required for the effective conduct of public affairs.
77. On balance, the Commissioner has decided that, in all the circumstances of this case, the public interest in making available the information in groups 6 to 9 is outweighed by the public interest in maintaining the exception under regulation 10(5)(d). With the exception of document 1 from group 7, therefore, the Commissioner accepts that the information in groups 6 to 9, and document 13 from group 11, was correctly withheld under regulation 10(5)(d) of the EIRs.



Regulation 11(2) (document 1)

78. Regulation 10(3) of the EIRs requires that any personal data included in environmental information shall not be made available otherwise than in accordance with regulation 11. Regulation 11(2) prohibits disclosure of personal data of which the applicant is not the data subject, where either "the first condition" (set out in regulation 11(3)) or "the second condition" (set out in regulation 11(4)) applies to the information.
79. In order for a public authority to rely on the exception in regulation 11(2), it must show firstly that the information which has been requested 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.
80. Personal data is defined in section 1(1) of the DPA as data which relate to a living individual who can be identified a) from those data, or b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller (the full definition is set out in the Appendix).
81. Of the information the Commissioner has not found to have been properly withheld under any other exception, the Council has applied regulation 11(2) to document 1 in group 7. As noted above, this is a record of a telephone call between two Council officers, who are named in the information. Clearly, therefore, the officers can be identified from the information. Having considered the information carefully, however, and having considered guidance from the (UK) Information Commissioner³ (in particular the guidance on whether information "relates to" an individual), the Commissioner cannot accept that the information *relates* in any meaningful sense to those individuals (as opposed to the aspects of Council business under discussion). In the circumstances, she does not consider this information to be personal data. As she has not found it to have been properly withheld under any other exception, the Commissioner requires the Council to disclose this information.

³ "Data Protection Technical Guidance: Determining what is personal data"

http://www.ico.gov.uk/upload/documents/library/data_protection/detailed_specialist_guides/personal_data_flowchart_v1_with_preface001.pdf



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 from Mr Julien.

As detailed above, the Council wrongly withheld certain information under the exceptions in regulation 10(4)(e) and 10(5)(d) of the EIRs, but these exceptions were correctly applied to some of the information covered by Mr Julien's request. The exception in regulation 11(2) was wrongly applied to some information. To the extent that information was wrongly withheld, the Council failed to comply with regulation 5(1) of the EIRs.

The Commissioner requires the Council to provide Mr Julien with the information which was wrongly withheld from him, as described in Appendix 2.

Appeal

Should either Mr Julien or the City of Edinburgh Council wish to appeal against this decision, there is an appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days after the date of intimation of this decision notice.

Margaret Keyse
Head of Enforcement
22 November 2012



Appendix 1

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;

...

(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;

...

(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–

- (1) A Scottish public authority may refuse a request to make environmental information available if-
 - (a) there is an exception to disclosure under paragraphs (4) or (5); and
 - (b) in all the circumstances, the public interest in making the information available is outweighed by that in maintaining the exception.
- (2) In considering the application of the exceptions referred to in paragraphs (4) and (5), a Scottish public authority shall-
 - (a) interpret those paragraphs in a restrictive way; and
 - (b) apply a presumption in favour of disclosure.
- (3) Where the environmental information requested includes personal data, the authority shall not make those personal data available otherwise than in accordance with regulation 11.
- (4) A Scottish public authority may refuse to make environmental information available to the extent that-

...

 - (e) the request involves making available internal communications.
- (5) A Scottish public authority may refuse to make environmental information available to the extent that its disclosure would, or would be likely to prejudice substantially –

...

 - (d) the confidentiality of the proceedings of any public authority where such confidentiality is provided for by law;

...

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 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.

...



Appendix 2

Schedule of information considered in this case

Group	Description	Decision
1.	Internal correspondence which seeks or gives legal advice.	Correctly withheld under 10(4)(e)
2.	Correspondence with external legal adviser	Correctly withheld under 10(4)(e)
3.	Internal correspondence	Correctly withheld under 10(4)(e)
4.	Internal administrative correspondence following the Lands Tribunal case	Withhold (information falls outwith scope of request)
5.	Notes of two internal meetings re sale of ODH	Wrongly withheld under 10(4)(e) – disclose (documents 17 & 18)
6.	Correspondence about 3 rd party claim for compensation under standard security	Correctly withheld under 10(5)(d)
7.	Internal and external correspondence about planning permission in place at time of CPO	Correctly withheld under 10(5)(d) except for document 1, which should be disclosed as wrongly withheld under 10(4)(e), 10(5)(d) and 11(2).
8.	Correspondence following conclusion of Lands Tribunal	Correctly withheld under 10(5)(d)
9.	Correspondence with parties affected by CPO	Correctly withheld under 10(5)(d)
10.	Meetings with local Councillor and staff from Council departments about potential uses for ODH	Wrongly withheld under 10(4)(e) – disclose documents 2, 3, 6, 7 and 8
11	Internal correspondence on future use for ODH and valuation of site	Some documents correctly withheld under 10(4)(e), some wrongly withheld – disclose documents 4, 5, 9, 10, 11, 12, 14, 16, 20, 23 and 24. Document 13 correctly withheld under 10(5)(d).
12	Communications between external surveyor and Council officers on valuation / potential use for ODH.	Wrongly withheld under 10(4)(e) and 10(5)(d) – disclose documents 21 and 22