

# Decision Notice

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## Decision 158/2014 Dr J Wallace Hinton and the Scottish Public Services Ombudsman

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### Complaint investigation

Reference No: 201400359

Decision Date: 17 July 2014



Scottish Information  
Commissioner



## Summary

On 8 October 2013, Dr Hinton asked the Scottish Public Services Ombudsman (the SPSO) for information sent to and received from Glasgow City Council during a complaint investigation. The SPSO withheld the information under section 26(a) of FOISA, on the basis that its disclosure was prohibited by other legislation.

Following an investigation, the Commissioner founds that the SPSO was entitled to withhold the requested information under section 26(a) of FOISA (on the basis of the statutory prohibition) and regulation 10(5)(d) of the EIRs (on grounds of confidentiality). She found that some of the information was environmental information and therefore should have been handled under the EIRs.

## Relevant statutory provisions

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1) and (2)(b) (Effect of exemptions); 15(1) (Duty to provide advice and assistance); 26(a) (Prohibitions on disclosure); 39(2) (Health, safety and the environment)

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (Interpretation) (paragraphs (a) and (c) of definition of "environmental information"); 5(1), (2)(b) and (3) (Duty to make environmental information available on request); 10(1), (2) and (5)(d) (Exceptions from duty to make environmental information available)

The Scottish Public Services Ombudsman Act 2002 (the SPSO Act) section 19 (Confidentiality of information)

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 8 October 2013, Dr Hinton wrote to the SPSO, requesting the enquiries sent to, and the responses received from, Glasgow City Council (the Council) in connection with an investigation.
2. The SPSO responded on 13 November 2013. It informed Dr Hinton that the information he sought was exempt from disclosure in terms of section 26(a) of FOISA. It also indicated that, to the extent that the information captured was his own personal data, it would respond under the Data Protection Act 1998 (the DPA). The SPSO suggested that the information might be available to Dr Hinton under FOISA once a full response to his complaint had been issued.
3. On 24 November 2013, Dr Hinton wrote to the SPSO requesting a review of its decision.
4. The SPSO notified Dr Hinton of the outcome of its review on 17 December 2013, upholding its original decision without modification.

5. On 18 February 2014, Dr Hinton wrote to the Commissioner, stating that he was dissatisfied with the outcome of the SPSO's review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
6. The application was validated by establishing that Dr Hinton made a request for information to a Scottish public authority and 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 3 March 2014, the SPSO was notified in writing that an application had been received from Dr Hinton and was asked to provide the Commissioner with the information withheld from him. The SPSO responded with the information requested and the case was then allocated to an investigating officer.
8. The investigating officer subsequently contacted the SPSO, 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 SPSO was asked to comment on the application of the EIRs to any of the information, and to justify its reliance on any provisions of either FOISA or the EIRs it considered applicable to the information requested.
9. During the investigation, the SPSO disclosed all correspondence it had authored and issued to the Council. Dr Hinton confirmed that he wished to withdraw this aspect of his application to the Commissioner. The decision below, therefore, focusses on the responses received from the Council in connection with the SPSO's investigation.
10. Also during the investigation, the SPSO concluded that some of the information captured by Dr Hinton's request was environmental information. It therefore sought to rely on provisions in the EIRs to withhold this information. Dr Hinton was provided with an opportunity to comment on the SPSO's reliance on provisions of the EIRs.

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

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11. In coming to a decision on this matter, the Commissioner considered all of the withheld information and the relevant submissions, or parts of submissions, made to her by both Dr Hinton and the SPSO. She is satisfied that no matter of relevance has been overlooked.

### **FOISA or EIRs?**

12. In this case, the SPSO has considered Dr Hinton's request as one which partially seeks environmental information in terms of the EIRs. Environmental information is defined in regulation 2(1) of the EIRs. 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.
13. Having considered the nature of the withheld information, the Commissioner is satisfied that at least some of it is environmental information as defined within regulation 2(1) of the EIRs. The Commissioner is satisfied that it would fall within either paragraph (a) of the definition of environmental information (as information on the state of the elements of the environment) or paragraph (c) of that definition (as information on measures affecting or likely to affect those elements).

14. Having drawn this conclusion, the Commissioner must conclude that, by initially failing to consider and respond to Dr Hinton's request in terms of the EIRs (in so far as it related to environmental information), the SPSO failed to comply with regulation 5(1) of the EIRs.

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

15. 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. During the investigation, the SPSO stated that it wished to apply the exemption in section 39(2) to the information requested by Dr Hinton. In this case, the Commissioner accepts that the SPSO was entitled to apply the exemption to the requested environmental information, given her conclusion that it is properly classified as environmental information.
16. As there is a separate statutory right of access to environmental information available to the applicant in this case, the Commissioner also accepts that the public interest in maintaining this exemption and in dealing with the request (insofar as it concerns environmental information) in line with the requirements of the EIRs outweighs any public interest in disclosing the information under FOISA.
17. As the withheld information in this case comprises both environmental and non-environmental information, the Commissioner is required to consider the SPSO's handling of the request in terms of both FOISA and the EIRs.

#### **Section 26(a) of FOISA – prohibitions on disclosure (non-environmental information)**

18. Section 26(a) of FOISA exempts information from disclosure under FOISA where disclosure of the information is prohibited by, or under, any enactment. This is an absolute exemption, in that it is not subject to the public interest test set down in section 2(1)(b) of FOISA. In this case, the SPSO argued that such a prohibition was created by section 19 of the SPSO Act (which is reproduced in the Appendix).
19. Section 19(1) of the SPSO Act provides that information obtained by the Ombudsman, or any of the Ombudsman's advisers, in connection with any matter in respect of which a complaint or a request has been made must not be disclosed, except for a limited range of purposes specified elsewhere in that section. These purposes do not include disclosure of information under FOISA.
20. The Commissioner accepts that section 19(1) of the SPSO Act creates a prohibition on the disclosure of information that engages section 26(a) of FOISA. Section 19(1) clearly states that the prohibition relates to information "obtained" by the Ombudsman or any of his advisers in connection with any matter in respect of which a complaint or a request has been made.
21. Having considered the information withheld in this case, the Commissioner is satisfied that the information under consideration was obtained by the SPSO during its investigation of a complaint and is information to which the prohibition in section 19(1) applies. The Commissioner therefore accepts that the SPSO was entitled to apply the exemption in section 26(a) of FOISA to all of the non-environmental information sought by Dr Hinton.

#### **Regulation 10(5)(d) – confidentiality (environmental information)**

22. Regulation 10(5)(d) states 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.

23. As with all of the exceptions under regulation 10, a Scottish public authority applying this exception must interpret it in a restrictive way and apply a presumption in favour of disclosure (regulation 10(2)). Even where the exception applies, the information must be released unless, in all the circumstances, the public interest in making the information available is outweighed by that in maintaining the exception (regulation 10(1)(b)).
24. The first matter to be addressed by the Commissioner, therefore, is whether the information relates to proceedings of the SPSO, the confidentiality of which is protected by law. She must then consider whether disclosure of the information would, or would be likely to, prejudice that confidentiality substantially.
25. The SPSO submitted that the rationale behind the prohibition on disclosure in the SPSO Act was to allow the SPSO to carry out investigations in private. This was in order to protect those making complaints to the SPSO, those being investigated and those assisting the SPSO in carrying out investigations. It argued that the purpose of these provisions, and the maintenance of confidentiality for which they provided, included not dissuading people from making complaints, encouraging frankness and openness on the part of those providing information, and giving effect to the reasonable expectation of confidentiality on the part of those submitting information to the SPSO. The SPSO stated that those who engage with its investigation process had an expectation that it would be conducted in private. Its ability to meet those expectations was crucial to the effective functioning of its complaints investigations.
26. In the Commissioner's view, the information under consideration is clearly related to proceedings of the SPSO, and the confidentiality of that information is protected by law by virtue of the expectation created by the prohibition in section 19 of the SPSO Act.
27. The Commissioner will therefore go on to consider whether disclosure of the information would have prejudiced substantially, or would have been likely to prejudice substantially, the confidentiality of the proceedings of the SPSO, as required by regulation 10(5)(d) of the EIRs.
28. The Commissioner has made clear in previous decisions that the test of substantial prejudice is a high one, requiring a real risk of actual, significant harm. In this case, the Commissioner accepts that the information was provided to the SPSO in confidence, with an expectation that the information would be used in private by the SPSO as part of an investigation. The Commissioner accepts that the disclosure of such information would discourage people from submitting complaints to the SPSO and would deter frankness and openness by parties assisting the SPSO in its investigation.
29. In the circumstances, including the nature of the information and the timing of the request, the Commissioner accepts that making it available would have caused, or would have been likely to cause, substantial prejudice to the confidentiality of the SPSO's proceedings. Consequently, the Commissioner accepts that the SPSO was entitled to apply the exception in regulation 10(5)(d) to the environmental information under consideration.
30. The Commissioner must now consider, as required by regulation 10(1)(b), whether the public interest in making the information available is outweighed by the public interest in maintaining the exception.

### *The public interest test*

31. The SPSO submitted that there was a public interest in allowing all parties involved in an investigation to provide information to it in confidence. In the SPSO's view, disclosure of the information might discourage full and frank cooperation with its investigations. Additionally, the SPSO considered that disclosure of the information would inhibit the open and candid discussions the SPSO required to have with its advisers. All of this would have a detrimental effect on the SPSO's complaints investigation function, which would not be in the public interest.
32. The Commissioner accepts the public interest arguments put forward by the SPSO in support of the information being withheld. In her view, it is in the public interest that the SPSO should be able to receive information in confidence during an investigation, in order that it can conduct a comprehensive investigation. The Commissioner considers it is in the public interest that parties involved in an investigation can communicate freely with the SPSO, in order to allow the SPSO to reach an equitable decision on the complaints it receives. In the circumstances, she is unable to identify any public interest arguments of substance in support of this particular information being disclosed. Consequently, the Commissioner concludes that the strong public interest in maintaining the exception outweighs any public interest that exists in making the information available, and is satisfied that the information could be properly withheld under regulation 10(5)(d).
33. The Commissioner notes that the information requested by Dr Hinton was provided to him during this investigation, following the conclusion of the SPSO's investigation and consultation with the Council in question.

### **Regulation 5(3)**

34. In his correspondence with the Commissioner, Dr Hinton queried whether the application of regulation 10(5)(d) in this context could be compatible with the provisions of regulation 5(3).
35. Regulation 5(3) of the EIRs provides that any enactment or rule of law which would prevent "the making available of information in accordance with these regulations" shall not apply. The Commissioner has considered this point.
36. In the Commissioner's view, "in accordance with these regulations" must mean in accordance with the whole scheme created by the EIRs. Clearly, in terms of regulation 5(2)(b), this includes (where applicable) all the exceptions in regulation 10. None of the exceptions is directly equivalent to section 26(a) of FOISA: it is difficult to see how such an exception could be compatible with regulation 5(3). What the Commissioner has been asked to (and has) considered here is whether, in the circumstances of this case, a legal obligation of confidentiality was created in relation to information covered by section 19 of the SPSO Act. In the particular circumstances applying here, she is satisfied that it was, and that the remaining conditions required by regulation 10(5)(d) were satisfied.
37. In addition, the Commissioner had to be satisfied, on balance, that the public interest favoured maintaining the exception in this particular case. It does not follow that the same would apply in every case where section 19 applied to the information, so the Commissioner is not saying that disclosure of information to which that section applies will automatically be excepted from disclosure under the EIRs. Addressing the exception on that basis, she does not consider it to conflict with regulation 5(3).

## **Decision**

The Commissioner finds that the Scottish Public Services Ombudsman (the SPSO) partially complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) and the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by Dr Hinton.

The Commissioner finds that by failing to identify and respond to Dr Hinton's information request as (in part) one seeking environmental information as defined in regulation 2(1) of the EIRs, the SPSO breached regulation 5(1) of the EIRs.

The Commissioner finds that the SPSO was entitled to withhold the environmental information sought by Dr Hinton under the exception in regulation 10(5)(d) of the EIRs. The Commissioner also finds that the SPSO was entitled to withhold the remaining information under the exemption in section 26(a) of FOISA.

The Commissioner does not require the SPSO to take any action in response to this decision.

## **Appeal**

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Should either Dr Hinton or the Scottish Public Services Ombudsman wish to appeal against this decision, they have the right to appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days after the date of intimation of this decision.

**Margaret Keyse**  
**Head of Enforcement**  
**17 July 2014**



### 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 –

- (a) the provision does not confer absolute exemption; and
- (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

- (2) For the purposes of paragraph (a) of subsection 1, the following provisions of Part 2 (and no others) are to be regarded as conferring absolute exemption –

...

- (b) section 26;

...

#### 26 Prohibitions on disclosure

Information is exempt information if its disclosure by a Scottish public authority (otherwise than under this Act)-

- (a) is prohibited by or under an enactment;

...

#### 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;

...

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

...

## 5 Duty to make available environmental information on request

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

(2) The duty under paragraph (1)-

...

(b) is subject to regulations 6 to 12.

...

(3) Any enactment or rule of law which would prevent the making available of information in accordance with these Regulations shall not apply.

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

(1) A Scottish public authority may refuse a request to make environmental information available if-

(a) there is an exception to disclosure under paragraphs (4) or (5); and

(b) in all the circumstances, the public interest in making the information available is outweighed by that in maintaining the exception.

(2) In considering the application of the exceptions referred to in paragraphs (4) and (5), a Scottish public authority shall-

(a) interpret those paragraphs in a restrictive way; and

(b) apply a presumption in favour of disclosure.

...

(5) A Scottish public authority may refuse to make environmental information available to the extent that its disclosure would, or would be likely to, prejudice substantially-

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

## **Scottish Public Services Ombudsman Act 2002**

### **19 Confidentiality of information**

- (1) Information obtained by the Ombudsman or any of the Ombudsman's advisers in connection with any matter in respect of which a complaint or a request has been made must not be disclosed except for any of the purposes specified in subsection (2) or as permitted by subsection (3).
- (2) Those purposes are-
  - (a) the purposes of-
    - (i) any consideration of the complaint or request (including any statement under section 11),
    - (ii) any investigation of the matter (including any report of such an investigation),
  - (b) the purposes of any proceedings for-
    - (i) an offence under the Official Secrets Acts 1911 to 1989 alleged to have been committed in respect of information obtained by the Ombudsman,
    - (ii) an offence of perjury alleged to have been committed in the course of any investigation of the matter,
  - (c) the purposes of an inquiry with a view to the taking of any of the proceedings mentioned in paragraph (b),
  - (d) the purposes of any proceedings under section 14.
- (3) Where information referred to in subsection (1) is to the effect that any person is likely to constitute a threat to the health or safety of individuals (in particular or in general), the Ombudsman may disclose the information to any person to whom the Ombudsman thinks it should be disclosed in the interests of the health or safety of the particular individuals or, as the case may be, individuals in general.
- (4) In relation to information disclosed under subsection (3), the Ombudsman must-
  - (a) where the Ombudsman knows the identity of the person to whom the information relates, inform that person of the disclosure of the information and of the identity of the person to whom it has been disclosed, and
  - (b) inform the person from whom the information was obtained of the disclosure.
- (4A) The duty under subsection (4)(a) to inform a person about the identity of a person to whom information has been disclosed does not apply where informing the other person is likely to constitute a threat to the health or safety of the latter person.
- (5) It is not competent to call upon the Ombudsman or the Ombudsman's advisers to give evidence in any proceedings (other than proceedings referred to in subsection (2)) of matters coming to the knowledge of the Ombudsman or advisers in connection with any matter in respect of which a complaint or request has been made.

- (6) A member of the Scottish Executive may give notice in writing to the Ombudsman with respect to-
- (a) any document or information specified in the notice, or
  - (b) any class of document or information so specified, that, in the opinion of the member of the Scottish Executive, the disclosure of the document or information, or of documents or information of that class, would be contrary to the public interest.
- (7) Where such a notice is given nothing in this Act is to be construed as authorising or requiring the Ombudsman or any of the Ombudsman's advisers to communicate to any person or for any purpose any document or information specified in the notice, or any document or information of a class so specified.
- (8) Information obtained from -
- (a) the Information Commissioner by virtue of section 76 of the Freedom of Information Act 2000 (c.36)
  - (b) the Scottish Information Commissioner by virtue of section 63 of the Freedom of Information (Scotland) Act 2002 (asp 13),
- is to be treated for the purposes of subsection (1) as obtained in connection with any matter in respect of which a complaint or request has been made.
- (9) In relation to such information, subsection (2)(a) has effect as if-
- (a) the reference in sub-paragraph (i) to the complaint or request were a reference to any complaint or request, and
  - (b) the reference in sub-paragraph (ii) to the matter were a reference to any matter.
- (10) In this section and section 20 references to the Ombudsman's advisers are to persons from whom the Ombudsman obtains advice under paragraph 10 of schedule 1.

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