

# Decision Notice

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**Decision 132/2017: Mr Robert Hogg and the City of Edinburgh Council**

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**Correspondence about planning matters at a specified site**

Reference No: 201700347

Decision Date: 9 August 2017



Scottish Information  
Commissioner

## Summary

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The Council was asked for correspondence relating to planning matters for a site in Ratho. The Council provided some information. During the Commissioner's investigation, the Council disclosed further information that fell within scope of the request but withheld some personal information.

After investigating, the Commissioner accepted that all relevant information had been identified and the Council had correctly withheld personal information.

## Relevant statutory provisions

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The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (paragraphs (a), (b) and (c) of definition of "environmental information"); 5(1) and (2) (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) sections 1(1) (Basic interpretative provisions) (definition of "personal data"); Schedules 1 (The data protection principles, Part I - the principles) (the first data protection 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 Appendix 1 to this decision. The Appendix forms part of this decision.

All references in this decision to "the Commissioner" are to Margaret Keyse, who has been appointed by the Scottish Parliamentary Corporate Body to discharge the functions of the Commissioner under section 42(8) of the Freedom of Information (Scotland) Act 2002 (FOISA).

## Background

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1. On 27 November 2016, Mr Hogg asked the Council for all internal and external correspondence during 2016 relating to planning matters for a named site in Ratho, including the content of internal email correspondence.
2. The Council responded on 6 December 2016. It disclosed some information and withheld the remainder.
3. On 9 December 2016, Mr Hogg emailed the Council requesting a review of its decision. He noted that the information he had received made no reference to recent use of the site for the storage and distribution of large quantities of road repair materials, and believed that the Council should hold information about this.
4. The Council notified Mr Hogg of the outcome of its review on 12 January 2017. It identified additional information covered by his request, and apologised that the existence of these records was not set out in its original response. The Council confirmed its decision to withhold information some information under various exceptions, and stated that Mr Hogg had received all of the information to which he was entitled.
5. On 21 February 2017, Mr Hogg applied to the Commissioner for a decision in terms of section 47(1) of FOISA. By virtue of regulation 17 of the EIRs, Part 4 of FOISA applies to the

enforcement of the EIRs as it applies to the enforcement of FOISA, subject to specified modifications. Mr Hogg appealed against the decision to withhold information covered by his request. He considered that the Council was abusing its position as a local planning authority by not taking appropriate enforcement action against a breach of planning regulations.

## Investigation

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6. The application was accepted as valid. The Commissioner confirmed that Mr Hogg made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to her for a decision.
7. On 21 March 2017, the Council was notified in writing that Mr Hogg had made a valid application. The Council was asked to send the Commissioner the information withheld from Mr Hogg. The Council provided the information and the case was allocated to an investigating officer.
8. On 27 April 2017, the Council confirmed that it was relying upon regulations 10(5)(f) and 11(2) of the EIRs to withhold the information (respectively, the exception relating to information provided by a person not under any legal obligation to supply it, and the exception for personal data), but was no longer relying upon regulation 10(5)(e) of the EIRs (commercial confidentiality).
9. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. These questions focused on the searches the Council had carried out to identify information covered by the request, and its reasons for withholding information under the exceptions in regulations 10(5)(f) and 11(2) of the EIRs.
10. Mr Hogg was invited to provide his legitimate interest in obtaining the withheld personal data and his reasons why disclosure of the withheld information would be in the public interest.
11. The Council entered into dialogue with the Commissioner regarding the information being withheld. On 2 June 2017, the Council disclosed further information from the withheld documents to Mr Hogg. It withheld the remaining information solely under regulation 11(2) of the EIRs (personal data). It explained to Mr Hogg in further detail why the exception applied to the withheld information.
12. Mr Hogg was asked if he required a decision from the Commissioner, given that the only information still withheld was personal data. Mr Hogg confirmed that he required a decision from the Commissioner. He did not accept that all the information falling in scope of his request had been identified by the Council.
13. On 15 June 2017, the investigating officer contacted the Council, asking it to describe the searches it had conducted and asking for its submissions in relation to the information withheld under regulation 11(2) of the EIRs. The Council responded on 29 June 2017.
14. On 12 July 2017, Mr Hogg provided a copy of a document that he considered supported his position that the Council had not disclosed all the information falling in scope of the request. The Council was asked about searches relating to the matters covered in this document, and provided comments.

## Commissioner's analysis and findings

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15. 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 Mr Hogg and the Council. She is satisfied that no matter of relevance has been overlooked.

### Application of the EIRs

16. The Commissioner is satisfied that the information covered by this request is environmental information, as defined in regulation 2(1) of the EIRs (paragraphs (a) and (c) of the definition of "environmental information": see Appendix 1). Mr Hogg's request was for information about a potential breach of planning consent (relating to the storage and distribution of road construction materials), which relates to activities (the operations on the site) (paragraph (c) of the definition) affecting or likely to affect the elements referred to in paragraph (a) of the definition, in particular air, atmosphere and landscape.
17. Mr Hogg has not disputed the Council's decision to handle the request under the EIRs and so the Commissioner will consider the information solely in terms of the EIRs in what follows.

### Regulation 5(1) – information falling within scope of the request

18. Regulation 5(1) of the EIRs requires a Scottish public authority which holds environmental information to make it available when requested to do so. It is important to bear in mind that this obligation relates to information actually held by an authority when it receives the request, as opposed to information which a requester believes the authority should hold.
19. On receipt of a request for environmental information, the authority must establish what information it holds falling within the scope of the request. Having done so, regulation 5(1) requires the authority to provide that information to the requester, unless a qualification in regulations 6 to 12 applies (see regulation 5(2)(b)).
20. The Council stated that any information falling in scope of Mr Hogg's request would have been held by its Planning & Building Standards service. The Council confirmed that the relevant records had been searched by Council Officers with responsibility for the processing of Planning and Building Standards' cases and the associated electronic data. The Council submitted that these individuals would be able to determine if information within the scope of this request was held by their service.
21. The Council provided details of the key words it had used in its searches, and the records systems which were searched. It explained that these systems are used to support the delivery of the planning service, including planning enforcement, and hold copies of all correspondence sent and received by the service. The Council stated that this ensures that all members of the service have access to the information they require at any time, and correspondence would not be held elsewhere.
22. The Council provided copies of screen prints of its searches.
23. The Council was shown an enforcement report into a breach of planning consent at the site in question, which Mr Hogg sent to the Commissioner during the investigation. The Council commented that this was a public document, available to view on its website. The document included a reference to a further site visit carried out by Council officials. The Council confirmed that a specific search had been undertaken for information relating to this site visit, but no additional correspondence had been identified.

24. After investigating, the Commissioner is satisfied that the Council carried out adequate searches, and has identified and located all the information falling in scope of the request.

### **Regulation 5 of the EIRs – Duty to make environmental information on request**

25. Regulation 5(1) of the EIRs requires a Scottish public authority which holds environmental information to make it available when requested to do so by any applicant. In addition, regulation 5(2)(a) requires a Scottish public authority to disclose the requested information as soon as possible and, in any event, no later than 20 working days after receipt of the request.
26. As noted above, the Council disclosed information covered by Mr Hogg's request during the Commissioner's investigation (and therefore well outwith 20 working days). Consequently, the Commissioner finds that the Council failed to comply with regulation 5(2)(a) of the EIRs.

### **Regulation 10(5)(e) of the EIRs – confidentiality of commercial or industrial information**

27. As mentioned above, the Council relied on regulation 10(5)(e) in its review response, but stated at the start of the investigation that it was not relying upon this regulation to withhold information. The Council has not provided any submission to show that the exception was correctly applied when the Council reviewed its response to Mr Hogg's request. In the absence of such submissions from the Council, the Commissioner must conclude that the information in question was not excepted from disclosure under regulation 10(5)(e) of the EIRs when the Council issued its review response to Mr Hogg.

### **Regulation 10(5)(f) of the EIRs – interests of the person who provided the information**

28. As mentioned above, the Council withdrew its reliance on regulation 10(5)(f) during the investigation. Again, the Council has not provided submissions on this change in position. In the absence of submissions from the Council, the Commissioner must conclude that the information in question was not excepted from disclosure under regulation 10(5)(f) of the EIRs, when the Council issued its review response to Mr Hogg.

### **Regulation 11(2) of the EIRs - personal data of third parties**

29. The information withheld from Mr Hogg under regulation 11(2) of the EIRs is complaint correspondence from third parties, specifically their names, email address, postal address and the reference number given to their property by the Council. The Council provided Mr Hogg with copies of the complaints after redacting all personal data.
30. In order for a Scottish public authority to rely on this exception, it must show (i) that the information is personal data for the purposes of the DPA, and (ii) that making it available would contravene at least one of the data protection principles laid down in the DPA. In this case, the Council argued that the first data protection principle would be contravened if the information was disclosed.

#### *Is the withheld information personal data?*

31. The definition of personal data is set out in Appendix 1. The Commissioner accepts that living individuals would be identified from the withheld information. The information relates to the individuals in a biographical sense and is their personal data.

### *The first data protection principle*

32. The first data protection principle states that the processing of personal data (in this case, making those data publicly available 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. In the case of sensitive personal data, at least one of the conditions in Schedule 3 to the DPA must also be met. The Commissioner has considered the definition of sensitive personal data set out in section 2 of the DPA and does not consider any of the withheld information to be sensitive personal data.
33. There are three separate aspects to the first data protection principle: (i) fairness, (ii) lawfulness and (iii) the conditions in the schedules. These three aspects are interlinked. For example, if there is a specific condition which permits the personal data to be made available, it is likely that disclosure will also be fair and lawful.
34. 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 made available. If any of these conditions can be met, she must then consider whether the disclosure of these personal data would also be fair and lawful.

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

35. The Council confirmed that the individuals concerned had not been asked for their consent to disclose the information. The Council referred to the webpage<sup>1</sup> used by the individuals to submit a complaint, which states that contact details will not be passed on. The Commissioner is satisfied that the individuals concerned contacted the Council to make a complaint, in their capacity as private individuals.
36. The Commissioner has considered all the conditions in Schedule 2 and considers that condition 6 is the only one which might be relevant in this case. Condition 6 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 (i.e. the individual to whom the data relates). The processing in this case would be making the data available in response to Mr Hogg's request.
37. There are, therefore, a number of different tests which must be satisfied before condition 6 can be met. These are:
  - i. Does Mr Hogg have a legitimate interest or interests in obtaining the personal data?
  - ii. If so, is the disclosure necessary to achieve those legitimate interests? In other words, is the processing proportionate as a means and fairly balanced as to ends, or could these interests be achieved by means which interfere less with the privacy of the data subjects?
  - iii. Even if the processing is necessary for Mr Hogg's legitimate interests, would the disclosure nevertheless cause unwarranted prejudice to the rights and freedoms or legitimate interests of the data subjects
38. There is no presumption in favour of disclosure of personal data under the general obligation laid down in FOISA. The legitimate interests of Mr Hogg must outweigh the rights and

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<sup>1</sup> [https://www.edinburgh.gov.uk/forms/form/25/en/report\\_a\\_possible\\_breach\\_of\\_planning\\_controls](https://www.edinburgh.gov.uk/forms/form/25/en/report_a_possible_breach_of_planning_controls)

freedoms or legitimate interests of the data subjects before condition 6 permits personal data to be disclosed. If the two are evenly balanced, the Commissioner must find that the Council was correct to refuse to disclose the information to Mr Hogg.

*Does Mr Hogg have a legitimate interest or interests?*

39. There is no definition within the DPA of what constitutes a "legitimate interest", but the Commissioner takes the view that the term indicates that matters in which an individual properly has an interest should be distinguished from matters about which he or she is simply inquisitive. The Commissioner's published guidance on regulation 11(2) of the EIRs<sup>2</sup> states:
- "In some cases, the legitimate interest might be personal to the applicant - e.g. he or she might want the information in order to bring legal proceedings. With most requests, however, there are likely to be wider legitimate interests, such as the scrutiny of the actions of public bodies or public safety."
40. Mr Hogg was asked to explain why he had a legitimate interest in obtaining the withheld personal data. He commented that anyone corresponding with the Council in a business capacity is aware that information can be disclosed under Freedom of Information legislation.
41. Given the nature of the personal data under consideration and the lack of any specific submissions from Mr Hogg on why he needs to obtain this information, or on why the public would benefit from knowing the names, etc. of the complainers, the Commissioner does not accept that Mr Hogg has demonstrated that he has a legitimate interest in its disclosure. She does not consider the complainants' identities and personal data to be of obvious relevance, in relation to Mr Hogg's concerns about the breach of planning consent.
42. Given this conclusion, the Commissioner finds that there is no condition in Schedule 2 which would permit disclosure of the personal data under consideration. In the absence of a condition permitting disclosure, that disclosure would be unlawful. Consequently, the Commissioner finds that disclosure would breach the first data protection principle and that the information is therefore excepted from disclosure (and properly withheld) under regulation 11(2) of the EIRs.

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<sup>2</sup> <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/EIRsexceptionbriefings/Regulation11/Regulation11PersonalInformation.aspx>

## **Decision**

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

The Commissioner is satisfied that the Council identified all information falling in scope of the request. She finds that the Council was entitled to withhold personal data under regulation 11(2) of the EIRs.

However, she finds that the Council wrongly applied regulations 10(5)(e) and 10(5)(f) of the EIRs to the information it withheld from Mr Hogg. The Council also failed to comply with regulation 5(1) and (2)(a) of the EIRs as it failed to provide Mr Hogg with some information covered by his request within 20 working days.

Given that the Council has disclosed all non-excepted information covered by Mr Hogg's request, the Commissioner does not require the Council to take any further action in respect of this failure.

## **Appeal**

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Should either Mr Hogg or the City of Edinburgh Council wish to appeal against this decision, they have the right to appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days after the date of intimation of this decision.

**Margaret Keyse**  
**Acting Scottish Information Commissioner**

**9 August 2017**



### The Environmental Information (Scotland) Regulations 2004

#### 2 Interpretation

(1) In these Regulations –

...

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

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- (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
- (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in paragraph (a);
- (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in paragraphs (a) and (b) as well as measures or activities designed to protect those elements;

...

#### 5 Duty to make available environmental information on request

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

(2) The duty under paragraph (1)-

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

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