

# Decision Notice

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**Decision 055/2016: Ms X and City of Edinburgh Council**

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## **Inspection records**

Reference No: 201502030

Decision Date: 8 March 2016



Scottish Information  
Commissioner

## Summary

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On 21 August 2015, Ms X asked City of Edinburgh Council (the Council) for information about road inspections in a specific street.

The Council supplied some information but withheld the remainder on the basis that it was subject to litigation privilege. Following a review, Ms X remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the Council was entitled to withhold the information on the basis that it was subject to litigation privilege and regulation 10(5)(b) of the EIRs applied.

## Relevant statutory provisions

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

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.

## Background

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1. On 21 August 2015, Ms X made a request for information to the Council. The request stated:  
*"I would like to know when Hope Terrace (EH9 2AR) was last inspected by the roads/pavements team for defects and how often that has happened since the start of 2014. Moreover, under Freedom of Information, I would like to see the full reports of any such inspections."*
2. The Council responded on 18 September 2015, providing some information but withholding the remainder on the basis that it was subject to litigation privilege (regulation 10(5)(b) of the EIRs).
3. On 29 September 2015, Ms X wrote to the Council, requiring a review of its decision. She considered the decision to withhold the information unreasonable.
4. The Council notified Ms X of the outcome of its review on 27 October 2015. The Council upheld its application of regulation 10(5)(b), with reasons. It also applied regulation 11(2) of the EIRs to some information, as personal data.
5. On 31 October 2015, Ms X wrote to the Commissioner. She 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. Ms X stated she was dissatisfied with the outcome of the Council's review because she considered the information to be relevant in connection with a potential claim.

## Investigation

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6. The application was accepted as valid. The Commissioner confirmed that Ms X 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 23 November 2015, the Council was notified in writing that Ms X had made a valid application. The Council was asked to send the Commissioner the information withheld from her. The Council provided the information and the case was allocated to an investigating officer.
8. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Council was invited to comment on this application, with reference to exceptions applied in its review outcome.
9. Ms X was also asked for her comments as to why she believed it would be in the public interest for the information to be disclosed.
10. Both the Council and Ms X provided submissions. Ms X stated that she did not require the personal data withheld under regulation 11(2) 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 Ms X and the Council. She is satisfied that no matter of relevance has been overlooked.

### Application of the EIRs

12. It is evident from the subject matter (inspection of the condition of roads/pavements) that any information falling within the scope of Ms X's request would be environmental information, as defined in regulation 2(1) of the EIRs (paragraph (a) of the definition, as information relating to the state of the elements of the environment). Ms X has not disputed this and the Commissioner will therefore consider the Council's handling of the request solely in terms of the EIRs.

### Regulation 10(5)(b)

13. Regulation 10(5)(b) of the EIRs 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 course of justice, the ability of an individual to receive a fair trial or the ability of any public authority to conduct an inquiry or a criminal or disciplinary nature. As with all exceptions in regulation 10, it is subject to the public interest test in regulation 10(1)(b) and, in line with regulation 10(1)(a), must be interpreted in a restrictive way with a presumption in favour of disclosure. The Council applied this exception on the basis that the information withheld was subject to litigation privilege.

#### *Litigation privilege*

14. The Commissioner recognises that the course of justice requires that parties to litigation (including public authorities) are able to prepare fully for a case. The principle, derived from the adversarial nature of litigation, is that no party can recover material which another party has made in preparing its own case. Disclosure of information covered by litigation privilege

will in many cases lead to substantial prejudice relevant to the exception in regulation 10(5)(b).

15. However, the Commissioner would also note that, even where information is subject to litigation privilege, an authority still must be satisfied that disclosure would, or would be likely to, cause substantial prejudice to the relevant interest before applying regulation 10(5)(b). Whether relevant harm is likely to occur will depend on the circumstances of the particular case under consideration.
16. Communications *post litem motam* (i.e. those subject to litigation privilege) are granted confidentiality in order to ensure that any person or organisation involved in or contemplating a court action can prepare their case as fully as possible, without the risk that their opponent/s or prospective opponent/s will gain access to the material generated by their preparations. The privilege covers communications at the stage when litigation is pending or in contemplation. Whether a particular document was prepared in contemplation of litigation will be a question of fact. The key question is whether litigation was actually in contemplation at a particular time.
17. For information to be covered by litigation privilege, it must have been created for the "dominant purpose" of obtaining legal advice on the litigation or for lawyers to use in preparing the case. Information created for another purpose before the litigation was anticipated may sometimes still be covered if brought together for the purpose of the litigation. This may be the case if pre-existing documents are relevant to the case and the lawyer has exercised skill and judgement in selecting and compiling them, particularly if the selection of documents reveals the trend of the advice on the case. However, pre-existing documents will not become privileged just by being passed over to a lawyer.
18. Litigation privilege will apply to documents created by either party to the potential litigation, expert reports prepared on their behalf and legal advice given in relation to the potential litigation: the communication need not involve a lawyer to qualify. The litigation contemplated need never actually happen for the privilege to apply, and it will continue to apply after any litigation has been concluded.

#### *The withheld information*

19. The Council withheld some lines from an inspection report sheet covering inspection work undertaken at the site where Ms X stated she had had an accident.
20. The Council explained that the inspection in question had been carried out as a direct result of a compensation claim having been made and that the report had been prepared in preparation of litigation. The Council submitted that because its claim handlers had rejected Ms X's injury claim, the next step would be for Ms X to pursue civil litigation. The Council stated that the inspection report would be used to defend such a claim and was, in its words, an "essential cornerstone" in its preparation for such an eventuality. It noted that Ms X still had some time left in which to pursue her claim.
21. The Council explained that an inspection of the area in question would be carried out following notification of any claim of this kind, as had happened in this case. This was required for reporting to the claim handlers, in order that they could consider the claim. It was, it submitted, a fundamental part of responding to the claim and preparing for any resulting civil litigation. Thus, it was done in contemplation of such litigation. It explained the inspection and reporting process, concluding that the information recorded in this case would

be the only relevant information held. The Council provided evidence that the inspection in question had been requested following receipt of Ms X's claim.

22. Having considered the content of the withheld information and the Council's submissions, the Commissioner accepts that the character of the withheld information brings it within the scope of litigation privilege.
23. The information cannot be privileged unless it is also confidential. A claim of confidentiality cannot be maintained where, prior to a public authority's consideration of an information request or conduct of review, information has been made public, either in full or in a summary sufficiently detailed to have the effect of disclosing the information. Where confidentiality has been lost in respect of part or all of the information under consideration, any privilege associated with that information is also effectively lost.
24. The Council submitted that the inspection details were not in the public domain and remained confidential. In the circumstances, the Commissioner accepts this.
25. Given the confidentiality afforded to the information, the Commissioner accepts that it was (and remains) subject to litigation privilege. The course of justice requires that parties to litigation (including public authorities) are able to prepare fully for a case. The Commissioner is satisfied that the information was created in contemplation of litigation and that disclosure of this information (in breaching the confidentiality attached to such information) would have prejudiced substantially, or would have been likely to prejudice substantially, the course of justice. She has reached this conclusion bearing in mind the general importance attached by the courts to maintaining confidentiality of communications (including the confidentiality afforded by litigation privilege) on administration of justice grounds.
26. Consequently, the Commissioner is satisfied that the Council was entitled to apply the exception in regulation 10(5)(b) of the EIRs to this information.

#### *Public interest test*

27. Having found that the Council correctly applied the exception in regulation 10(5)(b) to the pertinent redacted information, the Commissioner is required to consider the public interest test in regulation 10(1)(b). This provides that a public authority may only withhold information to which an exception applies where, in all the circumstances, the public interest in making the information available is outweighed by the public interest in maintaining the exception.

#### Submissions from Ms X

28. Ms X submitted that the Council was asking her for information to prove that the state of the pavement at the site in question was unsatisfactory when she fell, or before that. She stated that she would like the Council to disclose its report in full (minus the personal data of the inspectors) unless they had good reason not to do so.
29. It was Ms X's view that there was also a general public interest that information should be accessible and disclosure would enhance scrutiny of decision-making processes and thereby improve accountability and participation.
30. She also submitted that disclosure of such information would contribute to ensuring that a public authority with regulatory responsibilities was adequately discharging its functions, and ensure fairness in relation to applications or complaints, reveal malpractice or enable the correction of misleading claims.

### Submissions from the Council

31. The Council recognised that, in order to promote transparency and accountability in local government, there was a public interest in disclosure of the requested information.
32. The Council pointed out that all relevant information within scope of the request and prepared prior to the receipt of the claim had been released to Ms X. The Council acknowledged that the provision of information prepared in preparation of litigation would evidence to the claimant that the Council had correctly processed her claim application.
33. However, the Council went on to submit that it was acting on behalf of the citizens of Edinburgh when seeking to prepare and defend any civil litigation brought against it. It was the Council's view that it remained essential for it to be able to prepare for legal action in private and be confident that information it produced in preparation for litigation would not be provided to the other party through Freedom of Information legislation. The Council stated that as the claims process was not completed and the withheld information was produced specifically in preparation for litigation, on balance, the public interest in maintaining the exception outweighed disclosure at the point of the applicant's request. The Council accepted that this position would change following the completion of the claims process and any civil litigation.

### The Commissioner's conclusions

34. As indicated above, on administration of justice grounds, the Commissioner accepts that there is a significant public interest in maintaining confidentiality of communications, including confidentiality on the basis of litigation privilege. There may, however, be occasions where this significant public interest is outweighed by the public interest in disclosing the information: where, for example:
  - the requirement for disclosure is overwhelming
  - the privileged material discloses wrongdoing by or within an authority
  - the material discloses a misrepresentation to the public of advice received
  - the material discloses an apparently irresponsible and wilful disregard of advice
  - a large number of people are affected by the advice
  - the passage of time is so great that disclosure cannot cause harm.
35. The Commissioner has considered the public interest arguments advanced by both parties, bearing in mind the considerations set out in the preceding paragraph and all other relevant circumstances. She is of the view that none of the above six bullet points apply in this case, and can identify no other particularly compelling factors which would be relevant here.
36. She acknowledges that there is a degree of public interest in transparency and accountability in local government and accepts that Ms X has an interest in obtaining the information to inform her in relation to her claim.
37. However, in all the circumstances, having weighed all relevant considerations, the Commissioner is not satisfied that the public interest in making this particular information available is sufficiently compelling to outweigh the strong public interest in maintaining litigation privilege.

38. Consequently, the Commissioner accepts that the Council correctly withheld the information to which it applied regulation 10(5)(b) of the EIRs.

## **Decision**

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

## **Appeal**

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Should either Ms X or the 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**  
**Head of Enforcement**

**8 March 2016**

## Appendix 1: Relevant statutory provisions

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### 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;

...

#### 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.

...

- (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-

...

- (b) the course of justice, the ability of a person to receive a fair trial or the ability of any public authority to conduct an inquiry of a criminal or disciplinary nature;

...



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