

# Decision Notice



Decision 159/2013 Mr Bruce Thompson and City of Edinburgh Council

Development of Edinburgh Academicals rugby ground

Reference No: 201202505

Decision Date: 6 August 2013

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**Rosemary Agnew**

Scottish Information Commissioner

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## Summary

On 19 July 2012, Mr Thompson asked the City of Edinburgh Council (the Council) for information concerning the development of Edinburgh Academicals rugby ground at Raeburn Place, Edinburgh. The Council responded to Mr Thompson's request by signposting Mr Thompson to where relevant information was available to him. It also notified him that it was relying on various exceptions in the EIRs for withholding other information relevant to his request.

During the investigation which followed, the Council disclosed information to Mr Thompson that it had previously considered to be exempt. Following the investigation, the Commissioner found that the Council had dealt with Mr Thompson's request for information in accordance with the EIRs, by withholding the names of certain Council officials. She did not require the Council to take any action.

## Relevant statutory provisions

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The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (Interpretation) (paragraphs (a) and (c) of definition of "environmental information"); 5(1) and 2(b) (Duty to make available environmental information on request); 10(3) (Exceptions from duty to make environmental information available); 11(2), (3)(a)(i) and (3)(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 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 the Appendix to this decision. The Appendix forms part of this decision.

## Background

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1. On 19 July 2012, Mr Thompson asked the Council for the following information concerning the development of the Edinburgh Academicals rugby ground at Raeburn Place, Edinburgh:



*Copies of all documents, including minutes, agendas, emails and notes of meetings and telephone conversations that have taken place between the Edinburgh Academical Club (or any of their representatives) and the City of Edinburgh Council Members as well as officials from the Planning Department, the Economic Development Department, and the Departments dealing with Sport and Leisure, which have taken place in relation to the present plans for the development of the Academicals rugby ground at Raeburn Place.*

*These may have taken place both before and after the issue of the Proposal of Application Notice (12/01/567/PAN).*

2. The Council responded on 16 August 2012, explaining that it was dealing with Mr Thompson's request under the EIRs. The Council also explained that, as some relevant information was readily accessible on its website, it was relying on regulation 6 of the EIRs. It provided Mr Thompson with a link to this information. The Council also informed Mr Thompson that it was relying on the exceptions in regulations 10(4)(d) and 10(4)(e) of the EIRs for withholding other relevant information from him.
3. On 19 August 2012, Mr Thompson wrote to the Council requesting a review of its decision. He considered that the Council had a duty to be open and transparent in relation to this multi million-pound development in a conservation area. Mr Thompson remarked that the Council had provided information of the kind he was seeking in relation to previous developments, and that other organisations had no difficulty in providing their correspondence with this developer.
4. Having received no response to his requirement for review, Mr Thompson applied to the Commissioner for a decision on 1 October 2012. This led to an investigation, with the result that Mr Thompson was provided with a response on 8 October 2012. The Council upheld its original decision without modification.
5. On 3 December 2012, Mr Thompson wrote to the Commissioner, stating that he was dissatisfied with the outcome of the Council's review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA. By virtue of regulation 17 of the EIRs, Part 4 of FOISA applies to the enforcement of the EIRs as it applies to the enforcement of FOISA, subject to certain specified modifications.
6. The application was validated by establishing that Mr Thompson 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 5 December 2012, the Council was notified in writing that an application had been received from Mr Thompson and was asked to provide the Commissioner with any information withheld from him. The Council responded with the information requested. The Council also explained that, as the pre-planning process had been completed, it was going to release some relevant information to Mr Thompson, subject to redaction.



8. The Commissioner subsequently received confirmation that the information had been released and the case was then allocated to an investigating officer.
9. During the investigation, Mr Thompson contacted the Council to acknowledge receipt of the disclosed information. At the same time he highlighted the absence of other information he considered should be held by the Council falling within scope of his request. The Council undertook to investigate this and respond to Mr Thompson.
10. 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. These focused on the Council's withholding of information and the steps it took to identify and locate the information it held which fell within the scope of Mr Thompson's request.
11. The Council then informed the Commissioner that it was willing to release all of the other information previously withheld from Mr Thompson, subject only to redaction of personal data (in respect of which it was relying on regulation 11(2) of the EIRs). The Commissioner received confirmation that this information had been released. Having received the information, Mr Thompson informed the Commissioner that he was now only concerned about the withholding of the names and job titles of Council officials.
12. Having reviewed the redactions from the information disclosed, the Commissioner is satisfied that, where job titles of Council officials were recorded, these have been disclosed. Consequently, this decision will focus on the Council's application of regulation 11 of the EIRs to withhold the names of Council officials.
13. During the investigation, submissions were sought and received from Mr Thompson as to why he considered that he has a legitimate interest in disclosure of the Council officials' names.
14. In these submissions, Mr Thompson informed the Commissioner that he was aware, from reading information disclosed by the Council on this matter, that some Council officials' names had been disclosed. Following further communication between the investigating officer and the Council, the Council disclosed the names of these Council officials, where they had previously been redacted from information provided to Mr Thompson. The Council also did this in relation to the names of other Council officials whose names had been disclosed in other information provided to Mr Thompson on the subject. It did not believe these names to have been in the public domain at the time it dealt with Mr Thompson's request.

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

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



### Regulation 11(2) – personal data

16. In its submissions to the Commissioner, the Council explained that it was relying on regulation 11(2) of the EIRs in relation to the information still withheld from Mr Thompson.
17. Regulation 11(2), read with regulation 10(3), provides that personal data (in environmental information) of which the applicant is not the data subject shall only be released if either “the first condition” (set out in regulation 11(3)) or “the second condition” (set out in regulation 11(4)) applies to those data.
18. The Council’s arguments relate to those parts of the “first condition” which apply where making the information available would contravene the data protection principles. In order for a Scottish public authority to rely on these provisions, 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 and second data protection principles would be contravened.

#### *Is the information under consideration personal data?*

19. Personal data are 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, 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.*
20. In this case, the Commissioner is satisfied that the withheld information is the personal data of the Council officials in question. The information identifies the individuals and, in the context in which it appears, the Commissioner is satisfied that it relates to those individuals. In that context, the information can be considered to be biographical about, and to focus on, the Council officials.

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

21. As noted above, the Council argued that making the information available would breach the first data protection principle. The first data protection principle states that the processing of personal data (in this case, making those data available in response to a request made under the EIRs) shall 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.
22. The Commissioner has considered the definition of sensitive personal data set out in section 2 of the DPA and does not consider the withheld names of the Council officials to be sensitive personal data. It is therefore not necessary to consider the conditions in Schedule 3 in this case.



23. There are three separate aspects to the first data protection principle: (i) fairness, (ii) lawfulness and (iii) conditions in the schedules. However, these three aspects are interlinked. For example, if there is a specific condition which permits the personal data to be made available, it is likely that disclosure will also be fair and lawful.
24. The Commissioner must 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 the personal data would also be fair and lawful.

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

25. When considering the conditions in Schedule 2, the Commissioner has noted Lord Hope's comment (in the case of *Common Services Agency v Scottish Information Commissioner (2008) UKHL 47*<sup>1</sup>) that the conditions require careful treatment in the context of a request for information, given that they were not designed to facilitate the release of information, but rather to protect personal data from being processed in a way that might prejudice the rights, freedoms or legitimate interests of the data subjects.
26. Condition 6 in Schedule 2 would appear to be the only one which might permit disclosure to Mr Thompson in the circumstances of this case. Condition 6 allows personal data to be processed if 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 processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subjects (in this case the individuals whose names have been withheld).
27. As explained in the Commissioner's guidance on personal information<sup>2</sup> there are a number of different tests which must be satisfied before condition 6 can be met. These are:
- Is Mr Thompson pursuing a legitimate interest or interests?
  - If yes, is the processing involved necessary for the purposes of those interests? In other words, is the disclosure proportionate as a means and fairly balanced to its ends, or could these legitimate interests be achieved by means which interfere less with the privacy of the data subject?
  - Even if the processing is necessary for the purposes of Mr Thompson's legitimate interests, is the processing unwarranted in this case by reason of prejudice to the rights and freedoms or legitimate interests of the data subjects?

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<sup>1</sup> <http://www.publications.parliament.uk/pa/ld200708/ldjudgmt/jd080709/comm-1.htm>

<sup>2</sup> <http://www.itspubliknowledge.info/Law/FOISA-EIRsGuidance/section38/Section38.asp>



28. There is no presumption in favour of making personal data available under the general obligation created by the EIRs. Accordingly, the legitimate interests of Mr Thompson must outweigh the rights and freedoms or legitimate interests of the data subject before condition 6 will permit the personal data to be made available. If the two are evenly balanced, the Commissioner must find that the Council was correct to refuse to make the personal data available.

*Is Mr Thompson pursuing a legitimate interest or interests?*

29. There is no definition within the DPA of what constitutes a “legitimate interest”, but the Commissioner takes the view 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 personal information (see above) 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 scrutiny of the actions of public bodies or public safety.*
30. Mr Thompson was invited to comment on what he believed to be his legitimate interests, to inform the Commissioner’s consideration of condition 6(1). He indicated that he sought the names to make better sense of the information supplied by the Council, and to allow the public to understand which public servant knew what, and when.
31. Mr Thompson explained that there was no ongoing investigation of an internal, external or criminal nature into the planning department, so he did not believe there was any reason to hide the names of professionals acting in their professional capacity.
32. Mr Thompson submitted that correspondence and authorisations given by public officials acting in a professional capacity carried no weight, and were meaningless, without the professional’s name on it. He explained that, in one email, a public official effectively gave an external person “the green light” to avoid a traffic assessment in a conservation area in central Edinburgh. He believed it was in the public interest that the public know who this professional official was, otherwise it could be the “janitor” or the “Council chauffeur” instead of a professional transport official. He argued that if people were allowed to remove their names from documents then this could lead to a complete lack of accountability, which would cause a loss of public trust in “nameless public officials” and in turn undermine FOISA.
33. The Council acknowledged that it was important for staff in particular posts to have appropriate experience and qualifications. It did not believe that this extended to a legitimate interest in the withheld names.
34. The Commissioner has considered these comments carefully. In the circumstances, she accepts that Mr Thompson – along with the wider public – has a legitimate interest in ensuring that those persons who made recommendations, and were involved in discussions, on the plans for the development of the Edinburgh Academicals ground, were the appropriate professional officials. She also acknowledges a legitimate interest in information contributing to public understanding of the information disclosed.



*Is the processing involved necessary for the purposes of those interests?*

35. The Commissioner must now consider whether processing (i.e. disclosure) is necessary for those legitimate interests. When considering this, the Commissioner must consider whether these interests might reasonably be met by any alternative means which would interfere less with the privacy of the individuals whose names have been withheld.
36. As mentioned already, where the job titles of those Council officials whose names have been redacted are recorded in the disclosed information, these have been provided to Mr Thompson. The Commissioner considers that knowing the job title of the Council officials concerned would be sufficient to enable Mr Thompson to be satisfied as to whether they are the appropriate professional officials. Similarly, the provision of the Council officials' job titles should suffice to enable Mr Thompson, and the wider public, to make sense of the content of the information disclosed.
37. The Commissioner recognises that the job title of every Council official whose name has been redacted is not recorded in the information provided. Nonetheless, she does not consider that release of those individual's names without their job titles would make any further contribution to meeting Mr Thompson's legitimate interest. She does not accept that knowing the name (and not the job title) of a Council official would enable Mr Thompson, or any other interested party, to make any greater sense of the information disclosed, or satisfy themselves that the named individual is the appropriate professional official.
38. In the circumstances, the Commissioner has concluded that it is not necessary for the names of the individuals to be made available to Mr Thompson.
39. As the Commissioner has concluded that it is not necessary for the names to be made available, she finds that condition 6 of Schedule 2 could not be met in relation to that disclosure. In the absence of a condition permitting processing, it would not be either fair or lawful to make the information available. Consequently, disclosure would breach the first data protection principle.
40. As the Commissioner has found that the first data protection principle would be breached as a consequence of disclosure, she has not gone on to consider the Council's view that the second principle would also be breached by disclosure.
41. The Commissioner therefore accepts that the information was properly withheld under regulation 11(2) of the EIRs.

#### **Other issues**

42. In his submissions, Mr Thompson commented that, after questioning the initial release of information by the Council on two occasions, further substantial documentation was released to him. Mr Thompson expressed his concern at what he considered to be the Council's attempts to hold information back. He believed that if he had not asked questions about the apparent irregularities in the first tranche of information released, then the second and third tranches would not have been given to him.





43. As noted above, prior to and during the investigation, the Council released to Mr Thompson further information falling within scope of his request. This information was withheld under exceptions in the EIRs, specifically those in regulations 10(4)(d) and 10(4)(e).
44. The Council explained that it was able to disclose the previously withheld information to Mr Thompson because the planning process in relation to the development of the Edinburgh Academicals ground had been completed. The Council therefore considered that the sensitivity of the information previously withheld had diminished, and therefore it no longer wished to rely on the exceptions cited earlier.
45. As Mr Thompson was not, by the close of the investigation, asking the Commissioner to consider the Council's application of the exceptions in regulations 10(4)(d) and 10(4)(e) of the EIRs (under which the information was withheld prior to release), there would appear to be no basis under the EIRs for investigating the withholding of this information. Consequently, this is not a matter the Commissioner can comment on.

## DECISION

The Commissioner finds that the Council complied with the Environmental Information (Scotland) Regulations 2004 in responding to the information request made by Mr Thompson.

## Appeal

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Should either Mr Thompson 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.

**Margaret Keyse**  
**Head of Enforcement**  
**6 August 2013**



## Appendix

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### Relevant statutory provisions

#### 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;

...

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

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

(2) The duty under paragraph (1)-

...

(b) is subject to regulations 6 to 12.

...



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

...

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

**11 Personal data**

...

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

...



## Data Protection Act 1998

### 1 Basic interpretative provisions

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

...

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

(a) from those data, or

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

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

...

## Schedule 1 – The data protection principles

### Part I – The principles

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

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

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

...

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

...

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

...