

Decision Notice



Decision 165/2012 Mr Peter Verity and City of Edinburgh Council

Names of dismissed staff

Reference No: 201201212
Decision Date: 9 October 2012

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Rosemary Agnew
Scottish Information Commissioner

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Summary

Mr Verity asked the City of Edinburgh Council (the Council) for the names of staff who had been dismissed following an investigation relating to statutory notice repairs. The Council refused to provide the information.

The Commissioner found that the Council was entitled to withhold the information.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and 1(6) (General entitlement); 2(1)(b) (Effect of exemptions); 39(2) (Health, safety and the environment)

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (definition (a), (b) and (c) of “environmental information”); 5(1) and (2)(b) (Duty to make available environmental information on 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 the Appendix to this decision. The Appendix forms part of this decision.

Background

1. On 4 April 2012, Mr Verity asked the Council for the names of staff in its Property Repair Department who had been officially charged with offences related to alleged corruption within the Department, in relation to:
 - the issuing of Statutory Notices;
 - the specification and extent of works carried out under these notices;
 - the selection of contractors to perform such works.



2. On 5 April 2012, Mr Verity emailed the Council to clarify his request, referring to an article published in the Edinburgh Evening News¹ which revealed that five employees had been sacked from the Property Management section; it was these individuals' names he sought.
3. The Council responded on 3 May 2012. It advised Mr Verity that the information was the personal data of the individuals concerned and was exempt from disclosure under FOISA.
4. Later that same day, Mr Verity requested a review of the Council's response, challenging the decision to withhold the names of the staff who had been charged. He wanted to establish whether they were involved in work on his property.
5. The Council notified Mr Verity of the outcome of its review on 30 May 2012. The Council continued to withhold the requested information on the grounds that it was sensitive personal data. It advised that the information was also exempt because an investigation into the handling of statutory repair notices within the Council was on-going at the date of Mr Verity's request.
6. On 21 June 2012, Mr Verity emailed 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.
7. The application was validated by establishing that Mr Verity had made a request for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its response to that request. The case was then allocated to an investigating officer.

Investigation

8. Before commencing the investigation, the investigating officer alerted Mr Verity to the outcome of *Decision 094/2012 Mr Craig Beveridge and City of Edinburgh Council*², issued on 11 June 2012. In this decision, the Commissioner concluded that the Council was not required to confirm whether any of the individuals who had been suspended in connection with investigations relating to statutory notice repairs had been involved in work on a particular property. The investigating officer advised Mr Verity that the Commissioner was highly likely to come to the same decision relation to his application, and asked whether he still required a decision from the Commissioner in relation to his own request.
9. Mr Verity confirmed that he still required a decision, commenting that he considered disclosure of the information would be in the public interest.

¹ <http://www.scotsman.com/edinburgh-evening-news/repairs-scandal-to-cost-capital-30-million-1-2210624>

² <http://www.itspublicknowledge.info/applicationsanddecisions/Decisions/2012/201101862.asp>



10. On 4 July 2012, the Council was notified in writing that an application had been received from Mr Verity and was asked to provide the Commissioner with the withheld information. The investigating officer also gave the Council an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA which, by virtue of regulation 17 of the EIRs, applies for the purposes of the EIRs as it applies for the purposes of FOISA) and asking it to respond to specific questions.
11. The Council was advised that the Commissioner was likely to find that the information under consideration was environmental information, and was asked to provide submissions on whether the Council considered that the information was excepted from disclosure under the EIRs.
12. The Council accepted that the withheld information was environmental information and indicated that it would now consider it to be exempt from disclosure under section 39(2) of FOISA. The Council confirmed that it considered the exception in regulation 10(5)(b) of the EIRs ("course of justice") applied to the withheld information, and explained its reasoning regarding that exception and the associated public interest test. The Council also considered that the withheld information was the personal data of the individuals concerned and, as such, excepted from disclosure under regulation 11 of the EIRs. Submissions were provided to support the Council's position.
13. The investigating officer contacted Mr Verity during the investigation, seeking his submissions on the matters to be considered in the case. Mr Verity's submissions, along with those of the Council, are summarised and considered (where relevant) in the Commissioner's analysis and findings section below.

Commissioner's analysis and findings

14. In coming to a decision on this matter, the Commissioner has considered all of the withheld information and the submissions made to her by both Mr Verity and the Council and is satisfied that no matter of relevance has been overlooked.
15. The Council has withheld the names of the individuals under regulations 10(5)(b) and 11 of the EIRs. Before considering these exceptions, the Commissioner first considered whether the withheld information is environmental information.

Section 39(2) of FOISA – environmental information

16. The Commissioner's views on the relationship between FOISA and the EIRs are set out in detail in *Decision 218/2007 Professor A D Hawkins and Transport Scotland*³, and need not be repeated in full here.

³ <http://www.itspublicknowledge.info/applicationsanddecisions/Decisions/2007/200600654.asp>



17. In the course of the investigation the Council submitted that it was entitled to withhold the requested information under section 39(2) of FOISA, concurring with the Commissioner's view that it was environmental information as defined in regulation 2(1) of the EIRs.
18. 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 such information to be considered solely in terms of the EIRs.
19. During the investigation, Mr Verity expressed concern that the EIRs were being used to withhold the information he had asked for, as he did not consider that the information (names of individuals) related to the environment.
20. The Commissioner has noted Mr Verity's comments, and she recognises that his view on the extent of what constitutes environmental information may well be shared widely. However, the definition of environmental information within the EIRs is wide-ranging, and information which in isolation may not be regarded as environmental can, and should, be regarded as having the quality of environmental information when read in context.
21. In this case, the Commissioner notes that the withheld staff names are linked to an investigation into the Council's use of statutory notices and the associated building repairs. Since that investigation could lead to further building works or modifications to the built environment, the Commissioner considers it to be a measure that is likely to affect the state of the elements of the environment (including land and built structures), and factors (such as noise and waste) that affect or are likely to affect those elements. Consequently, she is satisfied that the requested information falls within the definition of environmental information set out in regulation 2(1) of the EIRs, specifically paragraph (c) of that definition.
22. Having reached that conclusion, she finds that the Council was entitled to apply the exemption in section 39(2) of FOISA to the requested information.
23. This exemption is subject to the public interest test in section 2(1)(b) of FOISA. As there is a separate statutory right of access to environmental information available to the applicant in this case, the Commissioner also finds that the public interest in maintaining this exemption and dealing with the request in line with the requirements of the EIRs outweighs any public interest in disclosure of the information under FOISA. The Commissioner has consequently proceeded to consider this case solely in terms of the EIRs.
24. During the course of the investigation the Council recognised that the information should be regarded as environmental information, but initially failed to do so. The Commissioner finds that, in this respect, the Council failed to comply with regulation 5(1) and (2)(b) of the EIRs when responding to Mr Verity's request.



Regulation 10(5)(b) of the EIRs

25. 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 of a criminal or disciplinary nature. As with all exceptions in regulation 10, this one is subject to the public interest test in regulation 10(1)(b).
26. The Council has explained that it applied this exception to information about the staff who have been dismissed or suspended, because it considered that disclosure would, or would be likely to, prejudice substantially the ability of the Council to conduct an inquiry of a criminal or disciplinary nature.
27. The Council advised that there was both an on-going investigation into the Property Care Section of the Property Department, and a police investigation. If the information was disclosed, it might substantially prejudice the outcome of such investigations, especially if criminal prosecutions were pursued.
28. The Council stressed that it was important to ensure that the dismissed staff were treated fairly while investigations were going on, particularly as the appeal period had not finished. Disclosure of their names would be premature and likely to have a substantially adverse impact on them in the event that they were exonerated at appeal, and could affect the Council's position in any future proceedings which may arise.
29. The Commissioner recognises that the Council's investigation into the Property Conservation service may have moved on since the Council responded to Mr Verity's requirement for review. However, the Commissioner must consider and make a determination on whether the exception in regulation 10(5)(b) of the EIRs was applicable to the requested information at the time of the Council's response to Mr Verity's requirement for review in May 2012.
30. Having considered carefully the submissions from both the Council and Mr Verity, the Commissioner accepts that the withheld names were information which, at that time, was excepted from disclosure under regulation 10(5)(b) of the EIRs, on the basis that disclosure would, or would be likely to, prejudice substantially the ability of the Council to conduct an inquiry of a criminal or disciplinary nature.
31. In reaching this conclusion, the Commissioner recognises that at the time of Mr Verity's request and requirement for review, the concerns surrounding the Council's Property Conservation service's statutory repairs system were under investigation; this investigation had led to the suspension or dismissal of some staff, but the appeal period for some or all of these decisions had not yet expired.



32. In these circumstances, the Commissioner is satisfied that disclosure of the requested information, would, or would be likely to, prejudice substantially the right of those individuals to receive fair treatment within the Council's on-going investigations, and in any disciplinary or other proceedings arising from them. If disclosure led to unfair treatment of those individuals, the Commissioner considers that disclosure would also be likely to undermine the position of the Council in relation to any disciplinary proceedings arising from its investigations, and the chance of a successful prosecution being brought in relation to any criminal offence.
33. The Commissioner is consequently satisfied that disclosure would, or would be likely to, prejudice substantially the ability of the Council to conduct investigations of a criminal or disciplinary nature. The Commissioner is therefore satisfied that, at the relevant time, the exception in regulation 10(5)(b) of the EIRs was applicable to the information requested by Mr Verity.

Public interest test

34. Having found that the Council correctly applied the exception contained within regulation 10(5)(b), the Commissioner is required to consider the public interest test required by regulation 10(1)(b) of the EIRs.
35. The test specifies 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.
36. The Council acknowledged that there is a public interest in an open and transparent repair process, in ensuring that investigations into the serving of statutory notices and related works are carried out properly and without prejudice, and in ensuring that complaints from members of the public are addressed appropriately.
37. However, the Council considered that the greater public interest lay in maintaining the exception in order to protect the process of investigation and the right of an accused to a fair trial or a fair and confidential internal disciplinary investigation and hearing, particularly in the circumstances where criminal proceedings may be the eventual outcome. The Council considered it to be contrary to the public interest for an investigation of this type to be prejudiced as a result of information being disclosed before the conclusion of the investigation (and before the conclusion of any subsequent prosecution or appeal).
38. In his submissions, Mr Verity indicated that he wanted to establish whether any of the individuals who had been dismissed had been involved in work on his property. In this case, he believed that the bills he had received in relation to repairs carried out under statutory notice might well have been inflated by misconduct and/or criminal actions of those staff. He queried whether, if the works had been affected by criminal or negligent actions, the Council should be taking court action to force recipients to pay the bills while still investigating this matter.
39. The Commissioner has considered the submissions from both Mr Verity and the Council regarding the public interest in disclosing or withholding the names he had asked for.



40. The Commissioner accepts that there is a general public interest in making information available to the public, and in transparency and accountability in decision making, but this must be balanced against any detriment to the public interest as a consequence of disclosure.
41. The Commissioner recognises that the Council is in the process of investigating and addressing serious concerns that have been raised in relation to its Property Conservation service, regarding the statutory notice process and associated works. She is aware that this context presents significant challenges for the Council
42. Having taken into account the submissions from Mr Verity, along with background information about the current investigation into the Council's Property Conservation service, the Commissioner recognises that the concern surrounding the statutory notice repairs system in the Council is one which has raised widespread and keen interest among the general public, not just among those property owners who have had statutory notices served on their properties.
43. However, the Commissioner must weigh the public interest favouring disclosure against that favouring the maintenance of the exception in regulation 10(5)(b).
44. The Commissioner accepts that, where complaints arise about the way in which work has been done by the Council or contractors acting on its behalf, there is a public interest in the Council being able to carry out comprehensive, balanced and robust investigations into those complaints, to ensure that complaints are thoroughly examined and suitable conclusions are reached about the way in which public resources have been used. The context created by the progress of the investigations and the particular facts of the case must both be considered when considering whether it would be in the public interest to disclose information from such an investigation.
45. Where investigations involve consideration of staff conduct, there is a significant public interest in ensuring that the individuals whose actions are under scrutiny are treated with fairness and dignity, especially where the time period for the individuals to appeal the Council's decision has not passed. Identification of individuals who have been suspended or dismissed, or whose actions are under investigation could prompt speculation about the actions of those individuals prior to the investigation being concluded, or prejudice the outcome of any appeal they might wish to bring. There is also a significant public interest in the investigation bodies being able complete their investigations independently and objectively.
46. The Commissioner accepts that disclosure of the withheld information would identify the individuals who were dismissed, and she considers that the following factors weigh heavily in favour of maintaining the exception in this case:
 - a. the need to ensure the right of those individuals to privacy while investigations remain on-going, and to receive a fair hearing in any future disciplinary or criminal proceedings; and
 - b. the need for the investigating bodies to complete their investigations and reach a conclusion before the information is disclosed.



47. On balance, having weighed up the arguments advanced by Mr Verity and the Council, the Commissioner finds that, in all the circumstances of the case, as these existed at the time when the Council notified Mr Verity of the outcome of its review, the public interest in making the staff names available to Mr Verity was outweighed by that in maintaining the exception in regulation 10(5)(b) of the EIRs.
48. As the Commissioner has found that the information is exempt under regulation 10(5)(b) of the EIRs, she will not go on to consider whether the information is excepted under regulation 11 of the EIRs.

DECISION

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

The Commissioner finds that by failing to identify and respond to Mr Verity's information request as one seeking environmental information (as defined by regulation 2(1) of the EIRs), the Council breached regulations 5(1) and (2)(b) of the EIRs. The Commissioner does not require the Council to take any action in relation to this breach.

However, the Commissioner found that the Council was entitled to withhold the names of the individuals concerned under regulation 10(5)(b) of the EIRs.

Appeal

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

Margaret Keyse
Head of Enforcement
9 October 2012



Appendix

Freedom of Information (Scotland) Act 2002

1 General entitlement

- (1) A individual who requests information from a Scottish public authority which holds it is entitled to be given it by the authority.

...

- (6) This section is subject to sections 2, 9, 12 and 14.

2 Effect of exemptions

- (1) To information which is exempt information by virtue of any provision of Part 2, section 1 applies only to the extent that –

...

- (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

...

39 Health, safety and the environment

...

- (2) Information is exempt information if a Scottish public authority-
- (a) is obliged by regulations under section 62 to make it available to the public in accordance with the regulations; or
- (b) would be so obliged but for any exemption contained in the regulations.

...



The Environmental Information (Scotland) Regulations 2004

2 Interpretation

(1) In these Regulations –

...

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

- (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
- (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)-

...

(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 individual to receive a fair trial or the ability of any public authority to conduct an inquiry of a criminal or disciplinary nature;
 - ...