

Decision Notice



Decision 186/2013 Mr Tim Quelch and Mr Donald Keith and the City of
Edinburgh Council

Complaint report

Reference No: 201202445 and 201202476
Decision Date: 22 August 2013

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Summary

On 7 October 2012, Mr Quelch asked for a copy of a complaint report prepared by Edinburgh City Council (the Council). Mr Keith made a request for the same report four days later. In both cases, the Council decided that the information in the report was entirely excepted from disclosure under the EIRs.

Following an investigation, the Commissioner accepted that some of the information in the report had been correctly withheld, but found that the majority of it should be disclosed.

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), (3) and (5)(b) (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"), 2(e) (Sensitive personal data); Schedules 1 (The data protection principles, Part 1: the principles) (the first data protection principle), 2 (Conditions relevant for purposes of the first principle: processing of any personal data) (Condition 6) and 3 (Conditions relevant for purposes of the first principle: processing of sensitive personal data) (conditions 1 and 5)

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. Mr Quelch and Mr Keith are members of a Proprietors' Association covering a number of properties which were subject to a statutory repairs notice from the Council. In April 2011, the Proprietors' Association submitted a formal written complaint to the Council about the work that had been undertaken on the properties in question. The complaint concerned the manner in which the Council's Property Conservation Department executed its statutory notice powers and about the scope, nature, quality and estimated cost of repairs completed at the front of the shared building.
2. On 7 October 2012, Mr Quelch asked the Council for two complaint reports which he understood it had prepared in relation to the complaint from the Proprietors' Association. Mr Keith made the same request four days later.
3. The Council responded to both Mr Quelch and Mr Keith on 26 October 2012. It advised them that their requests would be dealt with under the EIRs. The Council stated that the requested information was excepted from disclosure under regulation 10(5)(b) of the EIRs as there were on-going internal disciplinary investigations and it believed that disclosure could substantially prejudice the disciplinary process and any subsequent claims which might arise.
4. On 30 October 2012, Mr Quelch emailed the Council. He sought a review of its decision, as he considered that disclosure of the contents of the reports was clearly in the public interest, given the seriousness of the complaints submitted to the Council. Mr Keith sought a review on 31 October 2012. He considered that the breadth and depth of the complaints entitled the owners, as members of the public with a demonstrable interest in the information, to see the reports.
5. The Council notified both Mr Quelch and Mr Keith of the outcome of its review on 20 November 2012. The Council continued to withhold the information under regulation 10(5)(b) of the EIRs, adding that the documents were prepared in contemplation of litigation.
6. Mr Quelch wrote to the Commissioner on 20 November 2012, 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. Mr Keith did the same on 29 November 2012. (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 both Mr Quelch and Mr Keith 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 their requests.



Investigation

8. The Council was notified in writing that applications had been received from Mr Quelch and Mr Keith on 12 December 2012 and 6 January 2013 respectively. The cases were then allocated to an investigating officer.
9. The investigating officer subsequently contacted the Council, giving it an opportunity to provide comments on the applications (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.
10. The Council responded to this request, providing submissions in support of its decision to withhold the requested information. It provided further submissions in response to additional questions posed during the investigation and also told the Commissioner that it wished to rely on regulation 11(2) of the EIRs to withhold some personal data within the complaint report.
11. Both Mr Quelch and Mr Keith were asked for, and provided, submissions as to why disclosure would be in the public interest. Mr Quelch and Mr Keith also confirmed, during the investigation, that they did not require the Commissioner to issue a finding on whether their own and each other's personal data should be disclosed. As such, this will not be considered in the decision.

Commissioner's analysis and findings

12. 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 Mr Quelch, Mr Keith and the Council. She is satisfied that no matter of relevance has been overlooked.

FOISA or EIRs?

13. The Council's responses were issued on the basis that the information requested was environmental information, as defined in regulation 2(1) of the EIRs. The information in question concerns an investigation into the Council's use of statutory notices and 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.



Section 39(2) of FOISA – environmental information

14. The exemption in section 39(2) of FOISA provides, in effect, that environmental information (as defined by regulation 2(1)) is exempt from disclosure under FOISA, thereby allowing any such information to be considered solely in terms of the EIRs. In this case, the Commissioner accepts that the Council was entitled to apply the exemption to the withheld information, given her conclusion that it is properly classified as environmental information.
15. As there is a separate statutory right of access to environmental information available to Mr Quelch and Mr Keith in this case, the Commissioner accepts that the public interest in maintaining this exemption and in dealing with the request in line with the requirements of the EIRs outweighs any public interest in disclosing the information under FOISA.

Number of reports

16. As is clear from their requests, both Mr Quelch and Mr Keith believed that two complaint reports had been prepared by the Council in response to the complaint from the Proprietors' Association.
17. The Council confirmed that it held only one complaint report, and that there was no separate report written by the Council employee named by Mr Quelch and Mr Keith.
18. Having considered the Council's submissions and the contents of the complaint report, the Commissioner is satisfied that the Council holds only one complaint report covered by the requests from Mr Quelch and Mr Keith. It is this report which is the subject of this decision.

Exemptions relied upon to withhold the information

19. The Council withheld the complaint report under regulations 10(5)(b) and 11(2) of the EIRs. The Commissioner will consider whether the personal data in the complaint report is exempt under regulation 11(2) of the EIRs first, before considering the applicability of regulation 10(5)(b) of the EIRs. (As noted in paragraph 11, the personal data of both Mr Quelch and of Mr Keith will not be considered in this decision.)

Regulation 11(2) of the EIRs – personal data

20. The Council argued that some of the information within the complaint report was excepted from disclosure under regulation 11(2) of the EIRs. Regulation 11(2) excepts personal data of which the applicant is not the data subject, where either "the first condition" (set out in regulation 11(3)) or "the second condition" (set out in regulation 11(4)) applies.
21. "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.



22. The Commissioner has considered the content of the withheld information and the context in which it is held. She notes that the Council's submissions are based on the premise that the complaint report contains one individual's personal data, but, having considered the complaint report in detail, the Commissioner has concluded that it contains information capable of identifying several individuals. She is satisfied that the information is personal data in line with section 1(1) of the DPA – it clearly relates to the individuals and the individuals can be identified from the information.
23. 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 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.
24. Having agreed that parts of the withheld information comprise personal data, the Commissioner must now go on to consider whether disclosure of this information would contravene any of the data protection principles cited by the Council.

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

25. The Council argued that disclosure of the information would breach the first data protection principle. The first data protection principle requires that personal data shall be processed fairly and lawfully and, in particular, shall not be processed (in this case, disclosed) unless at least one of the conditions in Schedule 2 to the DPA is met and, in the case of sensitive personal data (as defined by section 2 of the DPA), at least one of the conditions in Schedule 3 to the DPA is also met.
26. Having considered the complaint report, the Commissioner notes it contains a small amount of sensitive personal data as defined in terms of section 2(e) of the DPA. Section 2(e) includes within the definition of "sensitive personal data" personal data "consisting of information as to physical, or mental health or condition".
27. Given the additional restrictions surrounding the disclosure of sensitive personal data, it makes sense to look at whether there are any conditions in Schedule 3 which would permit the data to be disclosed, before considering the Schedule 2 conditions.

Can any of the conditions in Schedule 3 to the DPA be met?

28. There are 10 conditions listed in Schedule 3 to the DPA. One of these, condition 10, allows sensitive personal data to be processed in circumstances specified in an order made by the Secretary of State, and the Commissioner has therefore considered the additional conditions for processing sensitive personal data contained in secondary legislation such as the Data Protection (Processing of Sensitive Personal Data) Order 2000. None of these are applicable in this case.



29. When considering the conditions in Schedule 3, the Commissioner has noted Lord Hope's comment in the case of *Common Services Agency v Scottish Information Commissioner* [2008] UKHL 47¹ (CSA case) that the conditions require careful treatment in the context of a request for information under FOISA, 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 subject.
30. The Commissioner's guidance² on the regulation 11(2) exception concludes that (in practical terms) there are only two conditions in Schedule 3 which would allow sensitive personal data to be processed in the context of a request for information under FOISA, namely:
- the data subject has given explicit consent to the release of the information (condition 1); or
 - the information contained in the personal data has been made public as a result of steps taken deliberately by the data subject (condition 5).
31. The Commissioner accepts that the data subject has not given explicit consent to the release of the withheld information and, given the subject matter, she would not expect the Council to attempt to obtain such consent. Consequently, she is satisfied that condition 1 in Schedule 3 cannot be met in this case.
32. Similarly, from the information available to her, the Commissioner is unable to conclude that condition 5 in Schedule 3 could be met in this case.
33. Having also considered the other conditions in Schedule 3, and (as indicated above) the additional conditions contained in secondary legislation, the Commissioner has come to the conclusion that there is no condition which would permit disclosure of the sensitive personal data under consideration here. 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 exempt from disclosure (and properly withheld) under regulation 11(2) of the EIRs.

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

34. Within the complaint report, the remainder of the personal data is not sensitive personal data and so the Commissioner will now go on to consider whether there are any conditions in Schedule 2 to the DPA which would permit the data to be disclosed, and whether the disclosure of this personal data would be fair and lawful.
35. The processing under consideration in this case is disclosure of the information into the public domain in response to the information requests from Mr Quelch and Mr Keith.
36. As with the conditions in Schedule 3, when considering the conditions in Schedule 2, the Commissioner has noted Lord Hope's comment in the CSA case that the conditions require careful treatment in the context of a request for information under FOISA.

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

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



37. Condition 1 of Schedule 2 permits personal data to be processed if the data subject consents to the data being processed. The Council did not state whether it had sought the data subjects' consent, but, in the circumstances of this case, the Commissioner has concluded that condition 1 in Schedule 2 cannot be met in this case.
38. The Commissioner considers that the only other condition in Schedule 2 to the DPA which might apply in this case is condition 6. Condition 6 allows personal data to be processed if that 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 subjects.
39. There are, therefore, a number of different tests which must be satisfied before condition 6 can be met. These are:
- Are Mr Quelch and Mr Keith 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 as to ends, or could the legitimate interest be achieved by means which interfere less with the privacy of the data subjects?
 - Even if the processing is necessary for the purposes of Mr Quelch's and Mr Keith'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? This will involve a balancing exercise between the legitimate interests of the applicant and those of the data subjects. Only if (or to the extent that) the legitimate interests of the applicant outweigh those of the data subjects can the personal data be made available.

Are Mr Quelch and Mr Keith pursuing a legitimate interest or interests?

40. 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. In the Commissioner's published guidance on regulation 11(2) of FOISA³, it 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."

41. Throughout their correspondence with the investigating officer, Mr Quelch and Mr Keith have presented detailed and comprehensive arguments for obtaining access to the complete complaint report, including the personal data which has been withheld.

³ <http://www.itspublishknowledge.info/nmsruntime/saveasdialog.asp?IID=3085&SID=133>



42. The Commissioner notes that, due to the events preceding the complaints raised by both Mr Quelch and Mr Keith, and the length of time during which they have waited for the Council's response to a complaint made in April 2011, they have lost trust in the Council's ability to fully investigate their complaint and report on the findings of that investigation: in the circumstances, they will not be satisfied without access to the full report.
43. The Commissioner considers that Mr Quelch and Mr Keith have demonstrated a compelling interest in obtaining the fullest possible information about the investigation into their complaints, giving them strong legitimate interests in the disclosure of personal data within the complaint report where this would improve their understanding of the Council's investigation of their complaint.

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

44. The Commissioner must now consider whether the processing (i.e. disclosure) of the personal data is necessary in order to satisfy the legitimate interests identified above. In doing so, she must consider whether these interests might reasonably be met by any alternative means.
45. In all the circumstances of this case, the Commissioner can identify no viable means of meeting the legitimate interests of Mr Quelch and Mr Keith which would interfere less with the privacy of the relevant data subjects than the provision of the withheld personal data. In the circumstances, she is satisfied that disclosure of the personal data is necessary to meet the legitimate interests in question.

Is the processing unwarranted in this case by reason of prejudice to the rights and freedoms or legitimate interests of the data subjects?

46. The Commissioner must now consider whether disclosure would cause unwarranted prejudice to the rights, freedoms or legitimate interests of the data subjects concerned. As noted above, this will involve a balancing exercise between the legitimate interests of Mr Quelch and Mr Keith and those of the data subjects. Only if the legitimate interests of Mr Quelch and Mr Keith outweigh those of the data subjects can the information be disclosed without breaching the first data protection principle.
47. The Commissioner has issued guidance on the interpretation of the exceptions in regulation 11⁴. This identifies a number of factors which should be taken into account in carrying out this balancing exercise. These include:
- whether the information relates to the individual's public life (i.e. their work as a public official or employee) or their private life (i.e. their home, family, social life or finances)
 - the potential harm or distress that may be caused by the disclosure
 - whether the individual has objected to the disclosure
 - the reasonable expectations of the individuals as to whether the information would be disclosed.

⁴ <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section38/Section38.aspx>



48. Some of the withheld information relates to private individuals (the other members of the Proprietors' Association, excluding Mr Quelch & Mr Keith's personal data) and matters of concern to them. The Commissioner is satisfied that this personal data is of a type that these individuals would expect to be kept private, and which was provided to the Council only for the purpose of making a complaint and having it investigated. While the Commissioner cannot provide details of the nature of that personal data in this decision, she is satisfied that it relates to an individual's private life, and that its disclosure would be likely to cause harm or distress. She therefore accepts that disclosure of this information would breach the first data protection principle, and that the information was correctly withheld under regulation 11(2) of the EIRs.
49. The remaining personal data relates to Council officials named in the complaint report. At the time when the Council responded to the requests for review from Mr Quelch and Mr Keith, the concerns surrounding the activities of the Council's Property Conservation Service 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. While the Commissioner recognises that the investigation has moved on since then, she must consider and make a determination on the situation as it existed at the time of the Council's review responses to Mr Quelch and Mr Keith in October 2012, and decide whether the exception in regulation 11(2) of the EIRs in the circumstances existing at that time.
50. Although the Council did not make any specific submissions about the distress that disclosure might cause the data subjects, the Commissioner considers that the remaining personal information relates to matters that, at the date in question, were still relevant to the investigation in the Property Conservation Service. Although disclosure might not have caused the data subjects actual harm, it is reasonable to conclude that disclosure could have caused them distress if disclosed into the public domain at a time when there was much public speculation and comment about the investigation.
51. On balance, the Commissioner does not accept that the legitimate interests of Mr Quelch and Mr Keith, in this case, are sufficient to outweigh the prejudice that would be caused to the rights, freedoms or legitimate interests of the individuals in question. Disclosure of the personal data relating to Council officials would add only limited additional understanding of the Council's investigation of their complaints, when considered in the context of the information which the Commissioner has already found should be disclosed. In the circumstances, the Commissioner finds that prejudice to the rights, freedoms or legitimate interests of the individuals would be unwarranted. The Commissioner is therefore satisfied that condition 6 in Schedule 2 to the DPA cannot be met in this case.
52. Having concluded that making the withheld information available would lead to unwarranted prejudice, to the rights, freedoms or legitimate interests of the data subjects, the Commissioner must also conclude that such disclosure would be unfair. In the absence of a condition permitting disclosure, she would also regard disclosure as unlawful. In all the circumstances, therefore, she finds that making the information available would breach the first data protection principle. Consequently, she finds that the information was properly withheld under regulation 11(2) of the EIRs.



53. Where the Commissioner has found that some of the information within the complaint is exempt under regulation 11(2) of the EIRs, she will not go on to consider whether the exception in regulation 10(5)(b) also applies to this information.

Regulation 10(5)(b) of the EIRs

54. 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 of the 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.
55. The Council explained that the withheld report was prepared following numerous complaints from property owners at the addresses covered by the information requests. The complaints related to building work carried out at these addresses under the statutory notice regime. The Council believed there was more than a mere possibility that the owners were likely to seek redress through the courts in the event that they disagreed with the outcome of the resolution process, and stated that the complaint report had been prepared in contemplation of litigation.
56. The Council also explained that the works at the property were relevant to an investigation into allegations of misconduct relating to a Council officer involved in the project. The Council considered that it must be allowed to carry out disciplinary investigations and any related disciplinary processes without confidential information being made public.
57. The Council therefore raised two separate matters in explaining why it considered the complaint report exempt: potential prejudice to its ability to carry out a disciplinary inquiry and the status of the report as having been prepared in contemplation of litigation. The Commissioner will consider each point, in turn.

Substantial prejudice to a disciplinary inquiry

58. Within the EIRs, there is no definition as to what constitutes "substantial prejudice"; however, in the Commissioner's view, the word "substantial" is important here: the harm caused, or likely to be caused, by disclosure must be of real and demonstrable significance. The risk of harm must be real or very likely, not simply a remote or hypothetical possibility.
59. The report considers complaints from the Proprietors' Association about works carried out under statutory notice and about the way in which the Council's Property Conservation Service handled the matter. As far as the Commissioner is aware, the Council has not yet provided the Proprietors' Association with a formal response to their complaint, made in April 2011, and certainly had not done so at the time it reviewed the responses to Mr Quelch and Mr Keith in November 2012. The report seeks to establish whether events occurred in the manner stated by the Proprietors' Association in its complaint.



60. In their correspondence, Mr Quelch and Mr Keith stated that they had no objection to certain details being redacted from the reports if the presence of particular details would be prejudicial to disciplinary action. However, they understood from similar cases considered by the Commissioner that it is incumbent upon those bodies who wish to withhold information for this reason to demonstrate why the entire contents are prejudicial to disciplinary action before they are entitled to apply a blanket refusal. (As noted above, the Council withheld the report in its entirety.)
61. At the time of the requests, the Council was investigating allegations of misconduct relating to a Council officer involved with the statutory repair works covered by the report. The Council's view was that it must be allowed to carry out such investigations and any disciplinary process without confidential information being made public, having a duty to the individual officer to keep such information confidential. The Council also considered that it had a duty to carry out any disciplinary investigation and process fairly and thoroughly. The Council commented that the individual officer has the right to a fair hearing, without the glare of publicity and without the minds of others being potentially tainted with knowledge gained prior to the issues being resolved in the proper forum (i.e. the disciplinary hearing, or any internal appeal, or indeed the Employment Tribunal, should the matter go that far).
62. The Council considered that the release of the information would have had a significant negative impact on the fairness of the process, believing it likely that the public would have pre-judged the individual, and those whose role it was to come to a decision internally would also have been put in a position whereby outside information would influence any decision.
63. The Commissioner notes the Council's comments, but she has already found the information in the report which could lead to the identification of that individual to be excepted from disclosure under regulation 11(2) of the EIRs .
64. The Commissioner has considered the content and nature of the remaining information contained within the complaint report (i.e. the information which she has not already found to be excepted from disclosure). She notes that it primarily comprises a factual assessment of the administration of the relevant statutory notices and associated repairs. Additionally, the report contains extracts of the Proprietors' Association's complaint and the Council's response. Therefore, the events described will already be known to the owners of the properties concerned, as will the identities of the companies involved in those works.
65. The Commissioner considers that the main purpose of the report was to respond to the Proprietors' Association's complaint and to make recommendations for the resolution of that complaint, rather than to apportion blame or criticise any individual Council employee.
66. Taking account of the contents of the complaint report (less the personal data which the Commissioner has found to be excepted from disclosure under regulation 11(2)), the observations above and the limited arguments put forward in submissions provided by the Council, the Commissioner is unable to see how or why disclosure of the majority of the complaint report would, or would be likely to, prejudice substantially the ability of any public authority to conduct an inquiry of a criminal or disciplinary nature.



Information prepared in contemplation of litigation?

67. The Council also argued that the exception in regulation 10(5)(b) of the EIRs was engaged because the report had been prepared in contemplation of litigation.
68. The Commissioner notes that, unlike section 36(1) of FOISA, the wording of regulation 10(5)(b) does not explicitly except from disclosure information in relation to which a claim to confidentiality of communications could be maintained in legal proceedings. Nonetheless, in the Commissioner's view, this particular exception may be applicable to information which is covered by legal professional privilege, including litigation privilege (also known as communications *post litem motam*).
69. Communications *post litem motam* 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 benefit from 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 generally being whether litigation was actually in contemplation at a particular time.
70. The Council argued that the report was prepared in contemplation of litigation. According to the Council, in May 2012, the residents stated that they had taken legal advice and raised some key legal issues. During the investigation, the Council confirmed that the complaint report was actually prepared before this, i.e. in April 2012, although it was not signed until 19 September 2012, by which time the marking "prepared in contemplation of litigation" had been added to the report.
71. The Council commented that the complaint report was therefore privileged and excepted from disclosure on the basis that disclosure would be likely to prejudice substantially the course of justice (in that the Council would not be able to defend itself appropriately against litigation).
72. Having compared the April 2012 and September 2012 versions of the report, the Commissioner has concluded that the changes made between the draft and final version relate to the finalisation of the report, rather than making substantive changes (e.g. to address the possibility of litigation by the Proprietors' Association). She considers that there is no evidence to support the view that the predominant purpose of the report was to prepare for future litigation. Instead, she takes the view that the report was prepared as part of the complaints process which the Council had put in place to respond to complaints regarding statutory notices.
73. Consequently, the Commissioner cannot accept the Council's position that the complaint report should be regarded as information prepared in contemplation of litigation. However, the Commissioner recognises that the report does contain details of the Council's likely position, should it have to raise or defend any court proceedings arising from this dispute. She accepts that disclosure of such information would impact on the fairness of these proceedings, substantially prejudicing the Council's position in defending any litigation.



74. The Commissioner is therefore satisfied that the Council was entitled to withhold some of the information within the complaint report under regulation 10(5)(b) of the EIRs, where disclosure would have given notice of the position likely to be taken by the Council in any future legal proceedings relating to the statutory notice works in question. Being satisfied that the exception is engaged in relation to such information, the Commissioner will go on to consider whether the public interest test favours disclosure of this information or not.
75. The Commissioner did not accept that the remaining information in the report (that is, information which would not show the position likely to be taken by the Council in any legal proceedings) was excepted from disclosure under regulation 10(5)(b) of the EIRs. She found that the arguments put forward by the Council in support of the exception (as already discussed) did not apply to most of the information in the report, which (as stated) consists of a largely factual assessment of the complaints brought by the Proprietors Association.
76. The Commissioner therefore concluded that the information to which the exception in regulation 10(5)(b) of the EIRs was wrongly applied should be disclosed to Mr Quelch and Mr Keith, where no other exception has been applied.

Public interest test

77. Having found that the Council correctly applied the exception in regulation 10(5)(b) to some of the withheld information in the complaint report, the Commissioner is required to consider the public interest test in regulation 10(1)(b) of the EIRs.
78. 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.
79. The Council acknowledged that there was public interest in the statutory notice process and ongoing investigations, and that such systems should be open and transparent.
80. As previously discussed, the Council argued that the release of the complaint report would, or would be likely to, prejudice substantially the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature and as previously stated, if the complaint report was released it would prejudice the fairness of the disciplinary procedures involved. None of these outcomes would be in the public interest.
81. The Council argued that, if it was obliged to release this information then, in future, officers would be reluctant to discuss and record information of this nature; this would seriously inhibit the free and frank exchange of views and would be un-desirable in terms of an audit trail point of view and contrary to the public interest. The Council considered that there is a strong public interest in ensuring that the Council can discuss matters privately, and keep records relating to statutory notices confidential, especially where a court case is a possibility.
82. The Council concluded that, on balance, withholding the information was proportionate and justified.



83. Mr Quelch stated that the Proprietors' Association has been waiting since April 2011 for a response to its complaints about how the statutory repair process was handled in this case. Mr Quelch commented that they were told in May 2012 that this report was almost finalised and would be submitted to the complaints resolution panel in June 2012, but they had yet to receive a response.
84. Mr Quelch considered disclosure of the contents of the reports to be clearly in the public interest, given the seriousness of the complaints that the Proprietors' Association had submitted about the Council's actions, and the time that had passed without achieving a resolution of the complaints.
85. Mr Quelch considered that the information should be made publicly available; given that the Council has powers to forfeit owners' property rights and enforce repairs that the owners are required to pay for, he believed the public should be able to ensure not only that the work was necessary, but that the related costs were 'reasonably incurred', as required by the relevant statute.
86. Mr Quelch considered that if they had known of the consequences of the Council's work, the Proprietors' Association would have decided to complete the work themselves, noting that they had done this at the rear of the property at an eighth of the cost estimated by the Council.
87. The Commissioner recognises that there has been widespread public concern surrounding the statutory repair process in Edinburgh. She considers that, given the scale of public concern, there is an identifiable public interest in disclosing information that would show how the Council is investigating residents' complaints about the works carried out under statutory notice. She takes the view that, to some extent, disclosure of the information to which the exception in regulation 10(5)(b) was wrongly applied (and which she has already ordered to be disclosed) would go some way towards satisfying this public interest.
88. On the other hand, the Commissioner recognises that the Council is in the process of investigating and addressing serious concerns raised in relation to its Property Conservation Service regarding the statutory notice process and associated works. She is aware that individuals affected by these works have raised concerns about works on their own properties, and that this presents significant challenges for the Council. She takes the view that where complaints have been made about the way in which work has been done by the Council or by contractors acting on its behalf, it is in the public interest for the Council to be able to carry out comprehensive, balanced and robust investigations into those complaints.

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89. On balance, having weighed up the arguments advanced by Mr Quelch and Mr Keith and the Council, the Commissioner finds that, in all the circumstances of this case, the public interest in making the remaining withheld information available to Mr Quelch and Mr Keith is outweighed by that in maintaining the exception in regulation 10(5)(b) of the EIRs. The Commissioner finds that the public interest in transparency and accountability, in relation to the actions and decisions of the Council, is outweighed by the public interest in ensuring that any future court action relating to the statutory works described in the report is not prejudiced by disclosure of information which would show the Council's likely position in such legal proceedings. Therefore, although there are strong reasons why disclosure of the information might be in the public interest, the Commissioner accepts that, on balance, it is in the public interest for the information to be withheld.
90. The Commissioner therefore finds that the Council was correct in applying the exception at regulation 10(5)(b) of the EIRs to the remaining withheld information.

Information to be disclosed

91. Due to the circumstances of this case, the Commissioner has not specified within this decision the information that should be disclosed to Mr Quelch and Mr Keith, but will provide a marked-up version of the complaint report to the Council indicating what information should be disclosed.

DECISION

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

The Commissioner finds that the Council was entitled to withhold the third party personal data within the complaint report under regulation 11(2) of the EIRs and parts of the report under regulation 10(5)(b) of the EIRs. However, the Commissioner found that the exception in regulation 10(5)(b) had been wrongly applied to parts of the report, and that in failing to disclose this information, the Council breached regulation 5(1) of the EIRs.

The Commissioner requires the Council to disclose the information which she has found not to be excepted from disclosure, by Monday 7 October 2013.

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Appeal

Should either Mr Quelch or Mr Keith wish to appeal this decision insofar as the decision relates to his application, or should 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
22 August 2013



Appendix

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002

1 General entitlement

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

...

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

2 Effect of exemptions

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

...

- (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.
- (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.
...
- (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;
...

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;

...

(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;

...

2 Sensitive personal data

In this Act “sensitive personal data” means personal data consisting of information as to-

...

(e) his physical or mental health or condition

...



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.

...

Schedule 3 – Conditions relevant for purposes of the first principle: processing of sensitive personal data

1. The data subject has given his explicit consent to the processing of the personal data.

...

5. The information contained in the personal data has been made public as a result of steps deliberately taken by the data subject.

...