

# Decision Notice

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## Decision 191/2014 Ms Alison Connelly and the City of Edinburgh Council

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### Potential acquisition of the Baileyfield Site in Portobello

Reference No: 201400790

Decision Date: 5 September 2014



Scottish Information  
Commissioner

## Summary

On 26 September 2013, Ms Connelly asked the City of Edinburgh Council (the Council) for information relating to the potential acquisition of the Baileyfield Site in Portobello. The Council responded by providing some information, but withheld other information. Following a review, Ms Connelly asked the Council to review its response, which it did, but she remained dissatisfied so applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the Council had responded to Ms Connelly's request for information in accordance with the EIRs. She did not require the Council to take any action.

## Relevant statutory provisions

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (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) (paragraphs (a) and (c) of definition of "environmental information"); 5(1) (Duty to make available environmental information on request)

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 26 September 2013, Ms Connelly wrote to the Council requesting information about the potential acquisition of the Baileyfield Site in Portobello, including the Council's interest in purchasing the Scottish Power site at Baileyfield Road, and what actions it had taken in this regard. Ms Connelly asked for copies of all emails and other correspondence regarding the process and timescales for considering the offers made for the site, and information about potential uses for the site. Her request was for information from the beginning of April 2013 onwards, and for any earlier information not previously supplied to her by the Council.
2. On 26 September 2013, the Council acknowledged receipt of the request.
3. Having received no response, on 25 October 2013, Ms Connelly wrote to the Council requesting a review of its failure to respond.
4. The Council responded on 22 November 2013. It apologised for the delay in responding, and provided some information, but relied on regulations 10(4)(e) and 11(2) of the EIRs to withhold other information.
5. On 8 April 2014, Ms Connelly wrote to the Commissioner, stating that she 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 specified modifications.
6. The application was validated by establishing that Ms Connelly 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. The case was then allocated to an investigating officer.

## Investigation

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7. On 2 May 2014, the Council was notified in writing that an application had been received from Ms Connelly and was asked to provide the Commissioner with any information withheld from her. The Council provided a single document withheld under regulation 10(4)(e) of the EIRs, and the case was then allocated to an investigating officer.
8. On 30 May 2014, the Council provided Ms Connelly with the document it had withheld, explaining that it had reviewed its decision to withhold the information in light of the change of circumstances following completion of the sale. The Council continued to withhold some personal data, redacted in terms of regulation 11(2) of the EIRs.
9. On 1 and 25 July 2014 Ms Connelly indicated that she was still dissatisfied and wished the Commissioner to consider her application. Ms Connelly explained that:

“...the process to establish whether or not the Baileyfield site could be purchased was protracted, and I believe that it is unlikely that the council did not have more regular activity /discussions with the agents and others, in an effort to reach a conclusion. My concern is that the council are willfully withholding information about communications in connection with their offer. I feel from the information that has been supplied by the council to me, that there are gaps remaining, and this concerns me because I would like to know what information the council would prefer to keep private and why...”.
10. Ms Connelly did not ask the Commissioner whether the Council's initial decision to withhold the document had been justified under regulation 10(4)(e) of the EIRs, or whether the Council was correct to continue to withhold some personal data from the document under regulation 11(1) of the EIRs. Accordingly, the Commissioner has not considered these matters in this decision notice.
11. The investigating officer subsequently contacted the Council on 31 July 2014, 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. The Council was asked to describe the searches it had undertaken for information covered by Ms Connelly's request, and to explain why these searches would have identified any relevant information.

## Commissioner's analysis and findings

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

### Application of the EIRs

13. The Council dealt with Ms Connelly's request under the EIRs.
14. The Commissioner is satisfied that any information falling within the request would be likely to be environmental information, as defined in regulation 2(1) of the EIRs, and fall within either paragraph (a) of the definition of environmental information contained in regulation 2(1) of the EIRs (as information on the state of the elements of the environment) or paragraph (c) of that definition (as information on measures affecting or likely to affect those elements).

15. Ms Connelly has not disputed that the information covered by her request would be likely to be environmental information.

#### *Section 39(2) of FOISA*

16. During the investigation, the Council confirmed that it wished to rely on the exemption in section 39(2) of FOISA.
17. 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 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 this exemption to the information requested by Ms Connelly, given the Commissioner's conclusion that it would all be environmental information.
18. The exemption in section 39(2) 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 Ms Connelly in this case, the Commissioner has also concluded that the public interest in maintaining this exemption, and in dealing with the request in line with the EIRs, outweighs the public interest in disclosure of the information under FOISA.
19. The Commissioner will consider the information in what follows solely in terms of the EIRs.

#### **Was all relevant information identified, located and provided by the Council?**

20. Regulation 5(1) of the EIRs requires a Scottish public authority which holds environmental information to make it available when requested to do so by any applicant. This obligation relates to the information held by an authority when it receives a request.
21. The Council submitted that it had released all the information it held that fell within the terms of Ms Connelly's request.
22. Ms Connelly commented that:  
*"...It may be that some of the communications were verbal and that they have not been recorded, but this was a significant element of a controversial plan for the council, and I would therefore have expected a more transparent process, and especially now that it has reached a conclusion, that the sensitivities that perhaps existed while negotiations were ongoing are no longer relevant."*
23. The standard of proof to determine whether a Scottish public authority holds information is the civil standard of the balance of probabilities. In determining this, the Commissioner will consider the scope, quality, thoroughness and results of the searches carried out by the public authority. She will also consider, where appropriate, any reason offered by the public authority to explain why the information is not held.
24. The Council was asked how it had identified the information falling within the terms of Ms Connelly's request, and how it held such information.
25. The Council provided details of the Council officials involved in searching for any information covered by Ms Connelly's request, or who had been consulted about the request, including an official in the Council's Children and Families service; the service that had been the sponsor for the project to deliver a new Portobello High School, of which the proposed acquisition of Baileyfield formed a constituent part.

26. The Council also consulted the official who had managed the bid process to try and acquire the Baileyfield site, and who undertook all communication with the vendor and their agent. The Council explained that this official held copies of all email correspondence between the Council and the vendor's agent, and kept all the email correspondence relating to the Baileyfield property in a dedicated email archive folder. All correspondence was by email and the Council confirmed that there were no additional paper records that would fall within the scope of Ms Connelly's request.
27. The investigating officer drew to the Council's attention that Ms Connelly specifically asked for information about projected timescales for the process, and asked whether the Council held any recorded information about such projected timescales: i.e. whether any documents setting out a likely timescale for the whole process had been created by any Council official?
28. The Council replied that it did not hold any information regarding projected timescales for the process. The Council explained that it had no input regarding the timescale for the sale process as this was under the control of the vendor and their agents. Therefore, no projected timescale was created as the Council had no control over the vendor and their agent's actions with the preferred bidder.
29. The Council explained that an update on the ongoing process to acquire the Baileyfield site has been included in the regular reports submitted to its elected members. These reports were 25 October 2012<sup>1</sup>; 22 November 2012<sup>2</sup>; 14 March 2013<sup>3</sup>; 30 May 2013<sup>4</sup> and 6 February 2014<sup>5</sup> and are all in the public domain, accessible on the Council website.
30. The Council explained that the final outcome of the bidding process was not formally intimated to it until 19 March 2014, when the vendor's agents advised that the sale of Baileyfield to another party had been concluded and settled. Whilst this occurred after the last report on the matter had been submitted to the Council's elected members, this information was placed into the public domain after 19 March 2014 by being referenced in paragraph 10.9 of the Council evidence submission to the Scottish Parliament's City of Edinburgh Council (Portobello Park) Bill Committee. The Council explained that it could be found on the Scottish Parliament website as part of the papers for the Committee meeting of 26 March 2014<sup>6</sup>. The Council indicated that it believed Ms Connolly would be aware of this information.
31. The Council was informed that Ms Connelly expected it would be likely to hold more information. The Council was invited to comment on this.
32. The Council reiterated that it had no control over the vendor and their agent's actions regarding the sale of the Baileyfield site, or the time taken to conclude the sale. The

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[http://www.edinburgh.gov.uk/download/meetings/id/36933/item\\_81\\_the\\_new\\_portobello\\_high\\_school\\_and\\_new\\_st\\_johns\\_rc\\_primary\\_school](http://www.edinburgh.gov.uk/download/meetings/id/36933/item_81_the_new_portobello_high_school_and_new_st_johns_rc_primary_school)

<sup>2</sup> [http://www.edinburgh.gov.uk/download/meetings/id/37233/item\\_no\\_81\\_-\\_the\\_new\\_portobello\\_high\\_school\\_and\\_new\\_st\\_johns\\_rc\\_primary\\_school](http://www.edinburgh.gov.uk/download/meetings/id/37233/item_no_81_-_the_new_portobello_high_school_and_new_st_johns_rc_primary_school)

<sup>3</sup> [http://www.edinburgh.gov.uk/download/meetings/id/38495/item\\_no\\_87\\_-\\_portobello\\_park\\_private\\_bill](http://www.edinburgh.gov.uk/download/meetings/id/38495/item_no_87_-_portobello_park_private_bill)

<sup>4</sup> [http://www.edinburgh.gov.uk/download/meetings/id/39308/item\\_no\\_84\\_-\\_city\\_of\\_edinburgh\\_council\\_portobello\\_park\\_bill](http://www.edinburgh.gov.uk/download/meetings/id/39308/item_no_84_-_city_of_edinburgh_council_portobello_park_bill)

<sup>5</sup> [http://www.edinburgh.gov.uk/download/meetings/id/42201/item\\_no\\_82\\_-\\_the\\_new\\_portobello\\_high\\_school](http://www.edinburgh.gov.uk/download/meetings/id/42201/item_no_82_-_the_new_portobello_high_school)

<sup>6</sup> <http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/63956.aspx>. See Agenda and Papers for meeting 26 March 2014 - EPP/S4/14/4/4 "Consideration Stage - Promoter's written submission in response to groups 2 and 4"

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Council commented that it appreciated that Ms Connelly expected more information to be held by the Council, but the Council was not the top bidder for the site and therefore was not party to the discussions which evidently took place between the vendor, their agents and the preferred bidder. There was no reason for the Council to enter into discussions of greater detail other than that for which information has been provided to Ms Connelly. If the preferred bidder, who successfully acquired the site, had withdrawn from the sale process then potentially the Council would have held further information.

33. Having considered all the relevant submissions, the Commissioner accepts that the Council has taken adequate and proportionate steps to establish the information it held which fell within the scope of Ms Connelly's request. In reaching this conclusion, the Commissioner has taken into account the following:
- the information falling within the request is held by the Council in a way that the Council describes as specific, identifiable and searchable;
  - the Council officials involved in searching for the information had experience and knowledge of the subject;
  - the Council has explained why, in terms of the sale process, it does not hold any further information;
  - the Council located and provided relevant information that fell within the terms of the request.
34. The Commissioner is satisfied, on the balance of probabilities, that Ms Connelly has now received all of the information held by the Council which falls within the scope of her request, and that the Council complied with the regulation 5(1) of the EIRs in responding to Ms Connelly's request.

## Decision

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

## Appeal

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



**Rosemary Agnew**  
**Scottish Information Commissioner**  
**5 September 2014**

## Appendix

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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;

...

(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.

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