

# Decision Notice

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**Decision 236/2014: Ms Elizabeth Manshoury and City of Edinburgh Council**

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**Correspondence relating to legal opinion regarding Portobello Park**

Reference No: 201401454

Decision Date: 17 November 2014



Scottish Information  
Commissioner

## Summary

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On 5 March 2014, Ms Elizabeth Manshouri (Ms Manshouri) asked City of Edinburgh Council (the Council) for all information held, covering a specified time period, relating to permission to build on Portobello Park.

The Council responded by providing Ms Manshouri with information, subject to the redaction of personal details. The Commissioner investigated and accepted that the Council had provided Ms Manshouri with all the relevant information it held.

## Relevant statutory provisions

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (4) (General entitlement)

The full text of each of the statutory provisions cited above is reproduced in Appendix 1 to this decision. The Appendix forms part of this decision.

## Background

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1. On 5 March 2014, Ms Manshouri made a request for information to the Council. The information requested was:  
  
“...copies of internal and external correspondence, (letters, e-mails, etc.) and also minutes of any meetings, notes of any telephone calls, etc, on the subject of the need to seek permission from the courts to build on [Portobello] Park.”  
  
Ms Manshouri sought information from between 1 March 2008 and 1 December 2008.
2. The Council responded on 2 April 2014. The Council provided Ms Manshouri with information falling within the scope of her request, subject to redaction of personal data.
3. On 8 April 2014, Ms Manshouri wrote to the Council, requesting a review of its decision. She did not accept that the Council had identified and provided her with all of the information which fell within the scope of her request.
4. The Council notified Ms Manshouri of the outcome of its review on 8 May 2014. The Council confirmed that it held no further information which fell within the scope of her request.
5. On 21 July 2014, Ms Manshouri wrote to the Commissioner. She applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Ms Manshouri stated that she was dissatisfied with the outcome of the Council's review, because she believed the Council had not provided her with all of the information it held and which fell within the scope of her request.

## Investigation

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6. The application was accepted as valid. The Commissioner confirmed that Ms Manshouri made a request for information to a Scottish public authority and asked the authority to

review its response to that request before applying to her for a decision. The case was allocated to an investigating officer.

7. On 7 August 2014, the Council was notified in writing that Ms Manshouri had made a valid application.
8. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Council was invited to comment on this application and answer specific questions. In particular, it was asked for details of the steps taken to identify and locate the information requested by Ms Manshouri.

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

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9. In coming to a decision on this matter, the Commissioner considered all of the relevant submissions, or parts of submissions, made to her by both Ms Manshouri and the Council. She is satisfied that no matter of relevance has been overlooked.
10. Ms Manshouri believed that there was a gap in the information provided between 22 August 2008 and 6 November 2008. She submitted that at some point in that period there was a major change in the Council's approach to addressing the legal questions surrounding its plans to build on Portobello Park. Ms Manshouri could not accept that there were no records of the process by which this change occurred.
11. Ms Manshouri argued that the legal opinion obtained by the Council in August 2008 clearly stated there was no power under current legislation that allowed the Council to appropriate Portobello Park for another purpose. She argued that at some point between 22 August and 6 November 2008, the Council decided to involve another QC and obtain a different legal opinion, to the effect that it would not be necessary to obtain the Court's permission to build on the Park. A legal challenge to the Council's decision to appropriate the land was upheld by the Court of Session. Ms Manshouri argued that there must be information held which recorded the Council's change of position.
12. Both opinions are available publicly, having been disclosed in response to Ms Manshouri's request or previously.

### **Whether further information is held**

13. In terms of section 1(4) of FOISA, the information to be provided in response to a request under section 1(1) is that falling within the scope of the request and held by the authority at the time the request is received.
14. 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.

### *The Council submissions*

15. The Council disagreed with Ms Manshouri's suggestion that there was major change in the Council's position between 22 August and 6 November 2008.
16. The Council acknowledged that one QC did produce an opinion on 22 August 2008, which noted that appropriating the Park for educational purposes would not have been without legal risk. However, this QC was also one of the two QCs who provided the subsequent opinion in

November 2008. That earlier opinion was therefore superseded and so was not relevant to the decisions subsequently taken by the Council. To support its position, the Council supplied the Commissioner with both opinions. It did not accept the significance attached by Ms Manshouri to the earlier opinion.

#### *Details of searches*

17. The Council explained that, in relation to such a technical legal matter, relevant information would have been retained by its Legal Services department. It confirmed that it also consulted with its Children and Families department, although it was likely in the circumstances that any material held there would simply duplicate that held by Legal Services. The Council also listed the staff members consulted and explained why they would be likely to hold relevant information.
18. The Council explained that there were two solicitors in Legal Services who dealt with matters relating to the replacement of Portobello High School. It confirmed that these solicitors' emails and correspondence files were searched, including archived files, to ascertain what information falling within the scope of the request was held.
19. Additional checks at the Council's Records Centre were also carried out, to determine if any other papers covered by the request were held there. The Council confirmed that its searches included electronic data, which included information held locally on personal computers (including laptops) on networked resources and in email accounts, in addition to paper files.
20. The Council provided the Commissioner with a list of files that were searched to identify information falling within the scope of the request. It also supplied the Commissioner with screen shots of the searches of personal email folders, which confirmed that no emails were held covering the time period in question.
21. The Council also explained that its current record retention schedule was established in 2011. Prior to this date, it explained, Council service areas operated their own local policies. Any additional information which might have existed at the time and was considered of no further statutory or operational relevance would have been disposed of, in line with local practice and policy.
22. As a result of what it considered to be extensive searches, the Council concluded that it had identified and provided to Ms Manshouri all of the information it held and which fell within the scope of this request.

#### *The Commissioner's conclusion*

23. The Commissioner has considered the submissions made by both Ms Manshouri and the Council. She has considered the arguments presented by Ms Manshouri, which suggest to her that the Council should hold more information. She has also considered the explanations from the Council as to why it would not expect to hold further information, in addition to considering the searches undertaken by the Council.
24. The Commissioner considers it reasonable to acknowledge, in all the circumstances, that the second legal opinion was the result of a conscious decision to revisit the legal issues highlighted in the first. It would also be reasonable to acknowledge that anything prior to the second legal opinion would have assumed less relevance after the second opinion was produced. In the light of the explanations and evidence provided, the Commissioner is satisfied that the searches conducted by the Council were adequate and proportionate in the

circumstances. On balance, she does not consider it would be reasonable to expect further information to be held.

25. The Commissioner is satisfied that the Council has identified and provided to Ms Manshouri all of the information that fell within the scope of her request, in line with section 1(1) of FOISA.

## Decision

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The Commissioner finds that City of Edinburgh Council complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information request made by Ms Manshouri.

## Appeal

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

**Margaret Keyse**  
**Head of Enforcement**

**17 November 2014**

### 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.

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- (4) The information to be given by the authority is that held by it at the time the request is received, except that, subject to subsection (5), any amendment or deletion which would have been made, regardless of the receipt of the request, between that time and the time it gives the information may be made before the information is given.

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