



Scottish Information
Commissioner

**125/2007 Robert Hogg and City of Edinburgh
Council**

Request for information regarding a specified site in Ratho

**Applicant: Robert Hogg
Authority: City of Edinburgh Council
Case No: 200601096
Decision Date: 31 July 2007**

**Kevin Dunion
Scottish Information Commissioner**

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Decision 125/2007 Robert Hogg and City of Edinburgh Council

Request for information relating to a specified site in Ratho – information withheld – Commissioner held that the City of Edinburgh Council was justified in withholding the information

Relevant Statutory Provisions and Other Sources

Environmental Information (Scotland) Regulations 2004 (the EIRs) – Regulations 5(1) (duty to make available environmental information on request); 10(1)(a) and (b), and 10(5)(b) (exceptions from duty to make environmental information available on request).

The full text of each of these provisions is reproduced in the Appendix to this decision. The Appendix forms part of this decision.

Other Sources

Town and Country Planning (Scotland) Act 1996 (Part VI)

Scottish Executive Planning Advice Note PAN 54

Scottish Executive Environment Group – Guidance for Scottish Public Authorities and Interested Parties on the Implementation of the Environmental Information (Scotland) Regulations 2004

The Aarhus Convention – An Implementation Guide

Facts

Mr Hogg requested information from the City of Edinburgh Council (the Council), relating to a site in the Ratho area of Edinburgh. Mr Hogg requested all documents and correspondence, including e-mails relating to the site. The Council responded by advising Mr Hogg that some information relating to planning and building warrants could be accessed via its Planning and Building Standards portal or in person at its Plan Store.



Mr Hogg asked the Council to review this decision, noting that further information was held by the Council than had been identified in its response. Following its review, the Council acknowledge that it held further information. It withheld information in relation to planning enforcement as it considered the exceptions in regulations 10(4)(d) and 10(5)(b) applied and it did not consider it to be in the public interest to release the information. Mr Hogg remained dissatisfied and applied to the Commissioner for a decision on this matter.

Following an investigation, the Commissioner found that the Council had dealt with Mr Hogg's request for information in accordance with the Environmental Information (Scotland) Regulations 2004 (EIRs). He did not require the Council to take any action.

Background

1. On 11 April 2006, Mr Hogg submitted an online request form to the Council requesting copies of all documents and all correspondence, including e-mails, relating to a site in the Ratho area of Edinburgh.
2. On 21 April 2006, the Council emailed Mr Hogg in response to his request for information. The Council advised Mr Hogg that his request was being considered in terms of the EIRs. The Council went on to advise Mr Hogg that it only held a limited amount of information in respect of the site, which was not Council owned.
3. The Council directed Mr Hogg to its Planning and Building Standards portal. It advised that there were two planning applications and one building warrant listed. The Council explained that, as these dated from before 1 January 2003, they could not be viewed electronically. However, it advised Mr Hogg that the Council had a facility whereby he could view the planning files during office hours and provided contact details where an appointment could be made to view the files. The Council also advised Mr Hogg that building warrants could be viewed at its Plan Store and provided access details.
4. On 2 May 2006, Mr Hogg wrote the Council requesting a review of its decision. In particular, Mr Hogg advised the Council that, in addition to the material mentioned in its initial response, he was aware of other correspondence and documentation which he considered the Council would hold elsewhere. He pointed out that the Council had received correspondence from a number of people (including him) regarding activities at the site and was aware the Council had issued a Planning Contravention Notice earlier in the year. Mr Hogg also suggested it was likely the Council would hold correspondence regarding legal opinions in relation to the status of the site.



5. On 6 June 2006, the Council wrote to notify Mr Hogg of the outcome of its review. It apologised for failing to identify all relevant information in its initial response to his request, and went on to explain that it held the following information in relation to the site: planning information, building warrant information and planning enforcement information. It also explained that it held non-domestic Council Tax records but had assumed that Mr Hogg was not seeking any information regarding this subject. The Council apologised for not having advised Mr Hogg that certain information was being withheld from him.
6. The Council went on to explain that it would not be releasing any legal advice received in relation to the site. The Council considered this information to be excepted in terms of regulation 10(4)(e) of the EIRs (the request involved making available internal communications) and regulation 10(5)(d) of the EIRs (disclosure would, or would be likely to, prejudice substantially the confidentiality of the proceedings of any public authority where such confidentiality is provided for by law). In terms of regulation 10(1)(b) of the EIRs, the Council is only permitted to refuse a request where there is an exception to disclosure under paragraphs (4) or (5) and, in all the circumstances, the public interest in making the information available is outweighed by that in maintaining the exception. The Council stated that it did not consider it to be in the public interest to disclose its legal advice.
7. The Council also informed Mr Hogg that it would not be releasing any information relating to planning enforcement. The Council considered this to be excepted in terms of regulation 10(5)(b) of the EIRs (disclosure 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 any public authority to conduct an enquiry of a criminal or disciplinary nature). The Council also considered the information to be excepted in terms of regulation 10(4)(d) of the EIRs (the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data). In both instances, the Council did not consider it to be in the public interest to release the information.
8. On 18 June 2006, Mr Hogg wrote to my Office, stating that he was dissatisfied with the outcome of the Council's review and applying to me for a decision in terms of section 47(1) of the Freedom of Information (Scotland) Act 2002 (which also deals with applications under the EIRs).
9. The application was validated by establishing that Mr Hogg had made a request for information to a Scottish public authority and had applied to me for a decision only after asking the authority to review its response to that request.



The Investigation

10. The case was allocated to an investigating officer and, on 17 July 2006, the Council was notified in writing that an application had been received from Mr Hogg. The Council was asked to provide my Office with specified items of information required for the purposes of the investigation. The Council was also asked to provide comments on the application in terms of Section 49(3) of FOISA (which also applies where a request has been made under the EIRs), to respond to specific questions on the application and to provide its reasoning when applying the exceptions to the information withheld. The Council was also asked to detail the steps taken to ensure that all information falling under the scope of Mr Hogg's information request had been identified.
11. The Council responded on 21 August 2006. It provided a copy of the enforcement file that was being withheld and its submissions on the application of the exceptions under the EIRs. It also provided details of the steps taken to identify relevant information in response to Mr Hogg's request.
12. In its response, the Council indicated that it had not, in fact, received any legal advice relating to the site in Ratho at the date of Mr Hogg's initial request on 11 April 2006. This investigation and decision is limited to considering the whether the Council responded correctly to the information request it received from Mr Hogg, given the information held at the date of that request.
13. In these circumstances, I will not therefore consider whether any legal advice subsequently received by the Council should have been disclosed in response to Mr Hogg's request. I am satisfied that the legal advice identified by the Council in its review was wrongly identified as falling within the scope of his request.
14. The Council restated its position regarding the planning enforcement file as outlined in paragraph 7 above. In particular, it noted its opinion that disclosure would prejudice the ongoing case. Additionally, the Council indicated that it felt regulation 10(5)(g) may apply in that disclosure may inhibit the Council's ability to protect the environment to which the information related.
15. The Council noted that much of the information in the enforcement file came from Mr Hogg himself. However, it did not wish to make the content of the file publicly available whilst an investigation was ongoing. The Council did indicate that once a decision had been made and implemented and the file closed, it would be available for viewing by the public (subject to the deletion of any legal advice).



16. The Council's submissions stated that in order to identify information relevant to Mr Hogg's request, it had undertaken a search of its planning and building standards portal and the correspondence database which is shared by City Development and Services for Communities (including Roads Services) staff. It had also checked whether any relevant information was held within the Chief Executive's office. Other than information concerning non-domestic Council Tax records, the Council was unable to identify any other information that was held by it relating to the site.
17. In March 2006, Mr Hogg was invited to comment on this case, particularly in relation to why he believed that disclosure of the information withheld would be in the public interest. Mr Hogg provided his comments on 28 March 2007.
18. In July 2007, the investigating officer contacted Mr Hogg again, noting that much of the information withheld within the planning enforcement file was his own correspondence with the Council in relation to the site at Ratho. Mr Hogg subsequently agreed that his own communications with the Council could be discounted in my decision. I will therefore restrict my conclusions below to only the remaining documents withheld in response to Mr Hogg's request.

The Commissioner's Analysis and Findings

19. In coming to a decision in this matter, I have considered all of the information and the submissions that have been presented to me by both Mr Hogg and the Council and I am satisfied that no matter of relevance has been overlooked.
20. I am satisfied that (following Mr Hogg's request for a review) the Council took reasonable steps to identify information held by the Council that fell within the scope of his request. I am satisfied that the planning enforcement file for the site in question comprises all relevant information that has been withheld from Mr Hogg.
21. I will now turn to consider whether the Council acted in accordance with the EIRs in withholding the contents of the planning enforcement file from Mr Hogg. The Council has applied three of the exceptions contained in the EIRs. I will firstly consider the exception contained in regulation 10(5)(b).

Regulation 10(5)(b)

22. Regulation 10(5)(b) provides that an authority may withhold information where it is satisfied that disclosure 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.
23. Paragraph 90 of the Scottish Executive's guidance for Scottish public authorities and interested parties on the implementation of the EIRs (paper 2005/21 – September 2005) suggests that this exception “may relate to present proceedings or proceedings likely to take place in the future. It could include any information which, if disclosed, could prejudice the enforcement or appropriate administration of the law, which includes the prevention, investigation or detection of a crime, or the apprehension or prosecution of offenders”.
24. The Aarhus Convention: An Implementation Guide explains the principles behind the exception in the following way (at page 59):
- “If the release of the information would adversely affect the “course of justice”, public authorities may have a legal basis to refuse to release it. The course of justice refers to active proceedings within the courts. The term ‘in the course of’ implies that an active judicial procedure capable of being prejudiced must be under way. This exception does not apply to material simply because at one time it was part of a court case. Public authorities can also refuse to release information if it would adversely affect the ability of a person to receive a fair trial. This provision should be interpreted in the context of the law pertaining to the rights of the accused. Public authorities also can refuse to release information if it would adversely affect the ability of a public authority to conduct a criminal or disciplinary investigation.....The Convention clearly does not include all investigations in this exception, but limits it to criminal or disciplinary ones only. Thus, information about a civil or administrative investigation would not necessarily be covered.”
25. Although there is no definition within the EIRs as to what would constitute substantial prejudice, it is my view that in order for a public authority to be able to rely on this exception, it would have to show that the damage caused by disclosing the information would be real or very likely, not hypothetical. The harm caused must be significant, not marginal, and it would have to occur in the near future and not in some distant time.
26. In this case, the Council argued that regulation 10(5)(b) applied to the extent that its ongoing investigation into the alleged breach of planning control could lead to criminal proceedings depending on the outcome of that investigation. It argued that general release could prejudice such an investigation.



27. It may be useful at this stage to briefly outline the law relating to this aspect of planning enforcement in Scotland. The powers to enforce planning control are contained in Part VI of the Town and Country Planning (Scotland) Act 1997. Advice on planning enforcement in Scotland is contained in the Scottish Executive Planning Advice Note PAN 54 published on 1 March 1999.
28. Paragraph 22 of the guidance states: “The Planning Contravention Notice [PCN] is intended to be the main method by which the planning authority obtain information about allegedly unauthorised developmentIt does not comprise enforcement action but it represents the start of formal action which may ultimately lead to enforcement action..... If enforcement is required however, the service of a PCN facilitates the accurate serving of subsequent enforcement notices”. The guidance goes on to describe how recipients of a PCN are required to provide specified information about operations being carried out on the land, or relating to conditions or limitations which apply to any planning permission granted in respect of the land. Supplementary information or representations on the matter raised in the notice may also be required. Failure to comply with the notice within 21 days of it being served is an offence.
29. In the event that the planning authority decides there has been a breach of planning conditions, this would generally be addressed by the service of an enforcement notice. This notice will specify a time period to take effect and will specify what steps must be taken to remedy the breach. There is a right of appeal against the enforcement notice to the Scottish Ministers. Failure to comply with the terms of an enforcement notice within the time specified is an offence and may lead to a subsequent criminal prosecution.
30. At the time of Mr Hogg’s information request, a PCN had been served on the operators of the site at Ratho and the process initiated by the issue of this notice had not been completed. In these circumstances, I accept that at the time of Mr Hogg’s request to the Council the planning enforcement process was live, and that this process had the potential to lead to criminal prosecution.
31. No criminal investigation or court proceedings had commenced at the time of Mr Hogg’s request. The Council’s investigations at that time therefore cannot be construed as “active proceedings within the courts”. Accordingly, I do not consider that release of the information can prejudice the course of justice for the purposes of Regulation 10(5)(b), interpreted in line with the Aarhus Convention: an Implementation Guide.



32. However, I am persuaded that release of the information withheld from Mr Hogg would be likely to, prejudice substantially the ability of the operator of the Ratho site to receive a fair trial. Until the process of planning enforcement is complete, there remains a possibility that it will lead to a criminal prosecution. Although most cases will not end in this manner, for those cases that do lead to prosecution, the evidence contained within the planning enforcement file will form the basis of that prosecution.
33. I am satisfied that information that public disclosure of the information requested by Mr Hogg while the matter remains ongoing would undermine the ability of the site operator to prepare their case and receive an impartial hearing should this ultimately lead to criminal proceedings.
34. I am also persuaded that release of the information would be likely to prejudice substantially any future criminal investigation prompted by the planning enforcement process. Whilst I am satisfied that the investigation concerning the Ratho site should be considered a civil or administrative matter at the time of Mr Hogg's request, the planning authority's investigations, findings and submissions on this matter will in turn lead to and inform any subsequent decision on prosecution made by the Procurator Fiscal. I am satisfied that disclosure while the matter was ongoing would undermine the investigation process.
35. I am therefore satisfied that the Council has correctly applied the exception in Regulation 10(5)(b) to the information withheld from Mr Hogg, on the basis that disclosure would be likely to prejudice the ability of a person to receive a fair trial, and the ability of an authority to conduct an investigation of a criminal nature.

The public interest test

36. Regulation 10(1)(b) of the EIRs provides for a public interest test. Having concluded that an exception in the EIRs applies (in this case, that in Regulation 10(5)(b)), an authority is required to consider whether the public interest in making the information available is outweighed by that in maintaining the exception.
37. The public interest test is similar to that in section 2(1)(b) of FOISA. The public interest is not defined within the act but it has been described as "something that is of serious concern and benefit to the public", not merely something of individual interest. It has also been held that public interest does not mean "of interest to the public" but "in the interest of the public" i.e. it serves the interest of the public.



38. In considering the circumstances of this case, I accept that there are public interest arguments in favour of release of the information, and I have noted Mr Hogg's comments on the public interest in relation to the specific circumstances of this case.
39. I acknowledge that there is a general public interest in allowing oversight of the planning enforcement process, to demonstrate that planning investigations are carried out properly and without prejudice, and that complaints which are made by members of the public are addressed appropriately. Mr Hogg has raised specific concerns about the conduct of Council officials in relation to the site at Ratho, and there is a public interest in the disclosure of the information insofar as it would enable him and other members of the community concerned to understand further what action had been taken in relation to the site.
40. However, I am of the opinion that any such considerations are, in this case, outweighed by the public interest in protecting the process of investigation and the right of an accused to a fair trial, in circumstances where criminal proceedings may be the eventual outcome of the planning enforcement process. Given the nature of this process. I am satisfied that where investigations and enforcement activities are ongoing, there will generally be a considerable public interest withholding information relating to that process.
41. I would consider it to be contrary to the public interest for an investigation of this type to be prejudiced as a result of the release of information and evidence prior to the conclusion of the investigation (and of any subsequent prosecution). In all the circumstances of the particular case before me, I can see no overriding reason why it would serve the interests of the public for information relating to this investigation in particular to be released at the stage in the process that had been reached at the time of Mr Hogg's request.
42. I note that it is the Council's general policy that, subject to the removal of legal advice, information relating to planning enforcement is made publicly available once the enforcement process to which it relates is complete. In this case, Mr Hogg requested the contents of the enforcement file while it was a relatively early stage in the overall process that may follow from a complaint.
43. While I accept that there would be some public interest in disclosure of the information requested by Mr Hogg at the time of his request, I would suggest that this same public interest would be served in time by the disclosure of the case file following its completion.
44. I am therefore of the view that, having considered all the circumstances of the case, the balance of the public interest lies in favour of the non-disclosure of the information contained in the file.



45. Given that I have upheld the use of the exception contained in regulation 10(5)(b), I am not required to go on to consider the Council's application of the exceptions contained in regulations 10(4)(d) and 10(5)(g).

Decision

I find that the Council acted in accordance with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by Mr Hogg.

Given that I find the Council correctly applied the exception contained in regulation 10(5)(b) and that the public interest lies in maintaining the exception, I do not require the Council to take any action.

Appeal

Should either Mr Hogg or the 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 of receipt of this decision notice.

Kevin Dunion
Scottish Information Commissioner
31 July 2007



Appendix

Relevant statutory provisions

Environmental Information (Scotland) Regulations 2004

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.

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.
- [...]
- (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;