# Decision Notice 064/2023

## Comments received following resident engagement

**Authority: City of Edinburgh Council**
**Case Ref: 202200171**

### Summary

The Applicant asked the Authority for the comments received following resident engagement relating to proposed changes to Comiston Road and Braid Road. The Authority refused to provide the information, arguing that it would be manifestly unreasonable for it to do so. Following an investigation, the Commissioner concluded that the Authority had not been entitled to claim that it would be manifestly unreasonable to fulfil part of the request, and so it had breached the EIRs.

### Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 39(2) (Health, safety and the environment); 47(1) and (2) (Application for decision by Commissioner)

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (definition of "the Act", "the applicant" and "the Commissioner" and definitions (a), (b) and (c) of "environmental information") (Interpretation); 5(1) and 2(b) (Duty to make environmental information available on request); 10(1), (2) and (4)(b) (Exceptions from duty to make environmental information available); 17(1), (2)(a), (b) and (f) (Enforcement and appeal provisions)

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

1. On 1 December 2021, the Applicant made two requests for information to the Authority. The Applicant asked:

*In the local resident engagement for Braid Road and Comiston Road we were asked for comments. Please list all comments in three separate sections a) leafletted residents b) EH10 residents and c) wider area* (first request)

*Secondly for Braid Rd we had the choice of rejecting all four options – how many people rejected all four option*s? (second request)

2. The Authority responded on 30 December 2021, in line with the EIRs. The Authority refused to make information available which would fulfil the first request, arguing that it would be manifestly unreasonable (in line with regulation 10(4)(b)) to do so. In response to the second request, the Authority informed the Applicant of the number of respondents who rejected all four options.

3. On 20 January 2022, the Applicant wrote to the Authority, requesting a review of its decision. The Applicant stated that he was dissatisfied with the decision because he considered the estimated time quoted by the Authority to respond to the first request to be grossly exaggerated. He also noted that at least one local Councillor had received all of the comments. Furthermore, the Applicant was aware that the Authority had, in the past, disclosed comments received in response to another consultation. Applying the same calculation as used in relation to his request, he believed this would have taken the Authority 1,466 hours to collate – however, the Authority had not considered this to be manifestly unreasonable.

4. In his requirement for review, the Applicant commented that he was willing to modify his request so that the Authority did not have to split the comments into three groups.

5. The Authority notified the Applicant of the outcome of its review on 26 January 2022. In doing so, the Authority upheld (with reasons) its application of the exception in regulation 10(4)(b) of the EIRs for information covering the first request.

6. On 8 February 2022, the Applicant wrote to the Commissioner, applying 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. The Applicant stated he was dissatisfied with the outcome of the Authority's review because:

    - the Authority had promised to publish the comments in the original engagement documentation.
    - his request was not manifestly unreasonable. If a Councillor had received the comments, it would not require the time and work the Authority indicated.
    - the estimate of five minutes per comment was exaggerated; most comments would be brief.
    - a previous data breach (referred to in the Council's review outcome) was no excuse for a failure, by the Authority, to keep their promise of publishing the comments; the Authority had made the promise to publish the comments months after it was informed of the data breach.

## Investigation

7. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.

8. On 8 March 2022, the Authority was notified in writing that the Applicant had made a valid application. The case was then allocated to an investigating officer.

9. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Authority was invited to comment on this application and to answer specific questions. These related to why the Authority was of the view that it would be manifestly unreasonable for it to make information available which would fulfil the first request. The Authority was given the opportunity to comment on the undertaking, given when the consultation was launched, that comments would be published, as well as why it had not been possible to publish the comments received in this case when it was done in relation to other consultations carried out. Comments were also invited from the Authority around why it considered it manifestly unreasonable to make information available to the Applicant which had already been disclosed to a named Councillor.

## Commissioner's analysis and findings

10. The Commissioner has considered all of the submissions made to him by the Applicant and the Authority.

### *Application of the EIRs*

11. It is clear from the Authority's correspondence with both the Applicant and the Commissioner that the information sought by the Applicant is properly considered to be environmental information, as defined in regulation 2(1) of the EIRs. It relates to proposals to make changes to the use of specific roads in the Authority's area and, given the relationship between these matters and the elements of the environment and related factors and measures, the Commissioner is satisfied that it falls within paragraphs (a), (b) and/or (c) of the definition in regulation 2(1) (the text of each paragraph is reproduced in Appendix 1). The Applicant has not disputed this, and the Commissioner will consider the information in what follows solely in terms of the EIRs.

### *Background*

12. In September 2021, the Authority opened a consultation seeking local resident and business engagement around its proposals for Braid Road and Comiston Road. The Authority had put in place protected cycle lanes on Comiston Road, and had prohibited vehicles from travelling north on Braid Road. This was carried out as part of its Spaces for People measures to make streets safe for walking, cycling and wheeling and to enable people to physically distance in response to Covid-19.

13. The consultation itself closed on 10 October 2021.

14. An earlier public consultation had taken place about the potential retention of Spaces for People Measures. The findings from that consultation were reported back to the Authority during an earlier meeting. During this meeting, an agreement was reached that further engagement should be carried out with the local community council and residents on options for:

- re-opening Braid Road in both directions; and
- easing the impact of changes on Comiston Road for local residents and for improving public transport.

15. It was intended that the results of that survey (the one opened in September 2021 and closed on 10 October 2021) would be considered alongside the previous public consultation feedback at a committee meeting on 11 November 2021.

**Regulation 10(4)(b) of the EIRs**

16. The Authority relied on the exception in regulation 10(4)(b) in relation to information which would fulfil the Applicant's first request.

17. Under the exception in regulation 10(4)(b) of the EIRs, a Scottish public authority may refuse to make environmental information available to the extent that the request for information is manifestly unreasonable. In considering whether the exception applies, the authority must interpret it in a restrictive way and apply a presumption in favour of disclosure. Even if it finds that the request is manifestly unreasonable, it is still required to make the information available unless, in all the circumstances, the public interest in doing so is outweighed by that in maintaining the exception.

18. The EIRs do not define the term "manifestly unreasonable", and neither does the Directive on which the EIRs were based (Directive 2003/4/EC on public access to environmental information and repealing Directive 90/313/EEC). However, the Aarhus Convention Implementation Guide, named after the Convention on which the Directive was based, makes it clear that volume and complexity alone do not make a request "manifestly unreasonable".

19. The Commissioner's general approach is that the following factors are relevant when considering whether a request is manifestly unreasonable under regulation 10(4)(b) of the EIRs. These are that the request:

    - would impose a significant burden on the public body
    - does not have a serious purpose or value
    - is designed to cause disruption or annoyance to the public authority
    - has the effect of harassing the public authority
    - would otherwise, in the opinion of a reasonable person, be considered to be manifestly unreasonable or disproportionate.

20. This is not an exhaustive list. Depending on the circumstances, other factors may be relevant, provided the impact on the authority can be supported by evidence. The Commissioner recognises that each case must be considered on its merits, taking all the circumstances into account.

*The Applicant's submissions about the exception*

21. As mentioned above, the Applicant did not agree that compliance with the first part of his request would be manifestly unreasonable.

22. The Applicant submitted that he was not asking for comments to be made available without redaction, in a way that would breach the UK General Data Protection Regulation.

Therefore, the Authority could not argue that his request was manifestly unreasonable because he is asking it to break the law. He noted that he was happy to receive appropriately redacted comments.

23. The Applicant pointed out that the Authority had set an expectation from the beginning of the engagement exercise that comments would be published. Therefore, it should not now be manifestly unreasonable for the Authority to do this and still be legally compliant. In the Applicant's view, the Authority should have allowed for any time required for publication, prior to making that promise. The Applicant provided the Commissioner with a copy of the letter, sent out by the Authority, which accompanied the consultation document, which states:

*The Council will publish all responses received to this activity, but will not publish individual names, email addresses or postcodes. We will publish the names of organisations.*

24. The Applicant commented that the Authority had published comments from other consultations. He provided a link to a report in which 2,455 comments arising from previous consultations had been published.

25. The Applicant explained that the comments, in this case, related to an engagement, with leaflets sent to 1,496 properties. They related to several roads, one of which, Comiston Road, had traffic levels of over 6,000 [vehicles] a day. Therefore, to claim that this request was only for the interest of a single applicant could not be justified. It was in the interest of all those living in, or travelling through, the area, whether or not they responded to the consultation, to understand the extent to which comments shaped decision making in their area, leading to a quasi-judicial traffic regulation process that appeared to go against the majority community opinion.

*Authority's submissions about the exception*

26. It was the Authority's view that the time and expense involved in complying with the Applicant's first request would be regarded as excessive by any reasonable person.

27. The Authority estimated that it would take approximately 92 hours to prepare the comments, covered by the first part of the request, for release. This included dividing the response into the three sections specified by the Applicant.

28. During the investigation, the Authority acknowledged that in the report prepared for its Transport and Environment Committee, the responses (total numbers only) had already been split into the three sections specified by the Applicant. However, it maintained that, since the bulk of the time would be spent on exporting data and identifying and applying redactions to personal data, processing the request would still cost in excess of £600. (Under section 12 of FOISA, a public authority is not required to comply with a request for information if complying would cost more than £600. This does not directly relate to requests for environmental information.)

29. It was the Authority's position that each comment would have to be checked manually, and have electronic redactions applied to any third-party personal data to ensure that data protection legislation was not breached as a result of disclosure. The Authority noted that it had allowed five minutes to check, categorise and prepare each comment for release, which equated to 92 hours of work in total.

30. The Authority explained the format in which the information was held and the process that would have to be followed, to enable it to be prepared so it could be made available to the Applicant.

31. As part of the sampling exercise carried out by the Authority to assess the cost of complying with the first part of the request, the Authority stated that it had considered several of the responses received to the consultation. Some of these responses were a few sentences in length, whilst others ran to several paragraphs. Taking account of the process that would have to be followed to transfer the results from survey format to PDF format in order for redactions to be applied, and then prepared for disclosure, the Authority calculated an average of five minutes per comment.

32. The Authority argued that undertaking this work was the equivalent of effectively removing a member of staff for a two and a half week period to work full-time on a request, and this would create a disproportionate pressure to the detriment of a service.

33. In its submissions, the Authority mentioned the service areas it considered would have to be involved in the process of reviewing each comment, applying redactions and preparing the information for disclosure. The Authority considered that the cumulative diversion of staff time would result in public resources, required for the benefit of citizens in its area, being diverted disproportionately to respond to the specific concerns of a single applicant.

34. In response to the Applicant's comments concerning the undertaking given when the consultation commenced, the Authority stated that a mistake had been made in the wording. The Authority explained that the correct wording should have been that a "summary" of comments would be made available. This was because the Authority had adopted a more cautious approach – only providing a summary of comments – following a previous data breach.

35. The Authority commented that the summary of the comments in question was published as part of a committee report to its Transport and Environment Committee on 11 November 2021. The Authority provided a link to enable the Commissioner to access this.

36. With regard to the Applicant's view that, as the Authority had published comments received in response to other consultations it should not be manifestly unreasonable to publish these comments also, the Authority asserted that each consultation is considered on a case-by-case basis. This takes into account the resources and potential impact on the service. The Authority re-iterated that it had adopted a more cautious approach to the publication of comments, to minimise the risks around breaching data protection legislation.

37. The Authority clarified these comments, explaining that, in its view, the request was manifestly unreasonable because of the time it would take to process the request, and the impact it would have on its resources. In referencing an earlier data breach, the Authority stated that it was merely highlighting the absolute importance of being able to identify and remove any personal data, to ensure that the information rights and expectations of those who participated in the survey were being met.

*The Commissioner's view about the exception*

38. Having considered fully all of the submissions made by the Applicant and the Authority, the Commissioner is unable to accept that it would be manifestly unreasonable for the Authority to make information available in response to the Applicant's first request.

39. It is clear from its submissions that the Authority is arguing that making the information available would impose a significant burden on it. This would include, in the Authority's view, the diversion of an unreasonable proportion of its human resources away from other statutory functions.

40. Although the Authority has described to the Commissioner the process it would have to follow in order to prepare the comments to enable them to be made available to the Applicant, and has provided the Commissioner with a copy of a sample of the comments received, the Commissioner is unable to accept that such an exercise would take five minutes per comment. The Commissioner is not satisfied that the Authority has provided sufficient evidence to demonstrate that this would be the case.

41. Given the way in which the survey responses are held by the Authority, centrally, and the ability for these to be transferred in an easily formattable document to other systems for filtering and redaction, the Commissioner cannot agree that the approximate timescale given by the Authority is fair. Again, the Authority has not provided enough detail to demonstrate to the Commissioner that the calculation is reasonable.

42. Furthermore, despite being asked to clarify the input required from the various service areas identified by the Authority as having a role in the preparation of the comments to make them available to the Applicant, the Commissioner is confused as to why so many different personnel (and service areas) would need to be involved. The bulk of the task (as identified by the Authority) appears to be the exporting of information and identification and redaction of third-party personal data. The Commissioner does not understand why this would necessitate input from more than one service area.

43. In reaching his view over the use of the exception in regulation 10(4)(b), the Commissioner has also been mindful of the clear intention expressed by the Authority in the letter which accompanied the documents distributed to residents. It is apparent that it was the Authority's position that it would disclose the comments received in response to the engagement exercise (subject to the redaction of third-party personal data). Therefore, it seems contrary and perverse for it to then argue that to fulfil its own objective and intention would be manifestly unreasonable, when asked to do so in response to an information request. Arguably (at the time the Applicant submitted his request), this information should already have been available for either publication or disclosure.

44. The Commissioner notes the Authority's submission that part of the reasoning for a reversal of its position to publish the comments received was as a consequence of an earlier data breach and its implementation of a more cautious approach. Specifically, to make available a "summary of comments" only.

45. This more cautious approach does not, in the Commissioner's view, justify a conclusion that it would therefore impose a significant burden on the Authority to make available information which would fulfil the Applicant's first request.

46. In its submission, the Authority noted that it should have written that it would publish a 'summary of the comments', and it went on to provide the Commissioner with a link to the report made to the Transport and Environment Committee where it asserted such a summary had been given.

47. Having accessed this report, the Commissioner is not satisfied that this does record a summary of the comments received. This report simply records the number of responses received, together with how the respondents ranked each of the four options given. The Commissioner has not been made aware of anything approximating more closely to such a summary.

48. For the reasons set out above, the Commissioner is not satisfied that responding to the Applicant's first request would have imposed a significant burden on the Authority and would,

in the circumstances, have been manifestly unreasonable. The Commissioner does not, therefore, agree that the Authority was entitled to rely on the exception in regulation 10(4)(b) of the EIRs for refusing to make information available to the Applicant.

49. As the Commissioner is not satisfied that the Authority was entitled to rely on the exception in regulation 10(4)(b) of the EIRs, he is not required to go on to consider the application of the public interest test in regulation 10(1)(b) of the EIRs.

## Decision

The Commissioner finds that the Authority failed to comply with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by the Applicant. The Commissioner finds that the Authority was not entitled to rely on the exception in regulation 10(4)(b) of the EIRs for information which would fulfil the first part of the Applicant's request.

The Commissioner therefore requires the Authority to provide a fresh response to the Applicant's requirement for review, other than in terms of regulation 10(4)(b), by **10 August 2023**.

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## Appeal

Should either the Applicant or the Authority 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.

## Enforcement

If the Authority fails to comply with this decision, the Commissioner has the right to certify to the Court of Session that the Authority has failed to comply. The Court has the right to inquire into the matter and may deal with the Authority as if it had committed a contempt of court.

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

**27 June 2023**

## Appendix 1: 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.

(2) The person who makes such a request is in this Part and in Parts 2 and 7 referred to as the "applicant."

…

(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.

…

### 47 Application for decision by Commissioner

(1) A person who is dissatisfied with -

(a) a notice under section 21(5) or (9); or

(b) the failure of a Scottish public authority to which a requirement for review was made to give such a notice.

may make application to the Commissioner for a decision whether, in any respect specified in that application, the request for information to which the requirement relates has been dealt with in accordance with Part 1 of this Act.

(2) An application under subsection (1) must -

(a) be in writing or in another form which, by reason of its having some permanency, is capable of being used for subsequent reference (as, for example, a recording made on audio or video tape);

(b) state the name of the applicant and an address for correspondence; and

(c) specify –

(i) the request for information to which the requirement for review relates;

(ii) the matter which was specified under sub-paragraph (ii) of section 20(3)(c); and

(iii) the matter which gives rise to the dissatisfaction mentioned in subsection (1).

…

## The Environmental Information (Scotland) Regulations 2004

### 2 Interpretation

(1) In these Regulations –

"the Act" means the Freedom of Information (Scotland) Act 2002;

"applicant" means any person who requests that environmental information be made available;

"the Commissioner" means the Scottish Information Commissioner constituted by section 42 of the Act;

…

"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.

….

(4) A Scottish public authority may refuse to make environmental information available to the extent that

…

(b) the request for information is manifestly unreasonable;

…

## 17 Enforcement and appeal provisions

(1) The provisions of Part 4 of the Act (Enforcement) including schedule 3 (powers of entry and inspection), shall apply for the purposes of these Regulations as they apply for the purposes of the Act but with the modifications specified in paragraph (2).

(2) In the application of any provision of the Act by paragraph (1) any reference to -

(a) the Act is deemed to be a reference to these Regulations;

(b) the requirements of Part 1 of the Act is deemed to be a reference to the requirements of these Regulations;

…

(f) a notice under section 21(5) or (9) (review by a Scottish public authority) of the Act is deemed to be a reference to a notice under regulation 16(4); and

…