

Decision Notice



Decision 050/2009 Ecas Limited and City of Edinburgh Council

Funding of Edinburgh Disability Equality Forum

Reference No: 200800699, 200800696
Decision Date: 23 April 2009

www.itspublicknowledge.info

Kevin Dunion
Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews KY16 9DS
Tel: 01334 464610



Summary

Ecas Limited (Ecas) requested from City of Edinburgh Council (the Council) information relating to the Edinburgh Disability Equality Forum (EDEF). The Council provided some information, but identified other information which fell within the scope of the requests which it considered exempt under sections 30, 36 and 38 of the Freedom of Information (Scotland) Act 2002 (FOISA). Following a review, Ecas remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the Council had partially failed to deal with Ecas's request for information in accordance with Part 1 of FOISA. The Commissioner found that the Council was correct in its application of section 30(c) of FOISA to elements of 3 of the documents withheld. However, he also found that the Council was incorrect in its application of section 30(b), 30(c) and 38(1)(b) to the remainder of the information withheld and required its release.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2 (Effect of exemptions); 15(1) (Duty to provide advice assistance); 30(b) and (c) (Prejudice to effective conduct of public affairs) and 38(1)(b) and (2) (Personal information).

Data Protection Act 1998 (the DPA) sections 1(1) (Basic interpretative provisions: definition of "personal data").

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. On 5 and 10 March 2008, Ecas wrote to the Council requesting copies of the evidence relating to the decision to reduce funding to the EDEF, particularly evidence of the consultations, impact assessment and details of how they were drawn to Councillors' attention. Ecas is a charity, established in 1902 to work to improve the lives of people with physical disabilities. Its interest lies in ensuring that the Disability Discrimination Act 1995 (DDA) is observed, and this includes compliance by public bodies with the Disability Equality Duty (DED).



2. Ecas sought evidence which would illustrate due regard to disability equality in budget decisions. Its request of 10 March 2008 specifically requested all briefings, correspondence or other papers provided in the last six months to elected members, which explicitly related to actual or proposed alterations to funding arrangements of the EDEF.
3. The Council responded to the first and second requests on 12 and 28 March 2008, respectively. Within its response of 12 March 2008, the Council provided a summary of the evidential sources used, and provided relevant documentation where it felt appropriate.
4. In its response of 28 March 2008, the Council stated that details of attendance and content of *formal* meetings of the Elected Members of the Council and its Committees were available from the Council's website and thus exempt under section 25(1) of FOISA (this deals with information which is otherwise available and the matter does not appear to have been taken further by Ecas). The Council also stated that briefing sessions (of the type requested by Ecas) would not normally have an attendance list and notes of actual content might not have been taken, and therefore some of the information requested was not held. Where these documents were produced, the Council submitted that it would have been for the purpose of facilitating discussion and decision making and that the information contained in them would have been recorded in circumstances where the individuals concerned had a legitimate expectation of confidentiality. In withholding the information identified, the Council cited sections 30(b)(i), 30(b)(ii), 30(c), 36(2) and 38(1)(b) of FOISA.
5. On 1 April 2008, Ecas wrote to the Council in respect of both requests of information, requesting reviews of its decisions. In particular, Ecas argued that the content of the briefings to elected officials was crucial to meeting the Council's disability equality duty. Ecas believed that the refusal to release the information was incompatible with the Council's obligations under its disability equality duty and, furthermore, that it was in the public interest for the reasoning behind fundamental changes to the Council's equalities consultation mechanisms, and consequently its Multi Equalities Scheme, to be made public.
6. The Council notified Ecas of the outcome of its review on 25 April 2008. In its response the Council upheld its original stance without amendment.
7. On 5 May 2008 and 13 May 2008, Ecas wrote to the Commissioner, stating that it 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.
8. The applications were validated by establishing that Ecas had made requests for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its responses to those requests.



Investigation

9. On 19 June 2008, the Council was notified in writing that applications had been received from Ecas and asked to provide the Commissioner with any information withheld from the applicant. The Council responded with the information requested and the cases were then allocated to an investigating officer. Given the connection between the two applications it was decided to investigate both together and issue one single decision notice.
10. 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) and asking it to respond to specific questions. In particular, the Council was asked to justify its reliance on any provisions of FOISA it considered applicable to the information requested.
11. During the course of the investigation, the Council released four further documents to Ecas which it had previously withheld. Consequently, this investigation focuses on the remaining eight documents withheld by the Council.

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 submissions made to him by both Ecas and the Council and is satisfied that no matter of relevance has been overlooked.
13. In withholding all eight of these documents under consideration here, the Council cited section 30(b)(i), (ii) and 30(c) of FOISA. In addition, the Council applied section 36(2) to two documents and section 38(1)(b) to one.
14. As noted above, Ecas's interest lies in ensuring that the DDA is observed, and this includes compliance by public bodies with the DED. Ecas wanted to know whether or not the Council had consulted appropriately, had conducted an Equalities Impact Assessment (EIA) and, crucially, whether or not the results of that EIA had been drawn to the attention of those responsible for the decision to reduce funding to the EDEF, i.e. the elected members of the Council.
15. Ecas applied to the Commissioner because it believed it essential that public authorities could be seen to be acting in accordance with the law. Ecas submitted that there was legal precedent which strongly suggested that in order to comply with the DED, Councillors required to be briefed on the anticipated impact of their decisions where such decisions were subject to the DDA/DED.



16. Ecas argued that in withholding the details of the assessment on which the Councillors were briefed, the Council prevented it from seeing evidence that the Council had complied with that aspect of the DED. Furthermore, Ecas submitted that it was in the public interest that the public should know what impact Councillors expected their decisions to have.
17. It should be stated at the outset that the Commissioner's remit is limited to the consideration of the information withheld. He cannot comment on the Council's obligations under the DDA or its compliance with the DED.

Section 30(b) and (c) – Prejudice to the effective conduct of public affairs

18. Given that the Council has applied section 30(b)(i), 30(b)(ii) and 30(c) to all eight documents, the Commissioner will consider the application of section 30 in the first instance.
19. The exemptions in section 30 are qualified exemptions and as such are subject to the public interest test contained in section 2(1)(b) of FOISA.

Section 30(b)

20. In order for the Council to be able to rely on the exemptions laid down in section 30(b)(i) or 30(b)(ii) of FOISA, it would have to show that the disclosure of the information under FOISA would, or would be likely to, inhibit substantially (i) the free and frank provision of advice or (ii) the free and frank exchange of views for the purposes of deliberation, respectively.
21. As the Commissioner has said in previous decisions, it is his view that the standard to be met in applying the tests contained in sections 30(b)(i) and 30(b)(ii) is high. In applying these exemptions, the chief consideration is not whether the information constitutes advice or opinion, but whether the release of the information would, or would be likely to, inhibit substantially (as the case may be) the provision of advice or the exchange of views.
22. Within its submissions, the Council explained that the Budget Group was a regular meeting of elected members who formed the political administration of the Council, i.e. members of the ruling political parties. Elected members of other political parties were not allowed to attend meetings of this group. The Council explained that the Budget Group was supported by a small number of key senior officers who would provide unbiased professional advice, if requested to do so, at the meetings. The Budget Group, the Council explained, existed to allow the members of the administration to debate and consider issues free from external political influence. The Council stated that this was a core component of enabling embryonic policy to evolve prior to submission to the Full Council and cross-party deliberation.
23. The Council also highlighted that it was a requirement of its Member/Officer Protocol contained within its Standing Orders that,

"Officers may properly be called upon to support and contribute to deliberations by party groups on matters of Council business under consideration. Officer support in these circumstances must not extend beyond providing information and advice in relation to matters of Council business. Officers must not be involved in advising on matters of party business."



24. The Council concluded that the Budget Group represented a forum at which the free and frank provision of advice and exchange of views for the purposes of deliberation was inherent, and that the requested information was therefore exempt in terms of section 30(b)(i) and 30(b)(ii).
25. In *Decision 166/2006 Mr Martin Williams of The Herald and the Scottish Executive*, the Commissioner set out in detail his views on the issues that should be considered in deciding whether the exemptions in section 30(b)(i) and (ii) can apply. These are not repeated in full in this decision notice, but they can be summarised as follows:
- Information must be treated on a case-by-case basis: release of information in one case need not imply release in another case
 - The nature and content of the information in question must be considered, rather than considering "advice" or "exchange of views" as categories of information
 - If the information withheld does not in itself constitute advice or an exchange of views, the argument for exemption under section 30(b) may be weaker.
- These points are reinforced in some of the Commissioner's more recent decisions, such as *Decision 089/2007 Mr James Cannell and Historic Scotland* and *Decision 105/2008 Mr Rob Edwards and the Scottish Ministers*.
26. Section 30(b) also requires the public authority to show that disclosure of information would, or would be likely to "inhibit substantially" (as appropriate) the free and frank provision of advice and/or the free and frank exchange of views. The term "inhibit" is not defined in FOISA. However, the Commissioner takes the view that in the context of these exemptions it means to restrain, decrease or suppress the freedom with which opinions or options are expressed. The inhibition must be substantial, in other words of real and demonstrable significance.
27. Where an authority seeks to exempt information under section 30(b)(i) and/or (ii), it must be able to demonstrate that there is a real risk or likelihood that substantial inhibition of the relevant kind will follow disclosure of the information. The authority will be expected to be specific about the inhibition that would be caused by disclosure and give reasons for expecting it to occur in the near or foreseeable future.

Document 1

28. Document 1 is the Equalities Manager's handwritten note of a meeting dated 23 October 2007. It provides a general description of the current issues and problems faced. Although it could be argued that views are recorded within this note, these cannot be attributed to a particular individual.
29. When assessing substantial inhibition the Commissioner will take into account a variety of factors, some of which are highlighted in his briefing on the application of section 30 available on his website (<http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section30/Section30.asp>). Relevant factors may include the identity/status of the author and/or the recipient; the circumstances in which the advice or views were given; the sensitivity of the advice or views expressed, and the timing of the request.



30. Although the document in question is a record of a meeting at a time when various options were still under consideration, Ecas made its request for information a number of months after this meeting had taken place and indeed after the relevant decisions regarding funding had been made. In light of the timing of the request, the few comments conveyed in this document are rendered innocuous, and consequently the Commissioner cannot accept the Council's argument that the disclosure of such information would, or would be likely to, inhibit substantially either the free and frank exchange of views or the free and frank provision of advice. The Commissioner is therefore not satisfied that the Council was correct in its application of section 30(b) of FOISA. The Council has also applied sections 30(c) and 38(1)(b) of FOISA to withhold this document. The application of these exemptions will be considered below.

Document 2

31. Document 2 consists of a briefing note for Members and Senior Officers dated November 2007, and amended February 2007, alongside the covering email which circulated the document.
32. Having carefully considered the content of the covering email, the Commissioner is not satisfied that it is exempt under either section 30(b)(i) or 30(b)(ii) of FOISA. The email in question is administrative and relatively innocuous in nature, only providing the briefest of summaries of the content of the attached document. Furthermore, the information contained in the summary has already been conveyed to the applicant in the Council's letter of 12 March 2008. Given the nature of this document and the fact that the material information contained within it has already been conveyed to Ecas, the Commissioner cannot accept the application of either section 30(b)(i) or 30(b)(ii) of FOISA. The Council has also applied section 30(c) to this document and this is considered below.
33. Document 2 also includes a briefing note which was provided to Members and Senior Officers. The Council explained that this document was circulated to two elected members with a lead role in relation to equalities. A large proportion of the substantive content of this document was provided to Ecas in the Council's initial response of 12 March 2008. On this basis, the investigating officer asked the Council to clarify exactly which parts of this document it considered should be withheld under section 30(b). In response, the Council provided a degree of general clarification without referring to specific items of text.
34. The document was compiled by an officer of the Council, detailing the evidence used to inform the budget cut proposal, reporting lines and consultation on the proposed budget cuts, general and specific duties under various pieces of legislation and the officer's recommendation. The majority of the information contained under the heading "Evidence Used to Inform Budget Cut Proposals" was conveyed to Ecas in the Council's letter of 12 March 2008 and therefore the Commissioner cannot accept the Council's application of sections 30(b)(i) or 30(b)(ii) to the relative portions of the document. Similarly, the Commissioner cannot accept that the descriptions of duties under various pieces of legislation (essentially summarising what is set out in the legislation itself) can in any way be deemed exempt under section 30(b) of FOISA.



35. With regard to the remainder of the information under the heading “Evidence Used to Inform Budget Cut Proposals”, and that under the heading “Reporting Lines on Proposed Budget Cut...”, the Commissioner is not satisfied, taking into account the factors referred to in paragraph 29 above, that its disclosure would, or would be likely to inhibit such exchanges substantially. In reaching this conclusion, the Commissioner has taken account of the information which has been provided to Ecas already.
36. With respect to the “Final Officer Recommendation”, the Commissioner accepts that this is the provision of advice and the officer’s view for the purposes of deliberation. However, the Council has provided no clear arguments as to how disclosure of this information would, or would be likely to, inhibit substantially the free and frank provision of advice or exchange of views for the purposes of deliberation. Nevertheless, the Commissioner has considered the content of the recommendation and the manner in which it is expressed, along with all relevant surrounding circumstances (including its timing). Having done this he is not satisfied, even given the context and forum in which the recommendation was made, that disclosure would, or would be likely to, inhibit substantially the free and frank provision of advice or exchange of views. The Commissioner cannot identify any information which could at the relevant time have been considered particularly sensitive or controversial in nature, even in this particular context, and overall is satisfied that disclosure in this case would be unlikely to hinder the provision of similar information in future analogous circumstances.
37. The remainder of document 2 conveys matters of a factual or administrative nature. Having considered the information in question, the Commissioner can identify nothing in it which he would regard as capable of having the relevant substantially inhibiting effects. As the Commissioner sets out in his briefing, where information setting out advice or views also contains other content – such as factual information – it will normally be appropriate for that other content to be extracted and supplied to the applicant. He sees no reason why this could not be done here and on this basis cannot accept that the Council was correct in its application of section 30(b) of FOISA to this remaining information.
38. In conclusion, the Commissioner is not satisfied that the Council was correct in its application of section 30(b)(i) and (ii) to the briefing note forming part of document 2. Again, the Council has also applied section 30(c) to this document and this will be considered below.

Document 3

39. Document 3 is a chain of two emails, one of which is duplicated in the covering email of document 2: the Commissioner’s consideration is therefore limited to the second email of 12 February 2008. This appears to be an innocuous exchange seeking clarification of the document supplied (see document 2). The Council has supplied the Commissioner with no specific arguments which would relate to the application of section 30(b) to this exchange, and in the circumstances the Commissioner cannot identify how disclosure would, or would be likely to, inhibit substantially the free and frank provision of advice or exchange of views for the purposes of deliberation. Having considered the content of this exchange, the Commissioner therefore concludes that the Council was incorrect in its application of section 30(b) to document 3. Again, the Council has also applied section 30(c) to this document, which will be considered below.



Document 4

40. Document 4 is an email chain seeking the advice of the lead officer with respect to questions posed about the proposed budget cuts. It is clear from this exchange that the advice was provided prior to the Full Council agreement on the proposed cuts. The Commissioner is satisfied, given the nature of the exchange that the Council was correct in its application of section 30(b)(i) to the third and fourth sentences of the email of 21 February 2008 12:27. The remainder of this exchange is of an innocuous nature and the Commissioner cannot accept the application of either section 30(b)(i) or 30(b)(ii) to the remainder of the information. Again, the Council has also applied section 30(c) to this document, which will be considered below. As the Commissioner has found that the Council was correct in its application of section 30(b) to part of this document, he is required to go on and consider the public interest test. The public interest in respect of the relevant part of this document will also be considered below.

Documents 5 and 6

41. Document 5 is a report to the Budget Group, which reviewed the Council's grant aid in the context of budget pressures. The Council explained that the Budget Group was a mechanism allowing free and frank discussion and assessment of issues by the current political administration of the Council. Its membership was restricted to the ruling political parties, advised by key senior officers. The Council submitted that this was a core component of enabling embryonic policy to develop prior to consideration in the formal decision making processes of the Council.
42. The Council submitted that the use of the section 30 exemptions related to decisions taken in private by members of particular political parties. The Council explained that these decisions had not been ratified by Full Council and therefore, at the time of recording, the views expressed by these members would not represent the views of the Council. Their premature release, the Council argued, would affect the financial viability of a number of external organisations in receipt of Council funding.
43. The Council submitted that it was a requirement of the Member/Officer Relations Protocol, contained within Standing Orders of the Council, that officers must respect the confidentiality of any discussions at which they were present with members. They were specifically prohibited from relaying the content of discussions involving particular party groups to other political parties. The Council highlighted that this requirement was based on the National Code of Local Government Conduct and the Ethical Standards in Public Life etc. (Scotland) Act 2000.
44. Document 5 sets out the current position and identifies a policy based approach to prioritising the Council's grant aided activity. Document 6 is a supplementary report which provides further information on the impact upon the services provided and the implications for individual projects and their futures. It is clear that the purpose of these documents was to instigate further discussion at an early stage in the decision-making process. Document 6 sets out the impact of proposed changes to funding arrangements on individual projects. The Council explained that the information on financial viability was an assessment made by Council officers, not a factual statement of each organisation's current trading position.



45. The Commissioner has considered the content of these documents and is satisfied that their purpose was to instigate debate: in this context, he recognises the possible impact disclosure could have on the relationship with external bodies. He also recognises the sensitivities surrounding the views expressed in this document and the subjective nature of some of the details conveyed, but has also taken into account the timing of Ecas's request. These documents were essentially consultative, forming part of the process that led ultimately to the funding decision which formed the subject matter of Ecas's request. However, this decision-making process had been concluded by the time of Ecas's request for information. Given the expectation that such a consultative process will take place, and noting that these documents do not in fact have anything to say about the substance of discussions within the Council's political groups, the Commissioner is not satisfied that the Council was correct in its application of section 30(b)(i) and 30(b)(ii) to these documents.
46. However, the Council also applied section 30(c) to these documents, the consideration of which is set out below.

Documents 7 and 8

47. These documents are action notes arising from the Budget Group meetings. Having considered the content of these documents the Commissioner is of the view that it is only item 3 in document 7 and item 5 in document 8 that fall within the scope of the request.
48. These documents record the key discussion points and note the actions arising. The Commissioner is not satisfied that the information conveyed in item 3 of document 7 is of such a nature that disclosure would, or would be likely inhibit substantially the free and frank provision of advice or the exchange of views for the purposes of deliberation. In reaching this conclusion, the Commissioner has taken account that the points conveyed in this document are the collective outcomes of a group meeting and are neutral in tone.
49. Similarly, heading 5 of document 8 records the key outcomes of the meeting alongside key action points. The action points refer to particular projects discussed in the report presented and discussed that the Budget Group. The Commissioner has considered these action points and has concluded that (although project specific) they are neutral in tone and innocuous. Therefore, the Commissioner is not satisfied that the Council was correct in its application of section 30(b) to the information contained within this document. In both cases, he has taken account of the timing of the request.
50. However, the Council also applied section 30(c) of FOISA to these documents, the consideration of which is set out below.



Public interest test

51. As the Commissioner has found that the Council was correct in its application of section 30(b) of FOISA to the third and fourth sentences of the first email contained in document 4, he is required (in respect of this information) to consider the public interest test set out in section 2(1)(b) of FOISA. Even if the information is exempt, he must still require disclosure unless, in all the circumstances of the case, the public interest in disclosure is outweighed by that in maintaining the relevant exemption.
52. The Commissioner accepts that there is a general public interest in making information available to the public and a general need for transparency and accountability in decision making, but this must be balanced against any detriment to the public interest as a consequence of disclosure.
53. Ecas submitted that it needed to know whether or not the Council had consulted appropriately, had conducted an Equalities Impact Assessment (EIA) and crucially whether or not the results of that EIA had been drawn to the attention of those responsible for the decision; the elected Councillors. It submitted that it required this information to ascertain whether the Council had complied with the DED, maintaining that it was essential for public authorities to be seen to be acting in accordance with the law. In addition, Ecas argued that it was in the public interest that the public should know what impact Councillors expected their decisions to have, because those decisions had far reaching effects on the lives of all those within their Authority's area. In conclusion, Ecas submitted that it was not in the public interest:
- For Councillors to make decisions affecting the lives of people without making public the effect that they expected those decisions to have, or
 - For the public, and other bodies such as charities, and their legal advisers to be prevented from establishing whether or not public bodies were operating within the law, in this case the DDA.
54. The Council submitted general public interest arguments to the effect that the information withheld related to decisions which had not been ratified by the Full Council, the premature release of which would affect the financial viability of a number of external organisations in receipt of Council funding. The Council explained that these funded organisations provided services to the public on behalf of the Council, often to the most vulnerable and disadvantaged members of society. The Council had a formal Compact with the funded sector, a copy of which was supplied to the investigating officer. It explained that this was a partnership agreement between the city's main public agencies and the voluntary and community sectors. It was jointly owned and developed by all partners and aimed to promote and support improved relations, mutual respect and strategic co-ordination. The Council believed the mutual trust and confidence on which the Compact was based would have been undermined by the premature release of the requested information.



55. The Commissioner has fully considered the public interest arguments placed before him by both parties. In this instance, in the context of the information falling under the scope of section 30(b), namely the third and fourth sentences of the first email contained in document 4, the Commissioner cannot accept the public interest arguments in favour of maintaining the exemption. In this instance the Commissioner is satisfied that the public interest in ensuring transparency in the decision-making process, particularly once the relevant decision has been reached, outweighs the public interest in maintaining the exemption. The Commissioner therefore concludes that the Council was incorrect in withholding these sentences under sections 30(b)(i) and 30(b)(ii) of FOISA.

Section 30(c)

56. Authorities seeking to rely on the exemption in section 30(c) of FOISA need to show that disclosure would (or would be likely to) otherwise prejudice substantially the effective conduct of public affairs.
57. The use of the word "otherwise" makes it clear that the exemption is different from the exemptions in section 30(a) and (b). This is a broad exemption, and the Commissioner expects any public authority citing it to show what specific harm (which must be of a different character from those kinds of harm envisaged by section 30(a) and (b)) would be caused to the conduct of public affairs by release of the information.
58. Authorities should be able to demonstrate that the risk of damage caused by disclosing information is real or very likely, not simply a remote possibility. The harm caused, or likely to be caused, must be of some real and demonstrable significance - not simply marginal - and must occur in the near (certainly the foreseeable) future rather than in some unspecified distant time. Authorities should therefore consider disclosing the information asked for unless it would (or would be likely to) cause real, actual and significant harm.
59. As noted above, the investigating officer requested further submissions from the Council on its application of section 30(c) of FOISA. Despite this, the Council provided substantially similar submissions in support of its reliance on the exemption in section 30(c) as it did for the exemptions in section 30(b).
60. Within these submissions, however, the Council referred in particular to its Compact with the funded sector. It explained that funded organisations provided services to the public on behalf of the Council, often to the most vulnerable and disadvantaged members of society. The Compact was a partnership agreement between the city's main public agencies and the voluntary and community sectors, jointly owned and developed by all the partners and aiming to promote and support improved relations, mutual respect and strategic co-ordination. The Council submitted that the mutual trust and confidence on which the Compact was based would have been undermined by the premature release of the requested information.



61. The Council explained that the elected members sat on the boards and management committees of these funded organisations and these organisations would provide services to constituents and to the members' wards. The Council submitted that the premature release of the requested information would impair the validity of the elected members' right to discharge the multiple roles described and would therefore be substantially prejudicial to the effective conduct of public affairs for reasons other than those previously described in relation to section 30(b).
62. Having considered the submissions made by the Council regarding its reliance on the exemption in section 30(c) of FOISA, together with the information contained in the relevant documents, the Commissioner does not on the whole agree that release of this information would, or would be likely to, prejudice substantially the effective conduct of public affairs.
63. Document 1 is a record of a meeting, as previously described, recording a generalised note of the discussions. The Council has not provided specific arguments in relation to this document. As in relation to section 30(b), the Commissioner does not accept the general harm envisaged by the Council in disclosure of this particular document.
64. As previously stated, document 2 (alongside an innocuous covering email) is a copy of the report presented to elected members and senior officers. As previously outlined, the substantive aspects of this document have already been conveyed to Ecas in the Council's initial response to its request. Documents 2 (the covering email), 3 and 4 are administrative emails authored by officers of the Council. In light of this, the Commissioner cannot give any weight to the harms described by the Council in relation to these documents. However, the Commissioner does (as he did in relation to section 30(b)) accept the Council's arguments in relation to the content of the third and fourth sentences of the email of 21 February 2008 12:27 (document 4).
65. As described above, document 5 is a report setting out the Council's current position (at the time of writing) and identifies a policy based approach to prioritising the Council's grant aided activity. The Commissioner is not satisfied that the Council was correct in its application of section 30(c) to this document. This document forms part of the consultative process, which took place and was completed in excess of four months prior to Ecas's request. Having reviewed the content of document 5, the Commissioner recognises how disclosure could have prejudiced substantially, or been likely to prejudice substantially, the effective conduct of public affairs at the time of writing (6 November 2007), given the candour with which the options and assessment of the current position are presented. However, he cannot accept that the same could be said following the conclusion of the decision-making process. The Commissioner therefore concludes that the Council was incorrect in its application of section 30(c) to document 5.



66. Document 6 is a subjective assessment carried out by the Council on the impact of proposed funding changes on third party organisations. Given the subjective nature of the last three columns of Appendix 1 to this document, headed “Proposed disinvestment level”, “Anticipated service impact” and “£ Total Saving” and the possible impact these assessments could have had on the Council’s ongoing relationships with third parties, the Commissioner is satisfied that the Council was correct in its application of section 30(c) of FOISA to these specific elements of this document. He cannot, however, identify any basis for applying the same arguments to the remainder of the document.
67. As stated above in relation to documents 7 and 8, the Commissioner considers that it is only item 3 in document 7 and item 5 in document 8 that fall within the scope of the request. These documents record key discussion points and note actions arising. As with the content of document 6, the Commissioner is satisfied, given the nature of the information conveyed in the last 3 sentences of the “Action” column under item 3 of document 7, and the comments contained under the last (black) bullet point of the “Decision” column in item 5 of document 8, that disclosure would have prejudiced substantially, or been likely prejudice substantially, the effective conduct of public affairs given the likely impact on the relationship between the Council and the third parties discussed.
68. In summary, therefore, the Commissioner has concluded that the Council was partially correct in its application of sections 30(c) to documents 6, 7 and 8 (to the extent described in the preceding paragraphs). As such, the Commissioner is required to go on and consider the application of the public interest test. However, the Commissioner is not satisfied that the Council was correct in its application of section 30(c) to the remainder of these documents, which is far more general in nature.
69. As stated above, the investigating officer requested further submissions from the Council on its application of section 30(c) of FOISA. In response, the Council provided substantially similar submissions in support of its reliance on the exemption in section 30(c) as it had for the exemptions in section 30(b). The Commissioner has considered the public interest submissions advanced by both parties and described in greater detail above in relation to section 30(b). In this instance, he is satisfied that the greater public interest lies in maintaining the relationship between the Council and third parties which might be damaged by the disclosure of the subjective assessments contained in the relevant parts of these documents. As previously outlined in relation to section 30(b), he also concludes that the public interest in allowing a transparent decision-making process favours disclosure of the third and fourth sentences from the email of 21 February 2008 12:27 forming part of document 4.
70. The Commissioner is not satisfied, therefore, that the Council was correct in its application of section 30(b) or section 30(c) to documents 1, 2, 3, 4, 5 and parts of documents 6, 7 and 8. It was, however, entitled to withhold those parts of documents 6, 7 and 8 specified in paragraphs 66 and 67 above, under section 30(c).



Section 36(2)

71. The Council also applied section 36(2) to documents 6 and 8. Section 36(2) provides that information is exempt if it was obtained by a Scottish public authority from another person (including another such authority) and its disclosure by the authority so obtaining it to the public (otherwise than under FOISA) would constitute a breach of confidence actionable by that person or any other person. Section 36(2) is an absolute exemption and is not, therefore, subject to the public interest test in section 2(1)(b) of FOISA, but it is generally accepted in common law that an obligation of confidence cannot apply to information the disclosure of which is necessary in the public interest.
72. The Council submitted that section 36(2) applied to the anticipated impact on specific funded organisation of the Council reducing or removing funding. The Commissioner is satisfied, without commenting on the appropriateness of the application of section 36(2), that the information to which the Council refers has been appropriately withheld under section 30(c) of FOISA, as described in paragraphs 66 and 67 above. As the Commissioner is satisfied that the information to which the Council applied section 36(2) has been appropriately withheld under section 30(c), the Commissioner will not consider the application of section 36(2) any further.

Section 38(1)(b) – document 1

73. The Council submitted that document 1 was also exempt under section 38(1)(b) of FOISA, read in conjunction with section 38(2)(b). The Council submitted that this document was a private note made by the Equalities Manager and was not intended to be seen by anyone else as written. The Council explained that the note made reference to a named individual, was open to interpretation and could be read as judgmental in a way that would be damaging to the trust relationship essential to the conduct of Officer/Member interaction. The Council further submitted that the note expressed the Equalities Manager's private view as well as his perception of the view of the named individual. The Council advised that the Equalities Manager refused to consent to this document being released.
74. The Council submitted that it believed both the first and second data protection principles would be contravened by disclosure of this information.
75. Section 38(1)(b) of FOISA, read with (as appropriate) section 38(2)(a)(i) or (b), exempts from release personal data the disclosure of which to a member of the public otherwise than under FOISA would contravene any of the data protection principles contained in Schedule 1 to the DPA.



76. In order for a public authority to rely on this exemption, therefore, it must firstly show that the information which has been requested is personal data for the purposes of the DPA. The DPA defines personal data in section 1(1) as data which relate to a living individual who can be identified from those data, or from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller (see the full definition in the Appendix).
77. It should be noted that the exemption in section 38(1)(b) of FOISA, read in conjunction with section 38(2)(a)(i) or (b), is an absolute exemption in that it is not subject to the public interest test contained in section 2(1)(b) of FOISA.
78. In this case, the information is contained in an aide memoire written by a Council officer. The Council also contends that this aide memoire also contains the personal data of a Councillor. When considering this document the Commissioner has taken into account the UK Information Commissioner's Data Protection Technical Guidance: *Determining what is personal data* (the technical guidance).
http://www.ico.gov.uk/upload/documents/library/data_protection/detailed_specialist_guides/personal_data_flowchart_v1_with_preface001.pdf.
79. The Commissioner accepts that a living individual can be identified from the data in question. He accepts that both a Councillor and the Equalities Manager could be identified. However, when determining whether or not the information "relates to" to these identifiable individuals the Commissioner has taken account of the tests set out in the technical guidance. The Commissioner notes that the data in question does not go beyond the fact of the Equalities Manager's connection with the meeting, with no personal connotations for him.
80. The Commissioner also recognises that the document in question contains a list of attendees. Again, however, this list does not go beyond the individuals' casual connection with a particular meeting: although providing a date of the meeting it does not, in the Commissioner's view, convey the whereabouts of an individual at a particular time.
81. With particular regard to the Council contention that the document contains the personal data of a Councillor, the Commissioner is not satisfied that the document contains any personal connotations of the Councillor and considers the views attributed to the Councillor to be representations of a collective position rather than a personal one. Having reviewed the content of this document and taking cognisance of the technical guidance, the Commissioner is satisfied that the information does not sufficiently "relate to" any identifiable individual for it to fall within the definition of personal data.
82. As the Commissioner is not satisfied that this information is personal data for the purposes of section 1(1) of the DPA, he is not required to go on and consider any of the DPA principles cited by the Council.



83. The Commissioner therefore concludes that the Council was incorrect in its application of section 38(1)(b) of FOISA in withholding the information in document 1 from Ecas. As he does not accept that this information has been correctly withheld under any of the exemptions cited by the Council, he must require its release. The note is, however, difficult to decipher in its present form. In this case, therefore, the Commissioner considers it appropriate to require the Council, in line with its duty to provide the applicant with reasonable advice and assistance under section 15(1) of FOISA, to provide this information in the form of an intelligible transcript.

General observations on the handling of Ecas's requests

84. During the course of the investigation the Commissioner noted that the individual who carried out the review was the author of (or at least the officer responsible for) some of the documents that fell within the scope of the request and were considered in this decision. The Commissioner is of the view that it would be good practice following a request for review, where possible, for an independent individual within the organisation to conduct an objective assessment of the information requested.

DECISION

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

The Commissioner finds that by withholding elements (as described in paragraphs 66 and 67 above) of documents 6, 7 and 8 (to the extent that the information in them fell within the scope of the request) under section 30(c) of FOISA, the Council complied with Part 1.

However, the Council was incorrect in its application of section 30(b) to all of the documents, 30(c) to documents 1, 2, 3, 4, 5, the remainder of documents 6, 7 and 8 and 38(1)(b) to document 1, and as a consequence failed to comply with Part 1.

The Commissioner therefore requires the Council to provide Ecas with a copy of documents 2, 3, 4, 5 and the remainder of documents 6, 7 and 8 (i.e. excluding those parts described in paragraphs 66 and 67 above) and a transcript of document 1 to Ecas, by 8 June 2009.



Appeal

Should either Ecas or 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 notice.

Kevin Dunion
Scottish Information Commissioner
23 April 2009



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 –

- (a) the provision does not confer absolute exemption; and
- (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

- (2) For the purposes of paragraph (a) of subsection 1, the following provisions of Part 2 (and no others) are to be regarded as conferring absolute exemption –

...

- (e) in subsection (1) of section 38 –
 - (i) paragraphs (a), (c) and (d); and
 - (ii) paragraph (b) where the first condition referred to in that paragraph is satisfied by virtue of subsection (2)(a)(i) or (b) of that section.

15 Duty to provide advice and assistance

- (1) A Scottish public authority must, so far as it is reasonable to expect it to do so, provide advice and assistance to a person who proposes to make, or has made, a request for information to it.

30 Prejudice to effective conduct of public affairs



Information is exempt information if its disclosure under this Act-

...

- (b) would, or would be likely to, inhibit substantially-
 - (i) the free and frank provision of advice; or
 - (ii) the free and frank exchange of views for the purposes of deliberation; or
- (c) would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs.

38 Personal information

(1) Information is exempt information if it constitutes-

...

- (b) personal data and either the condition mentioned in subsection (2) (the "first condition") or that mentioned in subsection (3) (the "second condition") is satisfied;
- (2) The first condition is-
- (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998 (c.29), that the disclosure of the information to a member of the public otherwise than under this Act would contravene-
 - (i) any of the data protection principles; or
 - ...
 - (b) in any other case, that such disclosure would contravene any of the data protection principles if the exemptions in section 33A(1) of that Act (which relate to manual data held) 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;

...