

# Decision Notice 177/2021

## Land transaction and planning enforcement

### The Applicant

**Public authority: City of Edinburgh Council**

Case Ref: 202001325



Scottish Information  
Commissioner

## **Summary**

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The Council was asked for information concerning the sale or transfer of title of a parcel of land from 28 January 2020 to the date of request. The Council responded, providing information and stated no further information was held for the time period specified. The Commissioner investigated and found the Council had identified all of the information falling within the scope of the request.

## **Relevant statutory provisions**

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The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (paragraphs (a) and (c) of definition of “environmental information”) and (2)(a) (definition of “information held”); (5)(1) and (2)(b) (Duty to make available environmental information on request); 6(1)(b) (Form and format of information); 10(1), (2) and (4)(a) (Exceptions from duty to make environmental information available)

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

## **Background**

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1. On 31 March 2020, the Applicant made a request for information to the City of Edinburgh Council (the Council). The Applicant requested information related to the sale/transfer of a parcel of land, at Marchbank Park, Balerno from 28 January 2020 to the date of the request, including information related to enforcement matters. The Applicant requested, amongst other items:
  - (i) copies of all relevant files (including maps and plans)
  - (ii) copies of all relevant delegations, authorisations or permissions granted by the Council to named officials or officers.
2. The Council responded on 24 April 2020 under the EIRs. The Council stated that the information had been provided to the Applicant in response to two earlier requests, available on its disclosure log, but, as it was experiencing technical issues with its disclosure log, the Council provided the information again. The Council explained that the information was provided subject to the redaction of third-party personal data (regulation 11(2) (Personal data)). The Council provided a site plan for the sale of the land and a website link to its Scheme of Delegation.
3. On 25 April 2020, the Applicant wrote to the Council requesting a review of its decision on the basis that the information provided was from 2019 and not within the time period specified in the request (28 January 2020 – 31 March 2020).
4. The Council notified the Applicant of the outcome of its review on 26 May 2020. The Council stated that, with the exception of one additional website link, no further information was held. It provided the Applicant with a link to its planning portal, explaining that the portal publishes information on planning enforcement matters. The Council confirmed that no further information has been added to the records previously provided.
5. On 4 November 2020, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of the Freedom of Information (Scotland) Act 2002 (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 she was dissatisfied with the outcome of the Council's review because the Council had not provided any information from the period covered by the request. The Applicant also stated that she had relevant correspondence from the Council, provided by another body, falling within that time period which should have been identified in any searches undertaken.

## **Investigation**

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6. The application was accepted as valid. The Commissioner confirmed that the Applicant made a request for information to a Scottish public authority and had asked the authority to review its response to that request before applying to him for a decision.
7. On 14 December 2020, the Council was notified in writing that the Applicant had made a valid application. The case was then allocated to an investigating officer.
8. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Council was invited to comment on this application and to answer specific questions. These related to the searches carried out for information held within the time period requested, evidence of searches and, if insufficient searches had been carried out, for further searches to be undertaken.
9. The Council responded with submissions on its searches.

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

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10. In coming to a decision on this matter, the Commissioner considered all of the relevant submissions, or parts of submissions, made to him by both the Applicant and the Council. He is satisfied that no matter of relevance has been overlooked.

### **Application of the EIRs**

11. It is clear from the topic of the request that the information sought is properly considered to be environmental information, as defined in regulation 2(1) of the EIRs. It relates to the purchase of land and planning issues and the Commissioner is satisfied that it falls within paragraphs (a) and (c) of the definition in regulation 2(1) (the text of these paragraphs is reproduced in the Appendix).

### **Regulation 5(1) of the EIRs**

12. Regulation 5(1) of the EIRs (subject to the various qualifications contained in regulations 6 to 12) requires a Scottish public authority which holds environmental information to make it available when requested to do so by any applicant. It is important to bear in mind that this obligation relates to information actually held by an authority when it receives the request, as opposed to information an applicant believes the authority should hold.
13. Under the EIRs, a public authority may refuse to make environmental information available if one or more of the exceptions in regulation 10 apply and, in all the circumstances of the case, the public interest in maintaining the exception or exceptions outweighs the public interest in making the information available.

*Regulation 10(4)(a)*

14. Regulation 10(4)(a) of the EIRs provides that a Scottish public authority may refuse to make environmental information available to the extent that it does not hold that information when an applicant's request is received.
15. In her submissions to the Commissioner, the Applicant stated that she did not consider that the Council had responded to her request. She submitted that she had subsequently obtained email correspondence from another source, which fell within the scope of her request.
16. The standard of proof to determine whether a Scottish public authority holds information is the civil standard of the balance of probabilities. In determining where the balance of probabilities lies, the Commissioner considers the scope, quality, thoroughness and results of the searches carried out by the public authority. He also considers, where appropriate, any reason offered by the public authority to explain why it does not hold the information. While it may be relevant as part of this exercise to explore expectations about what information the authority should hold, ultimately the Commissioner's role is to determine what relevant recorded information is (or was, at the time the request was received) actually held by the public authority.
17. The Council explained that this request was one of a series of requests related to the sale of a parcel of land. The Council stated that all information related to the sale had been provided previously and was available on the Council's disclosure log. However, as the disclosure log was experiencing technical issues at the time of the request, the information that was originally located by Property and Facilities Management Team previously was provided again, subject to the redaction of third-party personal data.
18. The Council explained that the sale of the land was concluded in mid-2019, with a subsequent planning application following August 2019. Following conclusion of the sale, the Property and Facilities Management Team had no further involvement in the matter and, on receipt of this request, taking account of the expanded timeframe, the same team confirmed that no further information was held following conclusion of the sale.
19. The Council stated that the original searches encompassed emails between the Council and the purchaser/their agent, located within the case officer's email inbox and sent items. The Council confirmed that all correspondence with the purchaser has been via email and therefore there were no physical or electronic records elsewhere, with the exception of the location plan, which was also provided.
20. The Council explained that, on review, it provided the Applicant with a link to its Planning Portal, confirming that there remained live planning applications for the address in question, which included planning enforcement matters. The Council stated that, as this information was already accessible to the Applicant through the portal, it was not required to provide it, in line with regulation 6(1)(b) of the EIRs.
21. With regard to the emails supplied by the Applicant, which she deemed as falling with the scope of the request, the Council submitted that the it was regrettable that these emails were mistakenly overlooked during the searches carried out by the relevant team and it was purely down to human error. The Council apologised for this oversight.
22. The Council submitted that it was in a process of implementing new protocols and procedures of the logging and evidencing of searches undertaken by the Council in response to requests for information. The Council hopes this will provide robust and stronger

administrative evidence that searches for information in response to requests are carried out to the best of its abilities.

23. On review of the emails provided, the Commissioner notes that they are dated prior to 28 January 2020 and therefore fall out with the scope of date parameters set by this request. However, it is clear that this information should have been provided in response to the Applicant's earlier requests. The Commissioner welcomes the Council's attempts to improve its process for evidencing searches conducted, but is unable to find a failing in this case.
24. Having considered all the relevant submissions provided in this case, the Commissioner accepts that the Council have now conducted adequate searches and that those searches were reasonable in the circumstances. In conclusion, the Commissioner is satisfied, on the balance of probabilities, that the Council does not hold any further information to that already provided to the Applicant.

#### *The Public Interest*

25. The exception in regulation 10(4)(a) of the EIRs is subject to the public interest test in regulation 10(1)(b) and so can only apply if, in all the circumstances of the case, the public interest in maintaining the exception outweighs that in making the information available. The question of whether or not a public authority holds information is a factual one, determined on the balance of probabilities. If a public authority does not hold the information, then there is no meaningful public interest test that can be undertaken.
26. In this case, for the reasons set out above, the Commissioner is satisfied that the Council does not hold any further information covered by the request. Consequently, he accepts that there is no conceivable public interest in requiring the disclosure of such information and finds that the public interest in making information available is outweighed by that in maintaining the exception.

## **Decision**

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

## **Appeal**

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

**Margaret Keyse  
Head of Enforcement**

**4 November 2021**

## **Appendix 1: Relevant statutory provisions**

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### **The Environmental Information (Scotland) Regulations 2004**

#### **2 Interpretation**

- (1) In these Regulations –

...

"environmental information" has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on

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(a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;

...

(c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in paragraphs (a) and (b) as well as measures or activities designed to protect those elements;

...

- (2) For the purpose of these Regulations, environmental information is held by a Scottish public authority if it is-

(a) in its possession and it has been produced or received by that authority; or

...

#### **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.

...

#### **6 Form and format of information**

- (1) Where an applicant requests that environmental information be made available in a particular form or format, a Scottish public authority shall comply with that request unless-

...

(b) the information is already publicly available and easily accessible to the applicant in another form or format.

## **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
    - (a) it does not hold that information when an applicant's request is received;
- ...

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