

Decision Notice

Decision 128/2015: Mr James McLean and the City of Edinburgh Council

St Stephen's Church Clock, Edinburgh

Reference No: 201402393

Decision Date: 11 August 2015



Scottish Information
Commissioner

Summary

On 3 September 2014, Mr McLean asked the City of Edinburgh Council (the Council) for information about the chime from St Stephen's Church clock. Following a review, the Council disclosed some information to Mr McLean, but withheld other information. Mr McLean remained dissatisfied and applied to the Commissioner for a decision.

The Commissioner investigated and found that the Council had been wrong to withhold some information from Mr McLean under regulations 10(5)(f) and 10(4)(e) of the EIRs. She accepted that the Council was entitled to withhold some personal information under regulation 11(2), and some information under regulations 10(4)(e) and 10(5)(f) of the EIRs.

The Commissioner ordered the Council to disclose the information which the Council had wrongly withheld from Mr McLean.

Relevant statutory provisions

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

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (definitions (a), (b), and (c) "environmental information") and (3) (definitions of "data protection principles" and "personal data"); 5(1) and (2) (Duty to make available environmental information on request); 10(1), (2), (3), (4)(e) and (5)(f) (Exceptions from duty to make environmental information available); 11(1),(2), (3)(a)(i) and (b) (Personal data)

Data Protection Act 1998 (the DPA) 1(1) (Basic interpretative provisions) (definition of "personal data"); Schedules 1 (The data protection principles, Part 1: the principles) (the first data protection principle) and 2 (Conditions relevant for purposes of the first principle: processing of any personal data) (Condition 6)

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. St Stephen's Church, in Stockbridge in Edinburgh, was built in the 1820s. Historically, the clock in the church chimed every hour. The chime was stopped for some months while work was being carried out in the church, and was restarted in April 2014. Following complaints about the noise of the chimes, the Council took steps to stop the chimes in August 2014.
2. On 3 September 2014, Mr McLean made a request¹ for information to the Council. The information requested was:
 1. *Copies of all the complaints made about the chime from [St Stephen's Church] clock and all the responses from council officers*

¹ https://www.whatdotheyknow.com/request/st_stephens_church_silencing_of

- 2. Copies of all reports carried out by council officials or commissioned by the council into the chiming of this clock*
 - 3. Copies of all correspondence relating to the silencing of this clock.*
 - 4. Copies of all minutes of meetings regarding the silencing of this clock*
 - 5. The specific legal reasons quoted by the council to silence this clock after 186 years*
 - 6. The list of consultees contacted before the clock was silenced*
 - 7. What alternative options that were discussed e.g. triple glazing etc.*
3. Mr McLean indicated that names could be redacted, but he expected to receive all other information. On 4 September 2014, the Council acknowledged receipt of Mr McLean's request, but he received no other response.
 4. On 2 October 2014, Mr McLean wrote to the Council requesting a review as it had not responded to his request.
 5. The Council notified Mr McLean of the outcome of its review on 6 October 2014, and apologised for its delay in responding. It supplied some information and explanation to him, but withheld other information under various exceptions in the EIRs. It also told Mr McLean that it did not hold some of the information he had asked for.
 6. On 9 October 2014, Mr McLean applied to the Commissioner 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. Mr McLean was dissatisfied with the outcome of the Council's review because information had been redacted from the documents sent to him. Mr McLean stated that there was a clear public concern over the silencing of an important church clock, and argued that it was in the public interest to disclose information about this, without excessive redactions. He believed that only names and addresses should have been withheld.

Investigation

7. The application was accepted as valid. The Commissioner confirmed that Mr McLean made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to her for a decision.
8. On 16 October 2014, the Council was notified in writing that Mr McLean had made a valid application and was asked to send the Commissioner the information withheld from him. The Council provided the information and the case was 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 Council was invited to comment on this application and answer specific questions including justifying its reliance on any provisions of FOISA or the EIRs it considered applicable to the information requested.

Scope of the investigation and decision

10. In his application to the Commissioner, Mr McLean expressed dissatisfaction in respect of the Council's response to parts 1, 2, 3 and 5 of his request.
11. In part 5, of his request, Mr McLean asked the Council to provide its legal reasons for silencing the clock chimes. The Council informed Mr McLean that they used the statutory

nuisance provisions of sections 79 and 80 of the Environmental Protection (Scotland) Act 1990 ("the 1990 Act"). In his application to the Commissioner, Mr McLean said that he found it difficult to understand how the Council "managed to classify a historic church bell as a nuisance." The Commissioner is unable to investigate this complaint as it is an expression of dissatisfaction with the Council's action in terms of the 1990 Act, rather than dissatisfaction with the Council's response in terms of FOISA or the EIRs.

12. The Commissioner's investigation will therefore consider the Council's decision to withhold information identified as falling within the terms of parts 1, 2 and 3 of the request.
13. During the investigation, the Council disclosed more information to Mr McLean. Mr McLean confirmed that he wished the Commissioner to issue a decision about the information which was still withheld by the Council. He did not understand why the Council had redacted whole paragraphs from the correspondence. Mr McLean also noted that the Council had not provided any of the complaint information and correspondence, which he considered to be the main point of his request.
14. Mr McLean has not challenged the decision to withhold the name and address of any person who complained to the Council or the decision to withhold information about the cost to any contractor. Mr McLean later confirmed that he did not wish to obtain personal data that identified anyone who had complained. Accordingly, the Commissioner will not consider whether this information was correctly withheld by the Council.

Commissioner's analysis and findings

15. In coming to a decision on this matter, the Commissioner considered all of the withheld information and the relevant submissions, or parts of submissions, made to her by both Mr McLean and the Council. She is satisfied that no matter of relevance has been overlooked.

Application of the EIRs

16. The Council responded to Mr McLean's request under the EIRs. The information covered by the request related to the noise generated by the chiming of St Stephen's Church clock, the complaints arising from this noise, and the Council's compliance with the appropriate legislation. The Council submitted that the information covered by Mr McLean's request was environmental information in terms of the EIRs, as defined in paragraph (c) of the definition of environmental information in regulation 2(1), read in association with paragraphs (a) and (b) of that definition.
17. The Commissioner is satisfied that the information falling within the request is environmental information, as defined in regulation 2(1) of the EIRs, and falls within either paragraph (b) (information on the state of the elements of the environment) or paragraph (c) of that definition (information on measures affecting or likely to affect those elements).
18. The Council confirmed that it wished to rely on the exemption in section 39(2) of FOISA. The exemption in section 39(2) of FOISA provides, in effect, that environmental information is exempt from disclosure under FOISA, thereby allowing any such information to be considered solely in terms of the EIRs. In this case, the Commissioner accepts that the Council was entitled to apply this exemption to the information requested by Mr McLean, given the Commissioner's conclusion that all information covered by parts 1, 2 and 3 of the request would be environmental information.

19. As there is a separate statutory right of access to environmental information available to Mr McLean in this case, the Commissioner concludes that the public interest in maintaining this exemption, and in responding to the request in line with the EIRs, outweighs the public interest in disclosure of the information under FOISA. The Commissioner will consider the information in what follows solely in terms of the EIRs.

Information falling within Mr McLean's requests

20. Part 1 of Mr McLean's request was for copies of all the complaints made about the chime from the clock of St Stephen's Church, and all responses from Council officers. Mr McLean confirmed that he was not seeking any internal correspondence in relation to this part of his request (such internal correspondence falls within the scope of part 3 of the request). The Council withheld information covered by part 1 of the request under regulations 10(5)(f) and 11(2) of the EIRs.
21. The information withheld in response to part 2 of Mr McLean's request was personal data included in noise measurement reports. Mr McLean received the reports, but with the redaction of personal data of the complainers (which he accepted) and the redaction of the personal data of the Council employees involved (which he did not accept). The Council withheld the Council employees' personal data under regulation 11(2) of the EIRs.
22. Part 3 of the request was for copies of all correspondence relating to the silencing of St Stephen's Clock. This might reasonably extend to complaints following the silencing of the chimes (from persons who were aggrieved because the chimes were silenced); however, Mr McLean confirmed that both parts 1 and 3 of his request were intended to relate only to the complaints about the noise of the chimes that led to the silencing of the clock. The Council withheld information covered by part 3 of the request under regulations 10(4)(e), 10(5)(f) and 11(2) of the EIRs.
23. Although the Commissioner invited the Council's submissions on how it dealt with each part of the request (i.e. parts 1, 2 and 3), many of the arguments put forward by the Council in relation to each exception apply equally to information covered by different parts of the request. The Commissioner will therefore consider each exception applied by the Council in relation to all the information withheld under that exception, rather than looking in turn at the Council's response to each part of the request.

Regulation 10(4)(e) - Internal communications

24. The Council withheld some information described as internal communications under the exception in regulation 10(4)(e) of the EIRs.
25. Under regulation 10(4)(e), a Scottish public authority may refuse to make environmental information available to the extent that the request involves making available internal communications. For information to fall within the scope of the exception, it need only be established that the information is an internal communication. The exception in regulation 10(4)(e) covers all internal communications, regardless of their content or the level of harm that disclosure would be likely to cause.
26. The EIRs do not provide a definition of what constitutes an internal communication. Neither does European Directive 2003/4/EC on public access to environmental information, from which the EIRs are derived.

27. In *Decision 141/2007 Integra Compliance Ltd and the Scottish Environment Protection Agency*², the Commissioner accepted that internal communications could cover a wide range of documents, including internal email exchanges, draft letters to an external organisation, and a file note prepared for internal use.
28. The use of the word “internal” provides, basically, that the information is a communication that stays within one public authority. The Commissioner's guidance³ on the exception under regulation 10(4)(e) of the EIRs draws on the Aarhus Convention Implementation Guide⁴, which (at page 79) specifically states that once information has been disclosed by the public authority to a third party, it cannot be claimed to be an “internal communication”.
29. The Commissioner accepts that a communication can be “internal” even if it records a discussion with a third party or contains information received from third parties. It is the extent to which the communication has been distributed that is important, rather than its content.
30. The Commissioner has considered whether any of the withheld information has been disclosed to a third party (such as a Community Council or elected member of the Council). No evidence has been provided that the information withheld under this exception has been disclosed to any third party.
31. Having studied the information withheld under regulation 10(4)(e), the Commissioner is satisfied that the information was correctly identified by the Council as comprising internal communications and, therefore, that the exception was correctly applied to this information.
32. The application of the exception is subject to the public interest test in regulation 10(1)(b), which the Commissioner will now consider.

Public interest test

33. The public interest test in regulation 10(1)(b) states that a Scottish public authority may only withhold information to which an exception applies where, in all the circumstances, the public interest in making the information available is outweighed by the public interest in maintaining the exception.
34. Mr McLean submitted that it was not in the public interest for the Council to keep “completely secret” the information from complaints and correspondence it had received and upon which it had acted. He submitted that there was clearly public concern about the silencing of a historic clock which he described as “one of the most important in Europe”. He argued that there should be no secrets about the discussions the Council had had with a contractor. He argued that there was a strong public interest in disclosing information and believed the Council needed to act in a much more transparent manner if the public were to have any confidence in local government. He stated that he “would expect proper process and a paper trail before taking a decision to silence this historic sound which had been chiming for 186 years”.
35. The Council acknowledged the presumption in favour of disclosure and the public interest in transparency and accountability. However, the Council submitted that there was a greater public interest in Council staff being able to have a free and frank exchange of views for the

² <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2007/200502068.aspx>

³ <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section29/Section29.aspx>

⁴ <http://www.unece.org/env/pp/acig.html>

purposes of deliberation during the formulation of strategies and the resolution of ongoing complaints. The Council explained that it was required, under the statutory nuisance provisions of the 1990 Act, to investigate noise complaints and take action as appropriate to resolve such complaints. It submitted that disclosing the information requested at this stage could interfere with the resolution of the noise complaint. The Council commented that, once the complaint was resolved, its position regarding the disclosure of the requested information was very likely to change, due to the material change in circumstances.

36. The Commissioner recognises that there is a public interest in ensuring that the Council is accountable and transparent in the actions taken and decisions it makes, particularly in relation to the investigation or resolution of a complaint regarding what is correctly described by Mr McLean as an historic entity.
37. On the other hand, the Commissioner also accepts that there is a strong public interest in ensuring that the Council is able to make the best possible decisions and to take appropriate actions to address and resolve any complaint, and to fulfil the Council's statutory duties. She accepts that officials of the Council need to make fully informed decisions, and this may require the free and frank deliberation and discussion of the options. This reflects the underlying rationale for this exception: that is, it protects a public authority's need for a "private thinking space".
38. The Commissioner is mindful that regulation 10(2) requires her to interpret exceptions within regulation 10(4) and (5) in a restrictive way, and to apply a presumption in favour of disclosure.
39. The Commissioner must consider the circumstances prevailing at the time the Council reviewed its response to Mr McLean's request, not the time at which she is asked to make her decision. She notes that some of the emails included in the withheld information were exchanged just days before the request was made, and therefore give details of discussions which were ongoing at the time of the request. Here, the Commissioner is satisfied that there is weight to the argument that some space should be afforded to the Council to have such exchanges. The need for private thinking space will be strongest when the issue is still live. For this reason, where the withheld information relates to discussions which were ongoing at the time of the request, the Commissioner accepts that the public interest in making the information available is outweighed by that in maintaining the exception in regulation 10(4)(e).
40. The Commissioner also accepts that, among the withheld information, there are some internal communications that might not have been expressed in the way they were, if the writers had expected the communications to be disclosed, but which show Council employees communicating amongst themselves to resolve and address a situation in terms of the Council's duties. The Commissioner has again taken into account that the discussions related to an issue which had not yet been resolved by the Council. She accepts that communicating information between employees in a certain way may be necessary to resolve the situation or to assess the Council's rights, duties or options, and she accepts that this type of communication might be stifled in future if disclosure of this correspondence is required. In relation to these communications, the Commissioner takes the view that the public interest in transparency is outweighed by the public interest in enabling Council employees to communicate fully and, where necessary, with candour to enable the Council to address or resolve the situation.

41. In relation to the remainder of the emails withheld under regulation 10(4)(e), the Commissioner finds that the public interest favours disclosing the information. There is a public interest in ensuring that the Council is accountable and transparent, and the Commissioner does not accept that disclosure of the remaining information would create the harm or risk suggested by the Council.
42. The Commissioner therefore concludes that the Council was not entitled to withhold all information to which it applied regulation 10(4)(e) of the EIRs.

Regulation 10(5)(f)

43. The Council withheld information covered by requests 1 and 3 under the exception in regulation 10(5)(f) of the EIRs. Regulation 10(5)(f) is set out in Appendix 1.
44. In the Commissioner's guidance on regulation 10(5)(f)⁵, she states that a number of factors should be addressed in considering whether this exception applies. These include:
 - (i) Was the information provided by a third party?
 - (ii) Was the provider, or could the provider be, required by law to provide it?
 - (iii) Is the information otherwise publicly available?
 - (iv) Has the provider consented to disclosure?
 - (v) Would disclosure of the information cause, or be likely to cause, substantial harm to the interests of the provider?

Does regulation 10(5)(f) apply in this case?

45. The Council explained that the complaints were made by third parties who were not under any legal obligation to provide information because they were not under any legal obligation to make complaints. The exception was applied to information in written complaints, or to the notes made by a Council officer dealing with a phone complaint.
46. The Commissioner accepts that the information withheld under regulation 10(5)(f) was provided by a third party, namely the individuals complaining about the chimes. The Commissioner is satisfied that the complainants could not have been required by law to provide the Council with the information in their complaints.
47. The exception cannot apply to information which is otherwise publicly available. The Council said that to address concerns about accountability, it had provided briefings to elected members, who shared these with interested organisations. Information from these briefings was provided to Stockbridge and Inverleith Community Council on 15 October 2014. The information provided to the Community Council related to the complaints received and the proposed solutions, and did not include information relating to the identity of the complainants.
48. The Commissioner has received no evidence that the information which has been withheld from Mr McLean is, or has been, publicly available.
49. Each of the complainers told the Council that they would not consent to their complaint being disclosed.

⁵ <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section33/Section33.aspx>

50. The Commissioner is satisfied that the complainers:
- (i) were under no obligation, and could not be put under an obligation, to provide the information to the Council;
 - (ii) did not supply the information in their complaints in circumstances such that it could be made available apart from under the EIRs and
 - (iii) have not consented to the information being disclosed.

She will therefore go on to consider whether disclosure of the information would, or would be likely to, prejudice substantially, the interests of any person who has complained. Unless disclosure would, or would be likely to, cause substantial prejudice, the information must be disclosed.

Substantial prejudice

51. If a Scottish public authority withholds information under regulation 10(5)(f), it must identify the harm that disclosure would cause to the third party's interests. The harm must be real, actual and of substance.
52. The Council said that the complainants would not have expected details of their complaints to be disclosed into the public domain in response to a request for information. It submitted that disclosing details of the complaints prior to the conclusion of the complaint process would cause substantial harm to the interests of the complainants who provided the information. The Council stated that complainants have a reasonable expectation that their complaints will be dealt with by the Council, without undue pressure being applied during the complaints process; disclosing details of complaints could result in people who disagreed with the complainants' views seeking to apply additional pressure during the process.
53. The Commissioner accepts that this might be the case if information which allowed complainants to be identified were disclosed. However, Mr McLean has made it clear that he does not want to receive any information which would identify the complainants (this is not restricted to the names or addresses of the complainants), so the Commissioner does not accept that there is any substance to the Council's argument.
54. Mr McLean commented that the Council would normally disclose details of complaints in response to an information request, withholding only the name and address of the complainant. The Council replied that information requests normally concern cases that had been investigated and closed, where the complaint had been resolved: disclosing the information in these circumstances had no bearing on the outcome of the case. However, in this case, the complaints were still active and unresolved. The Council explained that it was still trying to implement a long-term solution and needed to avoid jeopardising any co-operation from complainants and the other stakeholders. It submitted that the withheld information remained sensitive.
55. Having considered the submissions made by the Council and Mr McLean, the Commissioner believes that the Council has overstated the harm likely to be caused by disclosing anonymised information about the complaints, and has failed to show that disclosure would, or would be likely, to prejudice substantially the interests of the complainants. The Commissioner accepts that persons making complaints to the Council would have a reasonable expectation that they would not be identified: if they were, their interests (such as privacy and the right to make a complaint to the Council about an issue that concerned them) would be harmed. However, given that Mr McLean does not require information which would

identify the complainants, the Commissioner does not accept that disclosure would, or would be likely to, have the detrimental effect that the Council suggests.

56. The Commissioner takes the view that anonymised information showing the content of any complaints and the Council's response to those complaints could be disclosed without causing the harm described by the Council and addressed by regulation 10(5)(f).
57. Accordingly, the Commissioner finds that the Council incorrectly applied the exception in regulation 10(5)(f) to the anonymised content of the complaints.
58. The exception in regulation 10(5)(f) is subject to the public interest test in regulation 10(1)(b) of the EIRs.

Public interest in relation to regulation 10(5)(f)

59. The Commissioner has considered whether the public interest in disclosing information which could lead to the identification, or suspected identification, of a complainant outweighs the public interest in maintaining the exception in regulation 10(5)(f) and in withholding the information. In doing so, she acknowledges that most of the arguments put forward by both the Council and Mr McLean in relation to the public interest test were intended to apply to the public interest in withholding or disclosing all information from the complaints, rather than the small part of that information currently under consideration.
60. The Council stated there was a public interest in ensuring that it deals with the complaints in an accountable and unbiased manner. Similarly, there was a clear public interest in the Council disclosing information in a transparent manner.
61. The Council explained that the complaints required the Council to enforce the statutory nuisance provisions of the 1990 Act, investigate the noise complaints received, and take action to resolve such complaints. In the Council's view, the public interest in allowing officials to enforce the Council's statutory obligations and to resolve noise complaints without information requests "derailing the resolution of the complaint" outweighed the public interest in disclosing the information.
62. Mr McLean made submissions about the importance of achieving transparency and stated that the Council had misinterpreted its own interest as the public interest. He also referred to significant public concern over the matter.
63. In considering the public interest in disclosure against that in maintaining the exception, the Commissioner acknowledges that there is a legitimate public interest in transparency generally and that there is a strong public interest in transparency in environmental matters. However, she must also give weight to the public interest in the continued voluntary provision of information which would allow a Scottish public authority to be aware of, investigate and resolve problems falling within its remit. The Commissioner accepts that disclosure of information which would permit speculation about the identities of the complainants or which would lead to their identification would be likely to inhibit members of the public from contacting the Council with similar complaints in future. She also accepts that such disclosure would make it more difficult for the Council to carry out its statutory duties and to resolve complaints.
64. The Commissioner has already found that information which would not identify individual complainants should be disclosed. The Commissioner can identify no public interest in requiring the disclosure of information which identifies, or could lead to the suspected identification of, a complainer, particularly where the complaint is not yet resolved and the

complainant has made it clear that they do not wish to be identified. She therefore finds that the public interest in maintaining the exception in regulation 10(5)(f) of the EIRs outweighs the public interest in disclosure of the withheld information, and that the Council was entitled to withhold the information in question under regulation 10(5)(f) of the EIRs.

Cumulative public interest test

65. In some instances, the Council has applied the exceptions in regulations 10(4)(e) and 10(5)(f) to the same information. Where authorities apply more than one exception to the same information, the Commissioner must have regard to the judgment of the European Court of Justice (ECJ) in the case of *OFCOM v the Information Commissioner* [2011] EUECJ C-71/10⁶.
66. In that judgment, the ECJ considered how the public interest test should be addressed where more than one exception has been found to apply to the same information. The ECJ concluded that, in such cases, a two stage public interest test should be carried out:
 - (i) The first step is to consider, in relation to each exception judged to apply, whether the public interest in disclosing that information is outweighed by the public interest in maintaining the exception. (The Commissioner has already done this – see paragraphs 33 to 41 and 59 to 64 above.)
 - (ii) The second test is then to cumulatively weigh all grounds for refusing to disclose the information against all of the public interests served by disclosure, and to come to a decision as to whether the information should be disclosed.
67. In terms of the cumulative public interest test, the Council argue that the public interest arguments in favour of disclosure (and in ensuring that ongoing processes are completed without prejudicing the processes) do not outweigh the public interest arguments against the disclosure of the information.
68. Having considered the Council's arguments, the Commissioner remains unable to accept that the types of harm described by the Council would be a consequence of the disclosure of the information in question. The Council has provided no evidence or detailed arguments to show why disclosure would prevent it from resolving the complaint or from fulfilling its statutory obligations. Therefore, she is unable to give any significant weight to these grounds, even when considered cumulatively. On the other hand, she recognises that some (albeit limited) public interest would be served by disclosing the withheld information, by offering insight into how the Council has dealt with the complaints.
69. On balance, she considers that the overall public interest lies in disclosing the information. For this reason, the Commissioner concludes that the Council was not entitled to withhold some of the information covered by Mr McLean's request under either regulation 10(4)(e) or regulation 10(5)(f) of the EIRs.

Regulation 11(2) (Personal data)

70. The Council submitted that the details of Council employees remain excepted from disclosure under regulation 11(2) (read in conjunction with regulation 11(3)) of the EIRs. The Council applied this regulation to information falling within parts 1, 2 and 3 of Mr McLean's request. Whilst Mr McLean was content for the Council to redact the personal data of the

⁶ <http://www.bailii.org/eu/cases/EUECJ/2011/C7110.html>

complainants, he did not accept that the personal data of Council officers should be redacted.

71. In order for a Scottish public authority to rely on this exception, it must show (i) that the information is personal data for the purposes of the DPA, and (ii) that making it available would contravene at least one of the data protection principles laid down in the DPA. In this case, the Council argued that the first data protection principle would be contravened.

Is the withheld information personal data?

72. "Personal data" are defined in section 1(1) of the DPA as:

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 possessions of, the data controller (the full definition is set out in Appendix 1).

73. The Council explained that the information being withheld was information that could identify Council officers and was therefore personal data.
74. The information withheld by the Council includes names, email addresses, information about the officers' employment that would be particular to the officer, and so on. The Commissioner accepts that living individuals could be identified from a combination of their names and the documents emanating from the Council which show that they were working there in the capacity described. The information relates to the individuals and is their personal data.

The first data protection principle

75. The first data protection principle states that the processing of personal data (in this case, making those data publicly available in response to a request made under the EIRs) must be fair and lawful and, in particular, that personal data shall not be processed unless at least one of the conditions in Schedule 2 (to the DPA) is met. In the case of sensitive personal data, at least one of the conditions in Schedule 3 to the DPA must also be met. The Commissioner has considered the definition of sensitive personal data set out in section 2 of the DPA and does not consider any of the withheld information to be sensitive personal data.
76. There are three separate aspects to the first data protection principle: (i) fairness, (ii) lawfulness and (iii) the conditions in the schedules. These three aspects are interlinked. For example, if there is a specific condition which permits the personal data to be made available, it is likely that disclosure will also be fair and lawful.
77. The Commissioner will now go on to consider whether there are any conditions in Schedule 2 to the DPA which would permit the personal data to be made available. If any of these conditions can be met, she must then consider whether the disclosure of these personal data would also be fair and lawful.

Can any of the conditions in Schedule 2 to the DPA be met?

78. The Council stated that the data subjects (the Council officers) had not given their consent for the information to be disclosed, so condition 1 could not be met. The Council considered that only condition 6 in Schedule 2 could potentially apply.
79. The Commissioner has considered all the conditions in Schedule 2 and agrees that condition 6 is the only one which might be relevant in this case. Condition 6 allows personal data to be processed if the processing is necessary for the purposes of legitimate interests pursued by the third party or parties to whom the data are disclosed, except where the processing is

unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject (i.e. the individuals to whom the data relate). The processing in this case would be making the data available in response to Mr McLean's request.

80. There are, therefore, a number of different tests which must be satisfied before condition 6 can be met. These are:
- (i) Is Mr McLean pursuing a legitimate interest or interests?
 - (ii) If yes, is the processing involved necessary for the purposes of those interests? In other words, is the processing proportionate as a means and fairly balanced as to ends, or could these interests be achieved by means which interfere less with the privacy of the data subjects?
 - (iii) Even if the processing is necessary for Mr McLean's legitimate interests, is that processing nevertheless unwarranted in this case by reason of prejudice to the rights and freedoms or legitimate interests of the data subjects?

Is Mr McLean pursuing a legitimate interest or interests?

81. There is no definition within the DPA of what constitutes a "legitimate interest", but the Commissioner takes the view that the term indicates that matters in which an individual properly has an interest should be distinguished from matters about which he or she is simply inquisitive. In the Commissioner's published guidance⁷ on regulation 11(2) of FOISA, it states:

"In some cases, the legitimate interest might be personal to the applicant - e.g. he or she might want the information in order to bring legal proceedings. With most requests, however, there are likely to be wider legitimate interests, such as the scrutiny of the actions of public bodies or public safety."

82. The Council accepted that Mr McLean has a legitimate interest, as he was seeking information to ensure accountability and transparency on how the Council was dealing with complaints about the silencing of St Stephen's Church clock. Also, as Mr McLean is a member of the Stockbridge and Inverleith Community Council, it was clear to the Council that he had a legitimate interest in the Council's actions and the identity of Council Officers, to ensure that the citizens of Edinburgh are kept informed as to the actions of their Council. The Council accepted that disclosure of the information would allow Mr McLean to achieve these legitimate interests. Likewise, the Commissioner accepts that Mr McLean is (and was, in making his request) pursuing a legitimate interest in relation to the process, for the reasons identified by the Council.

Is the processing necessary for the purposes of those legitimate interests?

83. The Commissioner acknowledges that Mr McLean has a legitimate interest in understanding fully the process by which the Council dealt with the complaints about the clock chimes, which includes a legitimate interest in information showing *who* gave the responses held by the Council. To that extent, at least, the Commissioner accepts that disclosure is necessary to meet Mr McLean's legitimate interests: he could not acquire a full understanding of the

⁷ <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section38/Section38.aspx>

involvement of individual Council officers other than through disclosure of the withheld information.

84. In all the circumstances of this case, the Commissioner can identify no viable means of meeting Mr McLean's legitimate interests which would interfere less with the privacy of the relevant data subjects than the provision of the withheld personal data. In the circumstances, she is satisfied that making those personal data available is necessary to meet the legitimate interests in question.

Is the processing unwarranted in this case by reason of prejudice to the rights, freedoms or legitimate interests of the data subjects?

85. The Commissioner must now consider whether the processing is unwarranted by reason of prejudice to the rights and freedoms or legitimate interests of the Council officers. This test involves a balancing exercise between the legitimate interests of Mr McLean and the rights, freedoms and legitimate interests of the officers in question. Only if the legitimate interests of Mr McLean outweigh those of the officers can the information be made available without breaching the first data protection principle.

86. In the Commissioner's guidance on regulation 11 of the EIRs, she notes a number of factors which should be taken into account in carrying out the balancing exercise. These include:
- (i) whether the information relates to the individual's public life (i.e. their work as a public official or employee) or their private life (i.e. their home, family, social life or finances)
 - (ii) the potential harm or distress that may be caused by the disclosure
 - (iii) whether the individual objected to the disclosure
 - (iv) the reasonable expectations of the individuals as to whether the information should be disclosed.

87. The Council maintained that disclosing officers' personal data in this case would cause unwarranted prejudice to their rights and freedoms. It argued that there was "a very reasonable expectation by the [officers] that the Council would not disclose the information [Mr McLean] is seeking into the public domain." The Council explained that the Council officers whose identity is being withheld are not Heads of Service or above and, under the Council's current policy, would not have their details placed into the public domain in response to an information request. In these circumstances, the Council submitted, Mr McLean's legitimate interests do not outweigh those of the officers, and disclosure of personal data would contravene the first data protection principle.

88. The information pertains to the data subjects' public lives (i.e. their employment with the Council) rather than their private lives. Mr McLean himself makes the point that the officers were acting in a professional capacity. This fact makes it more likely that their personal data could be disclosed.

89. The Commissioner notes the Council's position that it is not its "policy" to disclose the names of the staff in question (although the Council has not made clear which policy covers this and what grades the staff in question actually are). However, she has concerns that this "policy" has been applied in such an apparently blanket way in responding to requests for information. This is, effectively, treating it as a blanket exemption without giving due consideration to the specific circumstances of the request. She does not accept that, simply because it is "policy", this is sufficient reason to withhold a member of staff's personal data

as claimed here. While it may be the Council's general approach, seniority alone may not be sufficient reason to withhold a name, as, despite the policy, there may be other factors that would change the balance of legitimate interest.

90. In this case, the Commissioner recognises that the officials whose personal data has been withheld are not senior council officials and that in relation to complaints work they hold a reasonable expectation that their names will not be disclosed. As the Council explained, the officers concerned do not (generally speaking) have public-facing roles so it is reasonable to assume that they may not automatically be associated with the information under consideration.
91. The Commissioner also recognises that the complaints about the clock have attracted attention both locally and in the national media⁸. Because of this, the Commissioner accepts that disclosing information which would identify the non-senior members of Council staff involved in dealing with the complaints would lead to an unwarranted focus on the officers; this would technically be regarded as harm, albeit at the lower end of the scale.
92. It is for these reasons the Commissioner accepts that the officers whose information has been withheld would not have any reasonable expectation that their personal data would be publicly disclosed in the context of Mr McLean's information request. She also accepts that disclosure would prejudice their rights and freedoms or legitimate interests.
93. Therefore, while the Commissioner accepts that disclosure of the officers' personal data would be necessary to fulfil Mr McLean's legitimate interests, she does not accept that Mr McLean's interests outweigh the prejudice that disclosure would cause to their rights and freedoms or legitimate interests. Consequently, she finds that such prejudice would be unwarranted.
94. The Commissioner is therefore satisfied that condition 6 of Schedule 2 cannot be met in this case. As no condition in Schedule 2 can be met, disclosing the officers' personal data would necessarily breach the first data protection principle. She therefore concludes that the exception in regulation 11(2) of the EIRs has been correctly applied by the Council to the personal data of the Council officers.
95. The Commissioner would encourage the Council to review its approach to the handling of information requests that involve the personal data of Council officials.

⁸ For example: <http://www.bbc.co.uk/news/uk-scotland-edinburgh-east-fife-29030882>

Decision

The Commissioner finds that the City of Edinburgh Council (the Council):

- (i) was correct to respond to Mr McLean's requests under the Environmental Information (Scotland) Regulations 2004 (the EIRs) (and, in doing so, complied with Part 1 of the Freedom of Information (Scotland) Act 2002) and
- (ii) was entitled to withhold officials' personal data under regulation 11(2) of the EIRs and
- (iii) was entitled to withhold some internal communications under regulations 10(4)(e) and 10(5)(f), but
- (iv) failed to comply with the EIRs by withholding some information under regulations 10(4)(e) and 10(5)(f) of the EIRs.

The Commissioner requires the Council to provide Mr McLean with the information wrongly withheld under regulations 10(4)(e) and 10(5)(f) of the EIRs, by **25 September 2015**. The Commissioner will specify to the Council which information must be disclosed.

Appeal

Should either Mr McLean 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.

Enforcement

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

Rosemary Agnew
Scottish Information Commissioner

11 August 2015

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.

...

...

- (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.

...

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 -

- (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;

...

(3) The following expressions have the same meaning in these Regulations as they have in the Data Protection Act 1998], namely-

...

(b) "the data protection principles";

...

(d) "personal data".

...

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.
- (3) Where the environmental information requested includes personal data, the authority shall not make those personal data available otherwise than in accordance with regulation 11.
- (4) A Scottish public authority may refuse to make environmental information available to the extent that
...
 - (e) the request involves making available internal communications.
- (5) A Scottish public authority may refuse to make environmental information available to the extent that its disclosure would, or would be likely to, prejudice substantially-
...
...
 - (f) the interests of the person who provided the information where that person-
 - (i) was not under, and could not have been put under, any legal obligation to supply the information;
 - (ii) did not supply it in circumstances such that it could, apart from these Regulations, be made available; and
 - (iii) has not consented to its disclosure; or

.

....

11 Personal data

- (1) To the extent that environmental information requested includes personal data of which the applicant is the data subject then the duty under regulation 5(1) to make it available shall not apply to those personal data.
- (2) To the extent that environmental information requested includes personal data of which the applicant is not the data subject and in relation to which either the first or second condition set out in paragraphs (3) and (4) is satisfied, a Scottish public authority shall not make the personal data available.

- (3) The first condition is-
- (a) in a case where the information falls within paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998 that making the information available otherwise than under these Regulations would contravene-
 - (i) any of the data protection principles; or
 - ...
 - (b) in any other case, that making the information available otherwise than under these Regulations would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) 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;

...

Schedule 1 – The data protection principles

Part I – The principles

1. Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –

(a) at least one of the conditions in Schedule 2 is met, and

(b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.

...

Schedule 2 – Conditions relevant for purposes of the first principle: processing of any personal data

...

6. (1) The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.

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