

# Decision Notice



Decision 152/2008 Capacity Building Project and City of Edinburgh Council

Investigation into complaints against the Capacity Building Project

Reference No: 200800888

Decision Date: 8 December 2008

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**Kevin Dunion**

Scottish Information Commissioner

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



## Summary

The Capacity Building Project (the Project) requested from the City of Edinburgh Council (the Council) copies of original letters of complaint, a list of individuals interviewed in the course of an investigation conducted by the Council and the transcripts of interviews conducted as part of the investigation. The Council responded by providing the Project with redacted versions of the complaint letters, where it has withheld information in terms of section 36(2) of the Freedom of Information (Scotland) Act 2002 (FOISA). The Council also withheld the list of interviewees and the transcripts of those interviews in terms of sections 36(2), 35(1)(g) and 35(2)(b) of FOISA. Following a review, the Council also applied the exemption in section 38(1)(b) to the information withheld. The Project remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the Council had dealt with the Project's request for information in accordance with Part 1 of FOISA because all of the information withheld was exempt from disclosure. He did not require the Council to take any action.

## Relevant statutory provisions and other sources

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1) and (2)(e)(ii) (Effect of exemptions) and 38(1)(b), (2)(a)(i) and (2)(b) (Personal information)

Data Protection Act 1998 (the DPA) sections 1(1) (Basic interpretative provisions) (definition of "personal data") and 2(a) and (g) (Sensitive personal data) and Schedule 1, Part 1, paragraph 1 (The first and second data protection principles)

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

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1. The City of Edinburgh Council (the Council) is the 'accountable body' for projects funded through the Community Regeneration Fund for Craigmillar, of which the Capacity Building Project (the Project) is one. The Project aims to offer residents in Craigmillar (a suburb in the South East of Edinburgh) the resources and support they need to participate in any local developments and activities and as such the Project organises various courses and events that are open to the local community.



2. In 2007, after receiving several written complaints from individuals about the Project, Communities Scotland asked the Council (in its role as 'accountable body') to investigate the complaints to see whether they had any basis in fact. The Council undertook an investigation (during which it interviewed the complainants along with other relevant parties) and issued a report, a copy of which was then provided to the Project.
3. On 21 January 2008, the Project wrote to the Council requesting the following information:
  - a. A copy of the original letters of complaint
  - b. A list of all those interviewed in the course of the investigation
  - c. A copy of the transcripts from each interview undertaken as part of its investigation
4. The Council responded on 4 February 2008. It provided the Project with redacted versions of the three original written complaints (in which it had redacted information it considered to be exempt from disclosure in terms of section 36 of FOISA). The Council also advised the Project that it considered the names of interviewees and the transcripts of the interviews to be exempt from disclosure in terms of sections 35(1)(g) read in conjunction with 35(2)(b) and 36(2) of FOISA.
5. On 18 April 2008, the Project wrote to the Council requesting a review of its decision. In particular, the Project noted that it had consulted the relevant sections of FOISA cited by the Council, but that it could see nothing in any of the exemptions which would support the Council's decision to withhold the information.
6. The Council notified the Project of the outcome of its review on 16 May 2008. It upheld its original decision to withhold the information in terms of sections 35(1)(g) and 36(2) of FOISA and also found that the information should be withheld in terms of section 38(1)(b) of FOISA.
7. On 17 June 2008, the Project 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 application was validated by establishing that the Project had made a request for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its response to that request.

## Investigation

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9. On 5 July 2008, the Council was notified in writing that an application had been received from the Project and asked to provide the Commissioner with any information withheld from the Project. The Council responded with the information requested and the case was then allocated to an investigating officer.



10. The investigating officer subsequently contacted the Council, giving it an opportunity to provide comments on the application (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 the exemptions it had cited earlier in sections 35, 36 and 38 of FOISA.
11. The Council responded on 29 August 2008, providing comments on the case and details of its reasoning when applying the relevant exemptions in sections 35, 36 and 38 of FOISA. Clarification of the Council's reasoning was provided in additional correspondence with the investigating officer.
12. In later communications, the Council withdrew its reliance upon the exemptions contained in sections 35, 36 and 38 of FOISA in relation to one of the documents it was withholding. Instead, the Council applied the exemption in section 25(1) of FOISA to this item, on the basis that it was a letter previously sent to the Project and so reasonably obtainable by the Project other than by requesting it under FOISA. A copy of this letter was sent to ensure that it remained available to the applicant.
13. The submissions of both the Council and the Project are discussed in more detail, where relevant, within the analysis and findings section below.

## Commissioner's analysis and findings

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14. 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 the Project and the Council and is satisfied that no matter of relevance has been overlooked.

### Information under consideration

15. In this case, the Council is withholding the names of people interviewed as part of its investigation into the Project, the transcripts of those interviews, parts of three written complaints received about the Project, notes of telephone calls and a letter that it sent to the Project.
16. The Commissioner has considered all of the withheld documents in conjunction with the terms of the Project's request (outlined above in paragraph 3) and he is of the view that the letter (which the Council sent to the Project) and the telephone notes do not, in fact, fall within the scope of the Project's request.
17. Consequently, in this Decision the Commissioner will only consider the names of those interviewed by the Council, the transcripts of those interviews and the original complaint correspondence.



### Section 38(1)(b) of FOISA – personal data

18. The Council has applied the exemption in section 38(1)(b) of FOISA to the remainder of the withheld information, including the information that was redacted from the correspondence previously disclosed to the Project.
19. The Council has submitted that the remaining withheld information is personal data in that it identifies individuals who submitted or received complaints about the Project or who were interviewed as part of the Council's investigation into the Project. The Council stated that the release of this information would contravene both the first and second data protection principles, and so the information was exempt from disclosure in terms of section 38(1)(b) of FOISA (read in conjunction with section 38(2)(a)(i) or (b)).
20. In order for a public authority to rely on this exemption it must first show that the information which has been requested is personal data for the purposes of the DPA, and second, that release of the information would contravene any of the data protection principles laid down in the DPA.
21. Section 38(1)(b), when read with section 38(2)(a)(i) or (b), is an absolute exemption and therefore is not subject to the public interest test laid down by section 2(1)(b) of FOISA.

#### *Is the information under consideration personal data?*

22. Personal data is defined in section 1(1) of the DPA 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. (The full definition is set out in full in Appendix 1.)
23. The Commissioner has reviewed the withheld information and he is satisfied that the content of the list of interviewees, the written complaints and the interview transcripts constitute personal data, in that the information relates to living individuals who can be identified from those data or from those data and other information which is in the possession of the data controller, i.e. the Council.
24. The Commissioner has noted that some of the personal data withheld is also sensitive personal data as defined by section 2(a) and (g) of the DPA. The relevant information refers to criminal allegations or the racial origin of an identifiable person.
25. However, FOISA does not exempt information from release simply because it is the (sensitive) personal data of a third party. Personal data is exempt from release under section 38(1)(b) of FOISA (read in conjunction with section 38(2)(a)(i) or (b)) only if the disclosure of the information to a member of the public otherwise than under FOISA would contravene any of the data protection principles contained in the DPA. As noted above, the Council has argued that, in this case, the disclosure of the information would breach the first and second data protection principles.



*The first data protection principle*

26. The first data protection principle states that personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless at least one of the conditions in Schedule 2 (of the DPA) is met, and, in the case of sensitive personal data, at least one of the conditions in Schedule 3 (again, of the DPA) is also met.
27. The Council has not made any submissions which suggest that disclosure of the information requested by the Project would be unlawful, other than by contravening the first and second data protection principles.

*Is it fair to release personal data of the interviewees and third parties?*

28. The Commissioner has first considered whether disclosure of the personal data would be fair.
29. According to guidance from the Information Commissioner, who is responsible for enforcing and regulating the DPA throughout the UK ("Freedom of Information Act Awareness Guidance No 1<sup>1</sup>"), the assessment of fairness includes looking at whether the disclosure would cause unnecessary or unjustified distress or damage to the person whom the information is about, whether the third party would expect that his/her information might be disclosed to others and/or whether the third party would expect that his/her information would be kept private.
30. In its submissions to the Commissioner, the Council pointed out that the individuals interviewed as part of its investigation were informed at the time of their interview that they would not be named, and the information they provided (during the course of the interview) would not be disclosed to the public. The Council argued that the individuals consented to be interviewed on the basis that their anonymity would be assured by the Council. In light of this, the Council submitted that disclosure of the personal data withheld in this case would not be fair to the interviewees. The Council also indicated that the information contained in the transcripts cannot be redacted in a way that removes the possibility of specific individuals being identified.
31. The Commissioner has noted that each interview transcript clearly states that while any notes taken during the interview may form part of the report passed to the Departmental Heads of Service (within the Council), they would not be made available for public scrutiny. The Commissioner also notes that each interviewee accepted these terms at the beginning of the interview, before any issues relating to the Project were discussed.
32. The Commissioner has reviewed the content of the transcripts and notes that they contain not only the personal data of the interviewees, but also the personal data of other third parties. In several cases the information provided about the third parties is, at best, unflattering and at worse, accusatory. The Commissioner is satisfied that disclosure of the personal data of these third parties (as well as that pertaining to the interviewees themselves) could cause distress to the third parties and that it would therefore be unfair.

<sup>1</sup> This guidance can be viewed at:

[http://www.ico.gov.uk/upload/documents/library/freedom\\_of\\_information/detailed\\_specialist\\_guides/awareness\\_guidance%201%20personal\\_information\\_v2.pdf](http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/awareness_guidance%201%20personal_information_v2.pdf),





33. In respect of the written complaints, the Commissioner notes that the individuals who submitted the three written complaints did not send copies of their complaints to the Project, but instead took their dissatisfaction with the Project to an external party, with the expectation that their complaints would be acted upon. The Council noted that it had removed from the letters provided to the Project only the information that would identify the complainants and other third parties. It has disclosed the substance of the complaints.
34. In all cases, the information redacted by the Council contains biographical information which would identify the authors of the complaints (and other third parties discussed by the complainants). The Commissioner believes that the complainants only wrote so candidly because they were under the impression that the information they were imparting would be protected and would not be publicly disclosed. The Commissioner also notes that the individuals who submitted the written complaints were interviewed by the Council as part of its investigation and were therefore given the same assurances by the Council that the information they provided would not be publicly disclosed.
35. Having considered the personal data withheld under section 38(1)(b) of FOISA, and noted the circumstances in which this information was provided to the Council, the Commissioner has found that the disclosure of this information would be unfair, because it would be contrary to the reasonable expectations of the individuals concerned, and could be expected to cause unnecessary or unjustified distress or damage to the data subjects. In all the circumstances, therefore, he is satisfied that disclosure of the information would breach the first data protection principle on the basis that it would be unfair.
36. Having drawn this conclusion, the Commissioner is not required to go on to consider whether it would otherwise be unlawful, or whether any of the conditions in Schedule 2 (and, in the case of the sensitive personal data contained in the information, Schedule 3) of the DPA could be met. Having found that the first data protection principle would be contravened by disclosure, the Commissioner has also concluded that the exemption in section 38(1)(b) of FOISA applies to all of the information withheld from the Project.
37. Having concluded that all of the information withheld is exempt under section 38(1)(b) of FOISA, the Commissioner has not gone on to consider the remaining exemptions applied to this information by the Council.

## DECISION

The Commissioner finds that the City of Edinburgh Council acted in accordance with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by the Capacity Building Project.



## Appeal

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Should either the Capacity Building Project or the 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.

**Margaret Keyse**  
**Head of Investigations**  
**8 December 2008**





## Appendix

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### 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 –

...

- (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.

##### 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

## Data Protection Act 1998

### 1 Basic interpretative provisions

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;

...

### 2 Sensitive personal data

In this Act “sensitive personal data” means personal data consisting of information as to-

- (a) the racial or ethnic origin of the data subject,

...

- (g) the commission or alleged commission by him of any offence, or

...

## 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.
2. Personal data shall be obtained only for one or more specified and lawful purposes, and shall not be further processed in any manner incompatible with that purpose or those purposes.