Decision Notice

Decision 101/2008 Mr Alistair Johnson and East Renfrewshire Council

Pre-application discussions in connection with a planning application

Reference No: 200700609
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Summary

Mr Alistair Johnson requested various documents relating to Council Departments and the East Renfrewshire Muslim Community Forum (ERMCF) from East Renfrewshire Council (the Council). The Council responded by releasing certain information whilst withholding other information on the grounds that it was exempt in terms of section 30(b) and (c) of FOISA. Following review, Mr Johnson remained dissatisfied and applied to the Commissioner for a decision

Following an investigation, during which the Commissioner decided that the information withheld from Mr Johnson was environmental information, the Commissioner found that he could not uphold the Council's application of regulation 10(4)(d), (e) or 10(5)(f) of the EIRs in relation to the information withheld. He required East Renfrewshire Council to release the information previously withheld, subject to the redaction of certain personal data.

Relevant statutory provisions and other sources

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (Interpretation – definition of "environmental information"); 5(1) (Duty to make available environmental information on request); 10(1), (2), (4) (d) and (e), and 5(f) (Exceptions from duty to make environmental information available); 11(2) and (3) (Personal data)

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

Background

1. On 11 May 2006, the East Renfrewshire Muslim Community Forum (ERMCF) submitted a planning application to the Council seeking approval for the erection of a Muslim prayer facility and community centre (the prayer facility) in Newton Mearns. Prior to the submission of that application, certain discussions had taken place between representatives of the Muslim community and Council officers regarding ERMCF's intended proposals.

2. As a concerned resident of the area in question, Mr Johnson also exchanged correspondence with the Council regarding the ERMCF's proposals. In the course of that correspondence, he submitted various requests for information.

3. On 31 July 2006, Mr Johnson wrote to the Council's Director of Central Services requesting the following information:

   (i) Copies of any minutes, notes or any documents, held by yourself or your department, relating to the May 2001 meeting [concerning the identification of a site for the prayer facility] which involved senior members and officers of the Council and representatives of the Muslim Community regarding a Muslim Community Facility;

   (ii) Copies of communication, held by yourself or your department, between any Council departments relating to the May 2001 meeting or the issues raised;

   (iii) Copies of communications, held by yourself or your department, between any Council department and the East Renfrewshire Muslim Community Forum regarding the May 2001 meeting and issues raised;

   (iv) A copy of the letter dated 10 February 2000 from the Council to the Muslim Community group now called East Renfrewshire Muslim Community Forum with regards to the Council's advice over various options the Council proposed;

   (v) A copy of a letter to Nasim Khan following the May 2001 meeting as mentioned in your letter to [Mr Johnson] dated 30 June 2006.

4. On 31 July 2006, the Council responded to Mr Johnson, seeking clarification of the intended date of the requested item at 3(iv), given that it preceded the May 2001 meeting by one year.

5. Mr Johnson replied on 2 August 2006, clarifying the letter he was seeking and further requesting:

   (i) the minutes of a meeting between the ERMCF and the Council on 1 June 2000; and

   (ii) All minutes and correspondence between East Renfrewshire Council and the East Renfrewshire Muslim Community Forum over their long search for a site for prayer facility in East Renfrewshire.

6. On 25 August 2006, the Council responded to Mr Johnson's requests of 31 July and 2 August 2006. The Council:

   a) stated that it held no information in relation to a meeting with the ERMCF on 1 June 2000;

   b) stated that it held no information in relation to the May 2001 meeting;

   c) released a copy of the letter of 10 February 2000, with some additional information, and

   d) indicated that the remaining information captured by Mr Johnson's requests related exclusively to pre-planning discussions with representatives of the Muslim community, which, in the Council's view, was exempt under section 30(b) and (c) of the Freedom of Information (Scotland) Act 2002 (FOISA).

7. In withholding the information under section 30 (b) and (c), the Council considered it likely that almost all such discussions would be regarded as exempt information, it being an essential element of the planning process that applicants should be allowed to discuss their specific proposals with planning officers prior to the submission of a formal planning application. On this basis, it contended that release of such information would substantially inhibit the free and frank provision of advice and the exchange of views for the purpose of deliberation, and would ultimately lead to a substantial increase in the number of abortive planning applications. The Council also stated its view that the public interest in disclosing the information was outweighed by that in maintaining the exemption.

8. On 12 October 2006, Mr Johnson wrote to the Council requesting a review of its decision to withhold information. The Council responded on 7 November 2006, confirming its original decision in full.

9. On 23 April 2007, Mr Johnson wrote to the Commissioner's office, stating that he was dissatisfied with the outcome of the Council's review and applying to him for a decision in terms of section 47(1) of FOISA. In addition to the withholding of information from him under section 30(b) and (c) of FOISA, Mr Johnson was concerned that his requests might have been interpreted narrowly by the Council, to exclude exchanges between the ERMCF and departments of the Council other than the Planning Department

10. The application was validated by establishing that Mr Johnson had made 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

11. On 27 April 2007, the Council was notified in writing that an application had been received from Mr Johnson. The Council was asked to supply copies of the information withheld from Mr Johnson. On receipt of this information the case was allocated to an investigating officer.

12. The investigating officer subsequently contacted the Council, asking it to provide comments on the application and to respond to specific questions on it, in particular in relation to its interpretation of the requests, its application of exemptions, the public interest and the potential application of the EIRs to the information withheld.

13. The Council responded by confirming that the only information withheld from Mr Johnson was information that related to pre-planning application discussions. The scope of Mr Johnson's request had not been viewed narrowly and he had been supplied with all other information which could possibly have been considered to fall within the scope of his requests dated 31 July and 2 August 2006.

14. The Council provided reasons for reliance on section 30(b) and (c) of FOISA, arguing also that it did not consider any of the withheld information to be environmental information as defined in regulation 2(1) of the EIRs.

15. Having considered the content of the withheld information again, the investigating officer asked the Council to reconsider its position on the application of the EIRs. In replying, the Council confirmed its position that the information was not environmental information as defined by regulation 2(1) of the EIRs and therefore that the EIRs did not apply. Having concluded that the information was not environmental information, the Council also indicated that section 39(2) of FOISA did not apply.

16. The Council added, however, that if the Commissioner considered the EIRs to apply then it would argue that the exceptions in regulations 10(4)(d) and (e) and 10(5)(f) would be applicable to the information which it claimed to be exempt under section 30(b) and (c) of FOISA. It provided specific arguments in support of this position.

17. The Commissioner will consider all relevant arguments put forward by the Council and Mr Johnson further in his analysis and findings below.

Commissioner's analysis and findings

Whether the EIRs apply to the information requested

18. While the Council argued that the withheld information was not environmental information for the purposes of the EIRs and referred to various previous decisions of the Commissioner in support of this assertion, in the Commissioner's *Decision 218/2007 Professor A D Hawkins and Transport Scotland* he considered the relationship between FOISA and the EIRs at some length and set out his understanding of the situation. Broadly, his general position on the interaction between the two regimes is as follows:

- The definition of what constitutes environmental information should not be viewed narrowly
- There are two separate statutory frameworks for access to environmental information and an authority is required to consider any request for environmental information under both FOISA and the EIRs
- Any request for environmental information therefore **must** be dealt with under the EIRs
- In responding to a request for environmental information under FOISA, an authority **may** claim the exemption in section 39(2)
- If the authority does not choose to claim the section 39(2) exemption it must then **also** deal with the request fully under FOISA, by providing the information, withholding it under another exemption in Part 2, or claiming that it is not obliged to comply with the request by virtue of another provision in Part 1 (or a combination of these)

- The Commissioner is entitled (and indeed obliged) where he considers a request for environmental information has not been dealt with under the EIRs to consider how it should have been dealt with under that regime.

19. Firstly, therefore, the Commissioner must determine whether the information withheld is environmental information. If it is, he must go on to consider the Council's handling of the request in terms of both the EIRs and FOISA.

20. The Council argued that the information withheld related to pre-planning application discussions, which did not form any part of the formal planning process and, importantly, did not constitute any form of proposal for development or application. At the time of these discussions, there was no formal proposal under consideration, no final outline of any development had been established and the discussions did not concern any definite proposals, being entirely tentative and speculative in nature.

21. While the Council took no issue with the view that planning application information would often constitute information on plans affecting or likely to affect the land and landscape, and potentially other environmental elements and factors, it did not accept that this could be the case in relation to pre-application discussions which related to nothing more than initial concepts. The Council asked how a concept could affect environmental factors in any way, while accepting that once the idea had become a proposal in connection with which there was an intention to deliver the development (in this context by the submission of an application for planning permission) the situation became very different. It also accepted that each case required to be dealt with on its own merits.

22. While taking due account of the Council's submissions as to whether the information withheld is environmental, the Commissioner has considered fully the categories of environmental information as defined in regulation 2(1) of the EIRs (the definition is reproduced in full in the Appendix to this decision). In doing so, he has taken account of *The Aarhus Convention: an implementation guide*, published by the Economic Commission for Europe (http://www.unece.org/env/pp/acig.pdf) which at page 30 states that in reading any definition it is important to distinguish between the core of the definition and the use of elements, lists or explanation. The Convention uses both exhaustive and non-exhaustive lists. Words such as "including", "such as" or "*inter alia*" indicate that the elements following are non-exhaustive. Furthermore, "such as" and "*inter alia*" also suggest that there are known elements not named, whereas "including" is less specific on this count.

23. The Commissioner accepts that the information withheld could be described as all relating to pre-planning application discussions. In such discussions, advice is sought from the planning authority as to what may or may not be viable in planning terms in a given context, and any future application for planning permission may or may not take account of the advice given during these discussions. The Commissioner notes the relevant sections of *Planning Advice Note: PAN 40 – Development Control Revised* (2001) and the document entitled *The Role of Pre-application Discussions and Guidance in Planning* (2000), both published on the Scottish Government website, from which it is clear to him that the role of such discussions is not as remote from the formal planning process as the Council appears to suggest.

24. In this case, the Commissioner is of the view that the withheld information is held by the Council by virtue of its functions in relation to the determination of applications for planning permission and would not have been held by the Council unless such an application was considered a possibility. The Council asked how a concept could affect environmental factors in any way. A planning application itself is merely such a concept at a more advanced stage, and the Commissioner is in no doubt that discussions of the concept at pre-application stage can involve consideration of its potential effects on the elements of the environment (as defined in regulation 2(1)). More particularly, he considers that the withheld information does so, in particular in relation to the potential implications of the contemplated development for the landscape and flooding.

25. Taking due account of all the arguments, the relevant regulations and guidance, and the content of the information withheld, the Commissioner is of the opinion that the withheld information is environmental information as defined in regulation 2(1) of the EIRs and therefore that the Council should have dealt with the applicant's requests for information under the EIRs. Having concluded that the information under consideration in this case is environmental information, and given that the Council has not chosen to apply section 39(2) of FOISA to it, the Commissioner must now go on to consider how the Council dealt with (or should have dealt with) Mr Johnson's request under the EIRs and FOISA.

26. Having considered the scope of the requests and having examined the information supplied by the Council, the Commissioner considers that only the information contained in documents 5-19, 21-27, 30, 31, 33-40, 42, 44-50, 52, 54-59 and 62-67 (all numbers inclusive) falls within the scope of the applicant's requests and requires to be considered in this decision.

Regulation 10(4)(d) of the EIRs

27. Regulation 10(4)(d) states that a Scottish public authority may refuse to make environmental information available to the extent that the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data.

28. In this case the Council argued that pre-planning application discussions related to concepts and ideas which could in no way be regarded as fully formed. It argued in particular that "concept drawings" could in no circumstances be regarded as complete and final representations of the intentions of the instructing party, stating that the information would only become complete when a formal application for planning permission was submitted.

29. *The Aarhus Convention: an implementation guide* states (at page 58):

The Convention does not clearly define "materials in the course of completion". However, the mere status of something as a draft alone does not automatically bring it under the exception. The move from the language of Directive 90/313/EEC on the freedom of access to information on the environment of "unfinished documents" to "materials in the course of completion" suggests that the term refers to individual documents that are actively being worked on by the public authority. Once those documents are no longer in the "course of completion" they may be released, even if they are still unfinished and even if the decision to which they pertain has not yet been resolved. "In the course of completion" suggests that the document will have more work done on it within some reasonable time-frame. Other articles of the Convention also give some guidance as to how Parties might interpret "in the course of completion". Articles 6, 7 and 8 concerning public participation require certain draft documents to be accessible for public review. Thus, drafts of documents such as permits, environmental impact assessments, policies, programmes, plans, and executive regulations that are open for comment under the Convention would not be "materials in the course of completion" under this exception.

30. The Council did not state in relation to which documents it was relying upon regulation 10(4)(d) and Commissioner has considered the exception in relation to all of the information withheld. Having done so, taking account of the relevant section of the Aarhus implementation guide and applying an analysis along the same lines as in his *Decision 230/2006 Messrs McIntosh and Aberdeen City Council*, he cannot accept that any of it is:

- Still in the course of completion (while the documents may form part of an ongoing process, none of them requires further work for it to be complete);
- An unfinished document (for the same reasons – each document is itself finished); or
- Incomplete data (there is no element of the content of any of the documents which could be said to be incomplete – elements may be revised or developed in subsequent versions of the documents, but the data in the withheld documents cannot be said to be other than complete in itself).

Consequently, he cannot accept that regulation 10(4)(d) of FOISA applies to any of the withheld information.

Regulation 10(4)(e) of the EIRs

31. The Council has claimed regulation 10(4)(e) as an exception in relation to all of the withheld documents in that it has classed them as internal communications. For information to fall within the scope of this exception, it need only be established that it is an internal communication.

32. Having examined the withheld information, the Commissioner is content that documents 7-16, 18, 19, 21-26, 30, 31, 33-35, 38-40, 44-49, 56 and 66 (all numbers inclusive) are all internal communications for the purposes of the EIRs. The application of the exemption is subject to the public interest test in regulation 10(1)(b), however, and the Commissioner will go on to consider this after he has determined whether the exception in regulation 10(5)(f) is applicable.

Regulation 10(5)(f) of the EIRs

33. Regulation 10(5)(f) states that 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 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.

34. Many of the withheld documents contain information supplied to the Council in circumstances meeting the requirements set out at (i) and (ii) above. The information in question was provided by third parties who did so voluntarily and could not, in the circumstances, have been required to provide it. However, *The Aarhus Convention: an implementation guide* also states (at page 61): "Not only must the information in question qualify as voluntarily supplied information, the person that provided it must have denied consent to have it released to the public".

35. In order to rely upon regulation 10(5)(f), therefore, the Council has to demonstrate that the persons supplying the information have denied consent for disclosure. Since this has not been done (the Commissioner has not been presented with anything to suggest that the Council has ever raised the question of consent with the persons providing the information), the Commissioner cannot agree that the exception applies to any of the withheld information.

36. Even if he had accepted that the requisite consent had been refused, however, for the exception to apply the Commissioner would still require to be satisfied that disclosure of the information would, or would be likely to, prejudice substantially the interests of the person providing the information. For the sake of completeness, and in case it could be argued that the necessary consent had been withheld, the Commissioner has gone on to consider this question.

37. The Council argues that the Scottish Ministers' guidance (*Access to Environmental Information – Guidance for Scottish Public Authorities and Interested Parties*) in relation to this exception confirms that its purpose is to ensure the continuation of the flow of voluntary information between members of the public and Scottish public authorities. It suggests that disclosing such information to the public could inhibit the open and constructive discussions and diminish the supply of the volunteered information. It also suggests that this exception might be relevant where members of the public or companies are applying for grants, permits or licences.

38. The Council submits that the particular circumstances of this case are appropriately considered as falling within the ambit of this exception. It has provided no arguments of substance to support this assertion, however, beyond the general possibility of harm set out in the previous paragraph. While accepting that the exception may well be relevant in certain circumstances (including where grants, permits or licences are being applied for) and that in some cases disclosure of information supplied voluntarily may diminish the supply of such information and that valuable discussion could be inhibited thereby, the Commissioner cannot accept (on the basis of either the arguments presented to him or the content of the information itself) that in this particular case substantial prejudice to the interests of those providing the information described in paragraph 34 above would, or would be likely to, follow from the disclosure of that information. Consequently, even if he could accept that the persons providing the information had not consented to its disclosure, he could not go on to accept substantial prejudice of the kind required for the exception in regulation 10(5)(f) to apply.

Public interest test – regulation 10(4)(e)

39. The exception set out in regulations 10(4)(e) of the EIRs is subject to a public interest test set out in regulation 10(1)(b). Regulation 10(1) provides that a public authority may refuse a request to make environmental information available if there is an applicable exception to disclosure in regulations 10(4) or (5) and, in all the circumstances of the case, the public interest in making the information available is outweighed by that in maintaining the exception. Further, regulation 10(2) of the EIRs specifies that in considering the application of the exceptions contained in regulations 10(4) and (5), the public authority shall interpret those exceptions in a restrictive way and apply a presumption in favour of disclosure.

40. In considering the public interest test, the Council quite rightly considered the meaning of "public interest" for the purposes of the EIRs to be the same as under FOISA, and quoted from the Commissioner's guidance on factors which might inform a decision about the public interest. Specifically, it referred to whether disclosure would:

- enhance scrutiny of decision making processes and thereby improve accountability and participation
- contribute to effective oversight of expenditure of public funds or value for money
- keep the public adequately informed of any danger to public health or safety or to the environment
- contribute to ensuring any public authority with regulatory responsibilities is adequately discharging its functions
- contribute to a debate on a matter of public interest
- prejudice the protection of an individual's right to privacy.

41. Having considered the above, the Council did not accept that disclosure of the withheld information would in any way contribute positively to the delivery of the outcomes which disclosure in the public interest was intended to achieve. Rather, the Council argued, its release would result in disinformation and confusion.

42. The Council also considered other factors in favour of disclosure, including:

- promoting accountability and transparency by public authorities for decisions taken by them
- placing an obligation on authorities and officials to provide reasoned explanations for decisions would improve the quality of decisions and administration
- allowing individuals and companies to understand decisions made by public authorities affecting their lives and, in some cases, assist individuals in challenging these decisions.

43. Having considered the factors favouring release, the Council concluded that these aims could realistically be achieved by the disclosure of all information in relation to the formal planning process (as had been done in this case). In relation to pre-planning application discussions, however, the Council took the view that release could in no way achieve the objectives detailed above in favour of disclosure. It regarded the information as too indistinct and undeveloped to permit any positive contribution towards these objectives. The Council went on to refer to the strong public interest in allowing officials within a public authority to communicate among themselves, protecting their right to think in private, concluding that the public interest would not be served by release of the withheld information.

44. In considering the public interest test under the EIRs, the Commissioner has noted the foregoing arguments and also considers relevant those put forward by the Council in support of the information being withheld under section 30(b) and (c) of FOISA. In this connection, it argued that applicants must be free to approach planning officers to discuss highly confidential and sensitive proposals in detail, in the knowledge that their discussions would not be disclosed, and also that planning officers must be able to provide free and frank advice in relation to nascent proposals without that advice becoming public and open to misinterpretation. It referred to the sensitivities of the ERMCF proposal and suggested that there had been a reasonable expectation of confidentiality in the mind of the ERMCF at the time the discussions had taken place. It argued that the process of pre-application discussions would be substantially inhibited by the prospect of disclosure and that the resulting increase in the submission of flawed or abortive planning applications was would be in the interests of no-one. Finally, it contended that the withholding of pre-application discussions in no way undermined the formal planning application process, which was subject to full public scrutiny.

45. The Commissioner accepts that the process of dealing with applications for planning permission is an important regulatory function and that there is a clear public interest in its proper and effective functioning. While noting the Council's arguments that pre-application discussions should be treated as something quite distinct from the statutory process of considering and determining a formal application for planning permission should one be received, it is clear to him from a number of sources (including the two documents referred to in paragraph 23 above) that pre-application discussions are now accepted (and indeed encouraged by Government) as a normal and valuable element of the wider process leading to the grant or refusal of permission. Accordingly, he is not persuaded that a line can be drawn as strictly as the Council appears to suggest: the formal and less formal parts of the system are clearly related.

46. The document entitled *The Role of Pre-application Discussions and Guidance in Planning* is a report following on from research conducted on behalf of the Scottish Government in 1999. The report itself was published in July 2000. The Commissioner considers it relevant to any consideration of pre-application discussions conducted around the time of the discussions under consideration in this case, while noting that the views expressed in it are those of the researchers and not necessarily shared by the Government. The overall importance to the wider planning process (in the eyes of the Government) of structured, properly recorded pre-application discussions is, however, clear, from *PAN 40.* Policies on pre-application discussions, while encouraged in Scotland, appear to be more common in England: from consideration of these (in an equivalent freedom of information and environmental regime) the Commissioner notes that it appears to be common practice to contemplate the prospect that discussions will be disclosed, and to warn developers of this (with a view to the withholding of particular information being justified where appropriate).

47. The July 2000 report recognises the negative perceptions which can be expected to arise if there is a lack of transparency surrounding the existence and content of pre-application discussions and generally is inclined to endorse openness on the part of planning authorities about such discussions having been held, with records of them being publicly available. The Commissioner recognises a public interest in such transparency, with a view to the functioning of the wider planning application process being seen in a positive light.

48. On the other hand, the Commissioner recognises the importance of freedom and frankness on both sides if pre-application discussions are to be effective. He accepts that there may be information created in the course of such discussions which is of such commercial or other sensitivity as to justify a stronger public interest against disclosure and that the reasonable expectations of both the potential applicant and the planning officers may be relevant in this context. Such arguments must, however, be analysed in the circumstances of each individual case, considering the content of the actual information withheld. In this case, the Commissioner can identify nothing in the withheld information which would make it particularly sensitive, or which might be expected to have any significant inhibiting effect on the nature of similar future discussions. It is possible that the parties might have entertained greater expectations of confidentiality at the time of these discussions (at least when they started – although even then it is questionable whether these would have been justified) than would be reasonable now, but in any event specific expectations of this kind were not clearly articulated and reasoned in the Council's submissions and it would not necessarily follow from such an expectation at the time the discussions took place that it would have remained current following the submission of a formal application for planning permission (which had happened well before Mr Johnson made his requests for information).

49. While the Commissioner notes the Council's arguments as to possible misinterpretation of the withheld information, he cannot accept them. He has made it clear, in his briefing on the public interest and elsewhere, that he does not accept the complexity of information, or potential difficulties of interpretation of that information, as reasons for the public interest favouring withholding. If a public authority has concerns that information could not be easily understood, or would be subject to misinterpretation, it has the option of providing additional information to aid proper understanding.

50. Having considered the relevant arguments, therefore, the Commissioner is satisfied in all the circumstances of this case that the public interest in making documents 7-16, 18, 19, 21-26, 30, 31, 33-35, 38-40, 44-49, 56 and 66 (all numbers inclusive) available is not outweighed by the public interest in maintaining the exception in regulation 10(4)(e).

51. Since the Commissioner has decided that none of the withheld information can properly be withheld under any of the exceptions in the EIRs advanced by the Council, he must conclude that it requires to be made available under regulation 5(1) of the EIRs and therefore is not required to consider any question relating to the information under FOISA (subject to the consideration of personal data which follows).

Personal data

52. While the Council has not presented any arguments in relation to personal data, the Commissioner has noted the presence in the withheld information of such data relating to individual representatives of the ERMCF (as opposed to its professional advisers). The religious beliefs of the individuals concerned are clear from the context and the data is therefore sensitive personal data as defined in section 2 of the DPA. Along with these data, he has considered the signatures of various individuals appended to letters, memos and the like (which he also considers to be the personal data of the individuals concerned, with obvious risks attached to their release). He takes the view that this information cannot be released in compliance with any of the data protection principles contained in the Data Protection Act 1998 (having considered in particular the first principle and fairness to the data subject) and therefore would regard the information as exempt under regulation 11(2) of the EIRs. Accordingly, the following information should be redacted from the information to be released to the applicant:

i) The names of all individual representatives of the ERMCF from documents 5, 6, 7, 8, 9, 12, 16, 21, 22, 30, 36, 37, 38 and 46;

ii) The personal addresses from documents 5, 6, 12, 36 and 37;

iii) All signatures.

Regulation 11(2) is in substantially the same terms as section 38(1)(b) of FOISA and the Commissioner is satisfied that he would reach the same conclusion in respect of the personal data under both provisions.

DECISION

The Commissioner finds that East Renfrewshire Council (the Council) failed to comply with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in not dealing with and responding to the information requests from Mr Johnson in accordance with regulation 5(1) of the EIRs. In particular, the Commissioner finds that the information withheld could not properly be refused under any of regulations 10(4)(d), 10(4)(e) or 10(5)(f) of the EIRs and he therefore requires the Council to release the information in documents 5-19, 21-27, 30, 31, 33-40, 42, 44-50, 52, 54-59 and 62-67 (all numbers inclusive) to Mr Johnson, subject to the redactions specified in paragraph 52 above, by 10 October 2008.

Appeal

Should either Mr Johnson or the 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
26 August 2008

Appendix

Relevant statutory provisions

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;

(d) reports on the implementation of environmental legislation;

(e) costs benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in paragraph (c); and

(f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in paragraph (a) or, through those elements, by any of the matters referred to in paragraphs (b) and (c);

…

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.

...

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

…

(d) the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data; or

(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

...

(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[6] 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.