

Decision Notice

Decision 005/2017: Mr Douglas Burns and East Dunbartonshire Council

Planning information

Reference No: 201601443

Decision Date: 17 January 2017



Scottish Information
Commissioner

Summary

The Council was asked for information about a planning application. The Council did not disclose the information which fell within the scope of the request until after the case was appealed to the Commissioner.

The Commissioner therefore found that the Council had failed to comply with the EIRs.

Relevant statutory provisions

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

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

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

Background

1. On 26 February 2016, Mr Burns made a request for information to East Dunbartonshire Council (the Council). In respect of a tree retention planning issue, he asked for *"All correspondence or notification between [the Council] and my neighbours relative to the changes in my garden since the beginning of 2014 and indeed any neighbour complaints and associated responses received since the construction of the original property. I would also like to receive copies of any internal [Council] correspondence relative to such communications."*
2. The Council responded on 14 March 2016, withholding information under regulations 10(5)(b) and 11(2) of the EIRs (respectively, provisions concerning confidentiality of proceedings and third party personal data). The Council stated that it had already provided Mr Burns with the text of the objection letters it had received.
3. On 19 April 2016, Mr Burns wrote to the Council requesting a review of its decision. He stated that he was looking for correspondence that he had *not* already seen. He also stated that he did not wish any third party personal data to be disclosed and asked that the Council provide him with the information he was seeking with any such personal data redacted. Additionally, Mr Burns made a new request for a full copy of a tree preservation order in respect of his property.
4. The Council notified Mr Burns of the outcome of its review on 19 May 2016. It confirmed that information was being withheld under regulation 10(5)(b) of the EIRs. Although Mr Burns had stated that he did not require any third party personal data, the Council notified him that personal data was being withheld under regulation 11(2). With regard to Mr Burns' new request, the Council explained that there was not in fact any tree preservation order in respect of his property and apologised for erroneously informing him that there was.

5. On 10 August 2016, Mr Burns 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 Burns was dissatisfied with the outcome of the Council's review as he felt that more information should be disclosed to him.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that Mr Burns 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.
7. On 1 September 2016, the Council was notified in writing that Mr Burns had made a valid application. The Council was asked to send the Commissioner the information withheld from Mr Burns. The Council provided the information and the case was allocated to an investigating officer.
8. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Council was invited to comment on this application including justifying its reliance on any provisions of the EIRs it considered applicable to the information requested.
9. Mr Burns was also asked for any further submissions he wished to make and he provided these.
10. During the investigation, the Council advised the investigating officer that instead of regulation 10(5)(b) of the EIRs it wished to rely on regulation 10(4)(e) (internal communications), in respect of those parts of its internal correspondence that it was withholding. However, the Council subsequently disclosed the internal correspondence to Mr Burns with third party personal data redacted. The Council was of the view that the remaining information not disclosed to Mr Burns comprised personal data and as such fell outwith the scope of his request.
11. Following this disclosure, Mr Burns stated that he still wished to see further information, in particular any correspondence relating to a tree retention order.

Commissioner's analysis and findings

12. 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 Burns and the Council. She is satisfied that no matter of relevance has been overlooked.

Application of the EIRs

13. The Commissioner is satisfied that the information covered by this request is environmental information, as defined in regulation 2(1) of the EIRs (see paragraphs (a), (b) and (c) of the definition, in particular: the text of each paragraph is reproduced in Appendix 1). The information relates to planning information. Mr Burns has not disputed the Council's decision to handle the request under the EIRs and the Commissioner will consider the information solely in terms of the EIRs in what follows.

The information disclosed during the investigation

14. The Commissioner notes that, during the course of the investigation and after reconsidering its position, the Council disclosed information from internal communications which it had originally withheld under regulation 10(4)(e) of the EIRs.
15. As this information was not provided when the Council responded to Mr Burns' request or request for review, the Commissioner finds that the Council failed to comply fully with regulation 5(1) of the EIRs. As the information has now been disclosed, the Commissioner does not require any action to be taken by the Council in relation to this breach.

Information falling outwith the scope of Mr Burns' request

16. As Mr Burns' request of 26 February 2016 did not ask the Council for a tree retention order, the Commissioner cannot consider whether or not the Council holds such an order as part of this appeal.
17. Similarly, information from the Council's internal communications which does not relate to communications with Mr Burns' neighbours on the subject of his property and garden also falls outwith the scope of his request, and cannot be considered by the Commissioner.
18. Having scrutinised the wording of Mr Burns' request for review (19 April 2016), the Commissioner considers that any information comprising third party personal data would not fall within the scope of his request. In that letter, Mr Burns explained that he did not require such information:

"If this request were to contain any third person personal data (as stated as being the reason for the initial FOI being rejected) I would be happy that such information be redacted as necessary to protect those involved. Hopefully this will ensure the FOI request can be expedited to ensure matters can be brought to a conclusion in the very near future."

19. The Commissioner must therefore decide whether all the remaining information (i.e. the information which has not been disclosed to Mr Burns and which was redacted from the documents provided to him) is personal data. If it is, then it falls outside the scope of Mr Burns' request, leaving no information for the Commissioner to consider further in this decision.

Is the remaining information personal data?

20. "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 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."

21. In the Commissioner's briefing on personal data¹, she has accepted that, in most cases, it will be easy to tell if information is personal data. The two main elements of personal data are that the information must "relate to" a living person, and that the person must be identifiable. Information will "relate to" a person if it is about them, linked to them, has some

¹ <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/EIRsexceptionbriefings/Regulation11/Regulation11PersonalInformation.aspx>

biographical significance for them, is used to inform decisions affecting them, has them as its main focus or impacts on them in any way.

22. The Commissioner accepts that both elements can be met here. Mr Burns already knows the identities of his neighbours and the identities of staff in the Council's planning department (so third parties would be identifiable) and the information under consideration clearly relates to the third parties.
23. The Commissioner is satisfied that this information is personal data as defined in section 1(1) of the DPA, being information which relates to living individuals who can be identified from that information. Given that Mr Burns told the Council that he did not require such information, she finds that the information does not fall within the scope of Mr Burns' request and she is not required to consider this information any further in this decision.

Decision

The Commissioner finds that East Dunbartonshire Council (the Council) failed to comply with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by Mr Burns. By failing to provide Mr Burns with all of the information it held which fell within the scope of his request, the Council failed to comply with regulation 5(1) of the EIRs.

Given that all information falling within the scope of his request has now been provided to Mr Burns, the Commissioner does not require the Council to take any action regarding this failure, in response to Mr Burns' application.

Appeal

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

Margaret Keyse
Head of Enforcement

17 January 2017

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;

...

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.

...

- (4) A Scottish public authority may refuse to make environmental information available to the extent that

...

- (e) the request involves making available internal communications.

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.

...

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;

...

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