

Decision Notice

Decision 079/2018: Mr A and South Lanarkshire Council

Planning application and effects on the local environment

Reference No: 201702076

Decision Date: 8 June 2018



Scottish Information
Commissioner

Summary

The Council was asked about a particular planning application and its potential effects on the local environment.

The Council provided a website link to where some of the information could be found, withholding other information (a) because it was commercially confidential, (b) to protect the environment or (c) because it was personal data and disclosure would breach the Data Protection Act. The Council also stated that some further information could be disclosed upon the payment of a fee.

The Commissioner investigated and found that the Council had partially failed to respond to the request in accordance with the EIRs. The Council had been correct to withhold some of the information, but wrong to withhold the remainder to protect the environment. The Commissioner required the Council to disclose most of the information redacted from a habitat survey report.

Relevant statutory provisions

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

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

Background

1. On 8 April 2017, Mr A made a request for information to South Lanarkshire Council (the Council). The information requested related to a specified planning application and its effects on the local environment. Due to the length and complexity of the request, the request is reproduced in Appendix 2.
2. The Council responded on 10 May 2017. It provided a link to part of its website where information about the planning application could be found. It:
 - (i) withheld the information previously redacted from the Habitat Survey information, as it considered disclosure would – or would be likely to – substantially prejudice the protection of the environment (regulation 10(5)(g) of the EIRs);
 - (ii) stated that some information was withheld as either commercially confidential (regulation 10(5)(e)) or personal data (regulation 11(2));
 - (iii) stated that it did not hold the Terrenus Land and Water letter referred to in the request (regulation 10(4)(a)).
3. It confirmed that the remaining information could be disclosed on payment of a fee. It provided Mr A with a Fees Notice explaining what the fee would be and how it had been calculated.

4. On 12 May 2017, Mr A wrote to the Council, requesting a review of its decision. He was unhappy with the Council charging a fee for some of the information and did not agree with the application of regulation 10(5)(e) and (g). He also submitted that the Council must hold further information which it had not disclosed to him.
5. The Council notified Mr A of the outcome of its review on 12 June 2017. In the review outcome, the Council:
 - (a) upheld the application of regulation 10(5)(g) to the redacted parts of a Habitat Survey;
 - (b) upheld the application of regulation 10(5)(e) to information in communications between the Council and the developers (or their agents);
 - (c) upheld the original Fees Notice and issued an additional Fees Notice for other information;
 - (d) provided a weblink where the approved Remediation Plan could be viewed;
 - (e) stated that it held no further information falling within the scope of Mr A's request (regulation 10(4)(a) of the EIRs).
6. On 19 November 2017, Mr A wrote to the Commissioner. He 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 A was dissatisfied with the outcome of the Council's review because he
 - (i) did not agree with the application of regulations 10(5)(e) and (g), and considered there to be a public interest in disclosure of the withheld information, and
 - (ii) believed the Council should hold further information falling within the scope of his request.

Investigation

7. The application was accepted as valid. The Commissioner confirmed that Mr A made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to him for a decision.
8. On 21 November 2017, the Council was notified in writing that Mr A had made a valid application. The Council was asked to send the Commissioner the information withheld from Mr A. 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, with specific reference to the points raised in Mr A's application to the Commissioner.
10. Mr A was also asked to provide any comments he wished to make.
11. During the investigation, both the Council and Mr A provided the Commissioner with submissions.

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 him by both Mr A and the Council. He is satisfied that no matter of relevance has been overlooked.

Application of the EIRs

13. The request made to the Council asked for the information in terms of "FOISA or the EIRs" and the Council responded in terms of the EIRs. Mr A has not disputed this.
14. The Commissioner is satisfied that the information requested comprises environmental information, as defined in regulation 2(1) of the EIRs. The information falls within paragraph (c) of the definition, being information on measures and activities affecting or likely to affect the state of those elements of the environment referred to in paragraph (a) of the definition. The Commissioner will consider the information in what follows solely in terms of the EIRs.

Regulation 5(1) of the EIRs - duty to make environmental information available

15. Regulation 5(1) of the EIRs requires a Scottish public authority which holds environmental information to make it available when requested to do so by any applicant. This obligation relates to information that is held by the authority when it receives a request.
16. On receipt of a request for environmental information, therefore, the authority must ascertain what information it holds falling within the scope of the request. Having done so, regulation 5(1) requires the authority to provide that information to the requester, unless a qualification in regulations 6 to 12 applies (regulation 5(2)(b)).
17. The Commissioner will firstly consider whether the Council has located all the information it holds falling within the scope of Mr A's request and then go on to consider the application of the exceptions applied for withholding some information.

Regulation 10(4)(a) – information not held

18. Regulation 10(4)(a) of the EIRs states that a Scottish public authority may refuse to make environmental information available to the extent that it does not hold that information when the applicant's request is received.
19. The standard of proof in considering whether a Scottish public authority holds information is the civil standard of the balance of probabilities. In determining this, the Commissioner will consider the scope, quality, thoroughness and results of the searches carried out by the public authority. He will also consider, where appropriate, any reason offered by the public authority to explain why the information is not held. While it may be relevant as part of this exercise to explore what information should be held, ultimately the Commissioner's role is to determine what relevant information is (or was, at the time the request was received) held by the public authority.
20. Mr A submitted that the Council should hold and disclose the following information:
 - (i) Communications between planning officers, the developers and their agents, and between the Council and national advisory bodies such as Scottish Natural Heritage and the Scottish Environment Protection Agency: in fact, Mr A's request did not cover

communications between the Council and external advisory bodies, so these cannot be considered in this decision.

- (ii) Information relied upon by the Council to conclude that the habitat issues (badgers and/or Japanese knotweed) were considered and that Directive 2011/92/EU on Environmental Impact had been complied with: Mr A did not ask this in his original request, so the Commissioner cannot consider this point in his decision.
- (iii) Information on the qualifications of the report author, Anthony Taylor.
- (iv) The Terrenus Land & Water letter dated 9 March 2016.
- (v) The information relied upon by the Council to satisfy them that all SUDS and drainage arrangements were appropriate (in particular, any reports by Scottish Water). This is among the information the Council stated would be provided to Mr A for a fee. As Mr A stated in his application to the Commissioner that he did not dispute the Council's Fees Notice(s), the Commissioner cannot consider this point in his decision.
- (vi) Information showing why (i) the area and (ii) the housing numbers varied, documentation explaining the changes, etc.
- (vii) In respect of the Remediation Plan, Mr A submitted that the link provided by the Council led him to a document which was illegible in parts. He believed the Council should provide him with a legible copy. The Council, while acknowledging the document's partial illegibility, submitted that it was legible insofar as required for the Council's purposes and that it did not hold – or require – another copy. As public authorities are not under any obligation to obtain information in order to respond to information requests, the Commissioner can only consider whether the “illegible” information is held by the Council elsewhere, in legible form.

Searches carried out by the Council

- 21. The Council provided submissions to the Commissioner explaining that all information relating to planning applications is scanned in and stored electronically on the relevant EDRMs (electronic document and records management system). The Council stated that the entire planning application files were checked, together with pre-application correspondence. All correspondence going back to January 2012 was checked. The searches were carried out by the planning case officer, who was the main point of contact between the developers and the Council.
- 22. The Council confirmed that other officers who had dealings with the developer's proposal had been asked about the request, but no searches of staff email accounts had been carried out, because all of the relevant information would have been held within the electronic EDRMs files and located as part of the searches of these files.
- 23. To guard against the possibility that not all relevant information would have been so filed, the investigating officer asked the Council to carry out searches of email files held for any relevant personnel, along with searches of any relevant paper files (if still retained). It was also asked to provide details of these searches and their outcomes, with evidence and copies of any further information located.
- 24. The Council carried out further searches and provided the Commissioner with a list of the names and job titles of 16 staff members, each of whom had been involved in aspects of the

development and had individually carried out searches of all types of records held by them personally. The search parameter used was “a note of all meetings and copy of email exchanges since 1 January 2012 between South Lanarkshire Council and Persimmon Homes and their agents or consultants”.

The Commissioner's conclusions on 10(4)(a)

25. Having considered all the relevant submissions and the terms of the request, the Commissioner is satisfied that the Council took adequate, proportionate steps to establish whether it held any further information falling within the scope of Mr A's request. He accepts that any information relevant to the request (and specifically any information covered by the points set out in paragraph 20 above, insofar as covered by the request) would have been identified using the searches described by the Council.
26. The Commissioner can only consider what information is actually held by the Council and not information it should hold, whether because the applicant believes it should do so or for any other reason. Taking all of the above into consideration the Commissioner is satisfied, on the balance of probabilities, that the Council does not (and did not, on receiving the request), hold any further information falling within the scope of Mr A's request.

Public interest test

27. The exception in regulation 10(4)(a) of the EIRs is subject to the public interest test in regulation 10(1)(b) of the EIRs and so can only apply if, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in making the information available.
28. In this case, for the reasons set out above, the Commissioner is satisfied that the Council does not (and did not, on receiving the request) hold any further information covered by Mr A's request. Consequently, he accepts that there is no conceivable public interest in requiring the disclosure of such information and finds that the public interest in making information available is outweighed by that in maintaining the exception.
29. The Commissioner therefore finds that the Council was correct to apply regulation 10(4)(a) of the EIRs to the relevant parts of Mr A's request.
30. The Commissioner will now go on to consider the Council's application of regulation 10(5)(g) of the EIRs to the redacted parts of the Habitat Survey.

Regulation 10(5)(g) - protection of the environment

31. Regulation 10(5)(g) of the EIRs 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 protection of the environment to which the information relates.
32. As with all the exceptions under regulation 10, a Scottish public authority applying this exception must interpret the exception in a restrictive way (regulation 10(2)(a)) and apply a presumption in favour of disclosure (regulation 10(2)(b)). Even where the exception applies, the information must be released unless, in all the circumstances of the case, the public interest in making the information available is outweighed by that in maintaining the exception (regulation 10(1)(b)).

Submissions on regulation 10(5)(g)

33. The Council submitted that it was withholding information relating to a badger survey, noting that such animals are a protected species. Consequently, the Council argued, it was affording a degree of protection for their habitat by withholding the information.
34. The Council noted that Mr A had stated he was not looking for specific locations, but was seeking information about the effective management and planning for all identified issues.
35. In the light of this, the Council advised that, although there were no badger setts there at present, there was evidence of badgers and the location was the type of habitat where you would expect to find them. The Council stated that the Habitat Survey included details of how to track badgers and find them at this site. It was possible that the badgers would return to set up home at that location in the interim period (up to three years) before work began on the site. The Council stated that to release this information into the public domain might allow people to go onto the site and try to track the badgers and cause this protected species harm
36. The Council submitted that it had taken account of *Decision 044/2007 Mr G Crole and Transport Scotland*¹ and noted that in this decision the Commissioner had commented that releasing badger surveys would diminish the level of protection for badgers' habitats.
37. Mr A questioned the harm claimed, noting the presumption in favour of disclosure and that he had made it clear he was not seeking locational details.

The Commissioner's conclusions on 10(5)(g)

38. The Commissioner has noted *Decision 044/2007*, in which it was accepted that information concerning badger surveys could be withheld in terms of regulation 10(5)(g) of the EIRs. In that case, Transport Scotland was concerned that the information might fall into the hands of people who would abuse the animals, and the Commissioner accepted that the information withheld in that case could, if misused, endanger the badgers' habitat and increase the likelihood that the habitat would be endangered.
39. The Commissioner must, however, consider the information withheld in each individual case: the fact that information from habitat surveys has been found to be exempt under regulation 10(5)(g) in one case does not mean that information from a similar source can necessarily be withheld under the same exception in other cases. Generally, the Commissioner is likely to accept that information carrying with it a significant risk of identifying the location of protected species will qualify for exception. To the extent that he is satisfied that such a risk is created by information withheld in this case – in respect of badgers and other protected species – the Commissioner is satisfied that the exception in regulation 10(5)(g) applies.
40. However, the Commissioner is not satisfied that that the bulk of the redacted information in the Habitat Survey falls into this category. In particular, the Council has withheld:
 - (i) general information identifying the protected species given particular attention in the survey, and those for which there was no suitable habitat identified on site;

¹ <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2007/200601282.aspx>

- (ii) the methodologies used in searching for signs of protected species (all of which would appear to be the kind of information readily available in published sources on tracking);
 - (iii) information on other species (not badgers), stating that the habitat might be suitable but that no signs were found of their being there;
 - (iv) generic habitat management information, with no apparent impact on specific species or their location;
 - (v) the statutory framework for species protection;
 - (vi) personal details of the staff involved in the survey (as Mr A has not stated that he is concerned with personal data, such information falls outwith the scope of this decision).
41. Having considered all relevant submissions and the information itself, the Commissioner is not satisfied that there would be any demonstrable risk of harm to any protected species, or indeed any other element of the environment concerned, should the information listed above be disclosed. Much of it adds nothing of substance to informed public knowledge, and even where it is specific to the site in question says more about what is not there – and about good practice – than what is.
42. The Commissioner must, therefore, conclude that the Council has not demonstrated that disclosure of this information would, or would be likely to, prejudice substantially the environment to which it relates. Consequently, he cannot uphold the application of the exception in regulation 10(5)(g).
43. Having found that the exception in regulation 10(5)(g) has not been shown to apply to this information, the Commissioner is not required to consider the public interest test in regulation 10(1)(b). Where the Commissioner has not found the information to be exempt – and he will provide the Council with a suitably marked-up copy of the Habitat Survey – he must require that the information be made available to Mr A.
44. The Commissioner must, however, consider the public interest test for the small amount of information he has found to be exempt.

The public interest test

45. Mr A expressed the view that the level of redaction was excessive. In the interests of transparency in the planning system, he believed the information should be disclosed.
46. The Council acknowledged a general public interest in disclosing information about badgers. However, it also submitted that information disclosed could fall into the hands of persons intent on harming badgers and endangering their habitats, which would not be in the public interest. It submitted that disclosure would be contrary to the statutory framework for protection, although how was not explained in any detail.
47. The Commissioner has weighed up the public interest arguments both for and against disclosure in this case, as required by regulation 10(1)(b). In all the circumstances, he is satisfied – where he has found the information to be exempt under regulation 10(5)(g) – that the public interest in making this information available is outweighed by that in maintaining the exception. There is clearly a strong public interest in maintaining the effectiveness of the statutory measures for species protection.

48. The Commissioner therefore accepts that the Council was correct to withhold this information in terms of regulation 10(5)(g) of the EIRs.

Regulation 10(5)(e) of the EIRs – confidentiality of commercial or industrial information

49. The Council applied this exception to communications between itself and the developers and their agents.

50. Regulation 10(5)(e) provides 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 confidentiality of commercial or industrial information where such confidentiality is provided for by law to protect a legitimate economic interest.

51. The application of regulation 10(5)(e) of the EIRs was fully considered in *Decision 033/2009 Mr Paul Drury and East Renfrewshire Council*² and the Commissioner does not intend to repeat that consideration in detail here. The Commissioner concluded that, before regulation 10(5)(e) can be engaged, authorities must consider the following matters:

- (i) is the information commercial or industrial in nature?
- (ii) does a legally binding duty of confidence exist in relation to the information?
- (iii) is the information publicly available?
- (iv) would disclosure of the information cause, or be likely to cause, substantial prejudice to a legitimate economic interest?

Is the information commercial or industrial in nature?

52. The Council stated that the information related to the negotiation of financial contributions payable to the Council in terms of a section 75 planning agreement, which involved a number of interests including those of the landowners and the developers. It considered these interests, the permitted use of the land and the undertaking of the development to be commercial in nature. The Council submitted that the information related to discussions and negotiations between the parties regarding the assumption of obligations and undertakings that would affect their ability to undertake commercial activities upon their land.

53. Having considered all relevant submissions, the Commissioner is satisfied that the withheld information is commercial in nature.

Does a legally binding duty of confidence exist in relation to the information?

54. The Council submitted that the negotiation information was protected from disclosure through an implied duty of confidentiality owed to the other parties concerned. The Council argued that an actionable claim of confidentiality could arise without there being any express statement that the information was provided in confidence. In coming to this view, the Council stated that it had considered things such as:

- the nature of the information: there might be circumstances where it is generally accepted that certain information is confidential, for example the agreed sale price of a property before the conclusion of missives
- the relationship between the parties.

² <http://www.itspublicknowledge.info/applicationsanddecisions/Decisions/2009/200800429.aspx>

55. In relation to this matter, the Council believed it was the nature of the information which gave rise to the implied duty of confidentiality. The Council submitted that information used in the process of negotiations was expected to be kept confidential between the parties, and so the information provided by the parties to the Council in relation to these negotiations would be considered to be subject to a legally binding duty of confidentiality.
56. The Commissioner accepts, in the circumstances, that the information (though not necessarily all information relating to negotiations) was provided to the Council subject to an obligation of confidentiality and is not in the public domain.

Would disclosure of the withheld information cause, or be likely to cause, substantial prejudice to a legitimate economic interest?

57. The Council stated that it had undertaken a consultation with the developers before putting forward its arguments addressing this point. The Council provided the Commissioner with a copy of an email seeking the developer's views and their response to that email.

Whose interests would be affected?

58. The Council explained that these would be the interests of landowners, developers and the Council.

What harm would be likely should the withheld information be disclosed?

59. The Council stated that commercial harm would be likely to occur to third parties and also to the Council itself. The Council explained that the information was at the core of the way in which the Council negotiated its statutory entitlement to seek developer contributions within a regulatory framework, one criterion of which was financial viability of development. As most developers negotiate their land deals conditional on the outcome of the developer contributions with the Council, release of the information would harm third party land deal negotiations.

Why would that harm be likely to result from disclosure?

60. The Council submitted that it was usual for commercial and business practice for parties involved in commercial negotiations to have a legitimate expectation that commercial information will be confidential. It submitted that harm would occur as otherwise confidential commercial information would be in the public domain. The Council, as planning authority, is bound by the Town and Country Planning (Scotland) Act 1997, by statutory government guidance and by statutory material considerations in respect of the criteria it must follow when processing planning applications and negotiating developer contributions. The Council acknowledged that this regulatory framework was in the public domain, but submitted that the way in which the Council, as planning authority, applied and followed this framework was, in essence, a commercial negotiation requiring developers to be open and frank about their land deals (in particular, the financial aspects impacting on their profit margins and the site viability). This, in turn (the Council submitted), influenced developers' negotiations with landowners. Release of information was therefore likely to have a negative impact on developers' ability to negotiate on a commercial basis, as bargaining power would be compromised.
61. In respect of harm to the Council, the Council submitted that it was competing with other Councils and planning authorities in respect of inward economic investment. If it was bound to release commercially sensitive information which other organisations would normally hold

as confidential, then it would gain a reputation with developers as a Council which could not be relied upon to hold a duty of care to developers in respect of the developers' commercial interests. As a result, developers would be deterred from investing in this Council area.

62. The developers stated, in an email provided to the Commissioner, that the disclosure of such viability information would be a significant issue for them, particularly the disclosure of the rates/prices they obtained from their suppliers and the costs associated with the development of the site. The developers submitted that should this information find its way to their competitors, it could provide them with a commercial advantage when bidding for sites. It could also prejudice negotiations with supplier (for reasons it would not be appropriate to state here, to avoid the risk of disclosing commercially sensitive information).
63. The developers stated that disclosure of the final figures for the section 75 agreement was clearly in the public interest, as reflected in the agreement's availability in a public register.
64. Having considered all relevant submissions and the information withheld under regulation 10(5)(e), the Commissioner is satisfied that the Council was entitled to apply the exception in this case. While not accepting the breadth of the Council's arguments – that harm is inevitable in the event of any disclosure of any information relating to negotiations of this kind – he is satisfied in these particular circumstances that the harm claimed would be a likely consequence of disclosing the information under consideration.

The public interest test

65. Having accepted that the exception in regulation 10(5)(e) applies to the information, the Commissioner must consider the public interest test in regulation 10(1)(b) of the EIRs. This specifies 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.

Submissions from the Council

66. In favour of disclosure, the Council acknowledged that disclosure of the information would enable the public to exercise their rights under the EIRs.
67. In favour of withholding, the Council stated that disclosure would be prejudicial to the confidentiality of the commercial process. The Council argued that it was in the public interest to maintain a competitive environment for businesses. There was a public interest in maintaining confidentiality around negotiations with developers in these circumstances.
68. The Council concluded that while there was a strong public interest in accountability and transparency in public services, that there was a process for this to happen. The Council argued that the public interest would not be served by making available information regarding the negotiations, where to do so would have a negative impact on future negotiations. This would result in the Council being unable to obtain best value for the public purse.

Submissions from Mr A

69. Mr A expressed the view that there was increasing evidence of developers seeking to misuse the protection afforded by the EIRs in relation to viability assessments, and increasing evidence in England of these viability statements being made publicly available in response to FOI requests, or by Councils in order that the "economic viability" assumptions suggested could be subject to public scrutiny.

70. Mr A stated that this planning application was for housing development of a farmland site (with a history of mining, flooding and wildlife issues that would normally be addressed via an Environmental Impact Assessment). He stated that there had been concern registered by the two local Community Councils and local residents. Noting that there had been no Environmental Impact Assessment in this case, he submitted that consultation with the public should be a key feature of environmental assessment.

The Commissioner's conclusions

71. The Commissioner accepts that there is a general public interest in transparency and accountability, particularly where this involves the development of land, regulated by the planning process. In relation to the information under consideration here, he acknowledges that disclosure might add to public understanding of how an agreement was reached between the developer and the Council in this case.
72. Against this, however, he must take into account the commercial harm he has already identified as a likely consequence of disclosure. He acknowledges the potential impact on obtaining best value for the public purse, should this harm manifest itself.
73. The Commissioner, having considered carefully the public interest arguments advanced by both parties, concludes that the public interest in making the information available is outweighed by the public interest in maintaining the exception in regulation 10(5)(e) of the EIRs. He is therefore satisfied that the Council was entitled to withhold the information under regulation 10(5)(e) of the EIRs.

Decision

The Commissioner finds that South Lanarkshire Council (the Council) partially complied with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by Mr A.

The Commissioner finds that the Council did not hold information in line with regulation 10(4)(a) and that, by withholding certain information under regulation 10(5)(e) of the EIRs, the Council complied with the EIRs.

However, the Council wrongly withheld other information under regulation 10(5)(g) of the EIRs

The Commissioner therefore requires the Council to disclose the information from the Habitat Survey specified in the marked-up copy accompanying this decision, by 23 July 2018.

Appeal

Should either Mr A 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.

Margaret Keyse
Head of Enforcement

8 June 2018

Appendix 1: Relevant statutory provisions

The Environmental Information (Scotland) Regulations 2004

2 Interpretation

(1) In these Regulations –

“the Act” means the Freedom of Information (Scotland) Act 2002;

...

“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;

...

(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-
- (a) it does not hold that information when an applicant's request is received;
- ...
- (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-
- ...
- (e) the confidentiality of commercial or industrial information where such confidentiality is provided for by law to protect a legitimate economic interest;
- ...
- (g) the protection of the environment to which the information relates.

Appendix 2: Information request

"I was a little surprised in checking the background papers for Application CR/15/0239 to find that substantial parts of the Habitat Survey by EnviroPlan Consultants were severely redacted.

This email is therefore to **formally request a copy under FoI or EIR of a full unredacted copy of this report**, which appears to have been relied on by officers in considering CR/15/0239 against LDP [Local Development Plan] policies (including SG.9, SG.1, and SG.8). The purpose of the redactions seems to be to hide the fact that "**invasive species were found on site**" (SEPA letter of 11 Nov 2016) - which is I suggest NOT a valid or acceptable reason for redaction.

Please also clarify:-

- (1) Has the Council had the full unredacted report?
- (2) The professional qualifications of the report's author (Anthony Taylor)?
- (3) Please set out the specific reasons for each item of redaction. As the report is about the Habitat & Environment it is surprising to have so much of it redacted. My presumption is that it was redacted at the request of Persimmon Homes - and I am at this stage seeking to clarify the extent to which the Council colluded with Persimmon Homes in hiding relevant habitat contamination information.
- (4) To explain to me why the Habitat Report posted on-line is redacted, and why the Council's collaboration in seeking to obscure the existence of Invasive Species is not mal-administration.
- (5) To confirm what specific conditions will be included in the Section 75 Legal agreement to address the invasive species found on the site (presumably in line with condition 39). Please provide me with a copy of the approved Remediation Plan as cited (again - this does not appear to be on the planning website)

In making this request I would also be grateful if you can

- (4) clarify the actual site area (I presume 8.65 ha as stated in Council report). However many of the specialist reports submitted by the applicant to justify the application use diverse areas of assessment (from 52.4ha in Habitat Survey, to 17ha in the FRA).
- (5) provide a copy (it doesn't seem to be on-line) of the Terrenus Land & Water letter dated 9 March 2016 that was clearly influential in the withdrawal of SEPA's objection by letter of 11 November 2016. Please also attach any additional information (if any) that South Lanarkshire Council relied on to be satisfied that "**all SUDS & Drainage Arrangements will be appropriate**" (as per SEPA 11 Nov 2016 letter). Please advise as to what Bond is to be required and confirm that the Council will (not like in other areas of South Lanarkshire) actually use the Bond if necessary.
- (6) Under FoI/ EIR regulations please provide a note of all meetings and copy of email exchanges since 1st January 2012 between South Lanarkshire Council and Persimmon Homes and their agents or consultants relating to the Gilbertfield site. I presume that the Council's Planner's do ensure there is an accurate record of all such communications in accord with the RTPI Code. None of these documents are posted on-line in relation to the application CR/15/0239

- (6) explain explicitly why an application containing no affordable housing within the 437 dwellings approved, complies with your policy 13. This is not explicitly addressed in the planning Officer Report.
- (7) Confirm that all documentation submitted to the Council to discharge the planning conditions will be posted on-line in a timely manner.”

Scottish Information Commissioner

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