

Decision Notice 148/2020

Information relating to two planning applications

Applicant: The Applicant

Public authority: Perth and Kinross Council

Case Ref: 202000289



Scottish Information
Commissioner

Summary

The Council was asked for information relating to two planning applications.

The Council disclosed some information. It withheld other information, on the basis that it constituted internal communications, and redacted other information it considered to be personal information excepted from disclosure.

While the Commissioner accepted that the Council was entitled to withhold internal communications in one document and certain personal data redacted from other pages of the same document, he found that the Council had not been entitled to withhold other information it disclosed during the investigation.

Relevant statutory provisions

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (paragraphs (a), (b) and (c) of the definition of “environmental information”, “the data protection principles”, “data subject”, “the GDPR” and “personal data”), 5(1) and (2)(b) (Duty to make available environmental information on request); 10(1), (2), (3) and (4)(e) (Exceptions from duty to make environmental information available); 11(2), (3A)(a) and (7) (Personal data)

General Data Protection Regulation (the GDPR) Articles 5(1)(a) (Principles relating to processing of personal data); 6(1)(f) (Lawfulness of processing)

Data Protection Act 2018 (the DPA 2018) sections 3(2), (3), (4)(d), (5) and (10) (Terms relating to the processing 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 8 July 2019, the Applicant made an information request to Perth and Kinross Council (the Council). The information requested was:
Copies of all correspondence and contacts to include, emails, letters, memos, notes of phone calls, records of meetings, reports, etc., between Perth and Kinross Council officers and the applicants or their agents in relation to planning applications 19/00090/FLL and 17/01260/FLL not otherwise available on the Public Access portal.
2. The Applicant stated that the information was to include all items detailed above from 15 May 2019 onward, including post-determination discussion and advice relating to 17/01260/FLL and any contact in relation to the DPEA appeal and decision. It was also to include all internal and external consultations.
3. Specifically in regard to 19/00090/FLL, the Applicant stated that the information was to include all discussion and advice on the suitability or otherwise of the proposal and all correspondence and contacts, to include, emails, letters, memos, notes of phone calls, records of meetings, reports etc., between Perth and Kinross Council officers and the applicants or their agents from 15 May 2019 to date.

4. The Council responded on 31 July 2019. It made some information available to the Applicant, subject to redaction of information it considered to be subject to legal advice privilege and exempt under section 36(1) of the Freedom of Information (Scotland) Act 2002 (FOISA). The Council also withheld information it considered to be personal data, under section 38(1)(b) of FOISA.
5. On 2 August 2019, the Applicant wrote to the Council requesting a review of its decision, on the basis that disclosure of the information he considered to have been omitted, redacted and withheld was in the public interest.
6. The Council notified the Applicant of the outcome of its review on 30 August 2019. It explained that it was now responding in terms of the EIRs (as opposed to FOISA), as it acknowledged it should have done originally.
7. The Council confirmed that the Applicant had received all of the information it held and which he was entitled to. It explained that it was continuing to withhold information it considered to be personal data, under the exception in regulation 11(1) of the EIRs. The Council also informed the Applicant that it was relying on the exception in regulation 10(5)(d) of the EIRs for information it considered to be subject to legal privilege.
8. On 21 February 2020, the Applicant wrote to the Commissioner, applying 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. The Applicant stated he was dissatisfied with the outcome of the Council's review because he considered:
 - he was entitled to have full access to the information he requested
 - in particular, the information withheld under the legal privilege exception should be disclosed to him,
 - he had been put at a significant and unfair disadvantage by not having any indication or knowledge of the exact nature of the redacted documents and their content, and
 - it was in both his interest and that of the public for the requested documentation to be made available.

Investigation

9. The application was accepted as valid. The Commissioner confirmed that the Applicant 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.
10. On 18 March 2020, the Council was notified in writing that the Applicant had made a valid application. The Council was asked to send the Commissioner the information withheld from the Applicant. The Council provided the information and the case was allocated to an investigating officer.
11. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Council was invited to comment on this application and to answer specific questions. These related to whether the Council continued to regard the EIRs as applicable to the request, and its application of exemptions/exceptions to any withheld information.

12. During the course of the investigation, on 17 August 2020, the Council informed the Commissioner that it had changed its position. It was no longer seeking to rely on the exception in regulation 10(5)(d) for certain of the withheld information, but instead was relying on the exception in regulation 10(4)(e) (internal communications).
13. The Council also explained that it was willing to make available information in two pages previously withheld, subject to the redaction of personal data. The information was made available. In the absence of submissions from the Council as to why this information was, prior to the investigation, excepted under regulation 10(5)(d), the Commissioner must find that the Council breached regulation 5(1) of the EIRs in failing to make this information available in response to the Applicant's request.
14. During the investigation, the Council also confirmed that it was willing to make available certain of the personal data previously withheld from the Applicant. This information was made available. Given that the Council has now made this information available to the Applicant, again without any submissions to support it being withheld earlier, the Commissioner must find that it breached regulation 5(1) of the EIRs in failing to make it available in response to the Applicant's request.
15. Submissions were also received from the Applicant, during the investigation, in relation to why he considered he had a legitimate interest in receiving the information deemed by the Council to be personal data, and why the public interest lay in making the other withheld information available.

Commissioner's analysis and findings

16. 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 the Applicant and the Council. He is satisfied that no matter of relevance has been overlooked.

Handling in terms of the EIRs

17. In response to the requirement for review, the Council informed the Applicant that its response to his request should have been made under the EIRs as the information requested clearly fell within the definition of "environmental information" in regulation 2(1) of the EIRs.
18. Where information falls within the scope of this definition, a person has a right to access it (and the public authority a corresponding obligation to respond) under the EIRs, subject to various restrictions and exceptions contained in the EIRs.
19. The Council submitted that it considered the substance of the Applicant's request to be covered by the definition of environmental information contained in the EIRs. The Applicant has not challenged the Council's decision to deal with the information as environmental information. The Commissioner is satisfied that the information does comprise environmental information and will consider the handling of the request in what follows solely in terms of the EIRs.

Regulation 10(4)(e) of the EIRs – internal communications

20. Under regulation 10(4)(e) of the EIRs, a Scottish public authority may refuse to make environmental information available to the extent that it involves making available internal communications. The exception must be interpreted in a restrictive way and a presumption in favour of disclosure must be applied (regulation 10(2) of the EIRs).

21. In order for information to fall within the scope of this exception it need only be established that the information is an internal communication. However, if the Commissioner finds that a document is an internal communication, he will be required to go on to consider the public interest test in regulation 10(1)(b).
22. The Council applied this exception to five pages in one document (pages 5-10). The information withheld comprises of an exchange of correspondence between the Council's Planning Service and the internal legal service seeking and providing legal advice on land ownership and the interpretation of planning legislation.
23. Having considered the information withheld by the Council under this exception, the Commissioner is satisfied that all of this information comprises internal communications and is therefore subject to the exception in regulation 10(4)(e). He must, therefore, go on to consider whether, in all the circumstances, the public interest in making the information available is outweighed by the public interest in maintaining the exception.

Public interest test

24. Although the information has been found to be excepted from disclosure, it must be disclosed unless, in all the circumstances, the public interest in making the information available is outweighed by that in maintaining the exception (regulation 10(1)).
25. The Council acknowledged the general public interest in disclosure of any information held by a public authority. It also recognised that consideration of a planning application is a statutory process and there is a public interest in disclosing information to ensure the consideration is fair, transparent and lawful.
26. The Council argued that, in practice, the greater part of the consideration of a planning application is routinely open to public inspection and the legislation makes provision for both an appeal process (the Local Review Board) and for consideration by Scottish Ministers.
27. It is the Council's view that there is, on the other hand, considerable public interest in maintaining the principle of legal professional privilege and maintaining the confidentiality of communications between legal advisers and their clients. It is, the Council claims, essential that legal advice can be sought and provided without fear that it may be disclosed and, potentially, taken out of context. The Council also note that there is a strong public interest in ensuring that legal advisers are not constrained from providing advice by the thought of its potential disclosure and that officers of the Council are not discouraged from seeking advice when required. The Council notes a similar public interest in Council officers being able to obtain full and objective legal advice regarding the conduct of its affairs.
28. In his submissions, the Applicant explained that he believed it was in his interest and those of the wider public that the information be made available, in order that proper scrutiny and accountability could be exercised in the interests of best practice, openness, fairness, and upholding public trust in the planning system and democracy.
29. Within his submissions, the Applicant has commented on concerns he has over the time taken by the Council to process the planning applications covered by his request. The Applicant also explained that there is a common perception of a lack of meaningful scrutiny when dealing with legitimate complaints arising from the community, which has led to a widespread mistrust in regard to the manner in which the planning process has been applied by the Council.

30. For these reasons, the Applicant considered the public interest to lie in disclosure of the withheld information.

Commissioner's conclusions

31. The Commissioner has considered all of the submissions carefully, alongside the withheld information. He is satisfied that the information in question is subject to legal professional privilege: it relates to communications between a client (a Council Planning Officer) and its in-house solicitors. The solicitors are clearly acting in their professional capacity and the communication has occurred as part of their professional relationship with their client.
32. As noted in previous decisions involving both FOISA and the EIRs, the courts have long recognised the strong public interest in maintaining the right to confidentiality of communications between legal adviser and client on administration of justice grounds. Many of the arguments in favour of maintaining confidentiality of communications were discussed in a House of Lords case, *Three Rivers District Council and others v Governor and Company of the Bank of England* (2004) UKHL 48¹ and in the *Department for Business, Enterprise and Regulatory Reform v Information Commissioner and O'Brien* [2009] EWHC 164 (QB)². The Commissioner will apply the same reasoning to communications attracting legal professional privilege generally. More broadly, he considers there to be a strong public interest, also recognised by the courts, in the maintenance of confidences.
33. The Commissioner acknowledges that disclosure would help fulfil an interest in accountability, scrutiny and transparency. He recognises that there is a public interest in ensuring that the Council processed these applications in accordance with appropriate requirements.
34. That said, it is the Commissioner's view that this public interest has been fulfilled through the Council's decision to disclose the information in page 11 of the document which was previously withheld. This disclosure provides the Applicant with information setting out conclusions reached following the discussion between the Planning Officer and the in-house solicitor, thereby enabling the Applicant to understand the matter at issue, without disclosing the underlying advice.
35. Therefore, the Commissioner considers, on balance, in all the circumstances of the case, and having applied a presumption in favour of disclosure, that the public interest arguments in this case in favour of maintaining the exception outweigh those for making the information available – there is a greater public interest in ensuring that the Council can receive legal advice in confidence.
36. Consequently, the Commissioner is satisfied that the information was properly withheld under regulation 10(4)(e) of the EIRs.

Regulation 11(2) of the EIRs – personal data

37. As mentioned above, the Council has relied on the exception in regulation 11(2) of the EIRs for withholding certain information.

¹ <http://www.bailii.org/uk/cases/UKHL/2004/48.html>

² <http://www.bailii.org/ew/cases/EWHC/QB/2009/164.html>

38. The Council submits that the redacted information constitutes personal data, disclosure of which in response to this request would breach the first and second data protection principles in Article 5(1) of the GDPR (“lawfulness, fairness and transparency” and “purpose limitation”).
39. Regulation 10(3) of the EIRs provides that a Scottish public authority can only make personal data in environmental information available in accordance with regulation 11. Regulation 11(2) provides that personal data shall not be made available where the applicant is not the data subject and other specified conditions apply. These include where making it available would contravene any of the data protection principles in the GDPR or in the DPA 2018 (regulation 11(3)(A)(a)).

Is the withheld information personal data?

40. The first question the Commissioner must address is whether the information is personal data in terms of section 3(2) of the DPA 2018.
41. “Personal data” is defined in section 3(2) of the DPA 2018 as “any information relating to an identified or identifiable living individual”. Section 3(3) of the DPA 2018 defines “identifiable living individual” as “a living individual who can be identified, directly or indirectly, in particular by reference to –
 - (i) an identifier such as name, an identification number, location data, or an online identifier, or
 - (ii) one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.”
42. Information will “relate” to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them, or has them as its main focus.
43. An individual is “identified” or “identifiable” if it is possible to distinguish them from other individuals.
44. The Council has submitted that the redacted information constitutes personal data as it comprises the name of a member of staff involved in the request handling process. It is the Council’s view that this satisfies the definition of personal data as the information relates to an identified or identifiable individual.
45. Having considered the Council’s submissions and the withheld information, the Commissioner accepts that an individual data subject can be identified from the redacted information.
46. The Commissioner is therefore satisfied that the redacted information is personal data as defined in section 3(2) of the DPA 2018.

Would making the information available contravene one of the data protection principles?

47. Article 5(1)(a) of the GDPR requires personal data to be processed “lawfully, fairly and in a transparent manner in relation to the data subject.”
48. The definition of “processing” is wide and includes (section 3(4)(d) of the DPA 2018) “disclosure by transmission, dissemination or otherwise making available”. For the purposes of the EIRs, personal data are processed when made available in response to a request. This means that the personal data can only be made available if disclosure would be both lawful (i.e. it would meet one of the conditions for lawful processing listed in Article 6(1) of the GDPR) and fair.

49. The Council did not consider any conditions in Article 6(1) applied in the circumstances of the case. In the Commissioner's view, only condition (f) could potentially be applicable in the circumstances.

Condition (f): legitimate interests

50. Condition (f) states that the processing will be lawful if it is necessary for the purposes of legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require the protection of personal data (in particular where the data subject is a child).
51. Although Article 6 states that this condition cannot apply to processing carried out by a public authority in the performance of their tasks, regulation 11(7) of the EIRs (see Appendix 1) makes it clear that public authorities can rely on Article 6(1)(f) when responding to requests under the EIRs.
52. The tests which must be met before Article 6(f) can apply are as follows:
- (i) Does the Applicant have a legitimate interest in obtaining the personal data?
 - (ii) If so, would making the personal data available be necessary to achieve that legitimate interest?
 - (iii) Even if the processing would be necessary to achieve that legitimate interest, would that be overridden by the interests or fundamental rights and freedoms of the data subject(s)?

Does the Applicant have a legitimate interest in obtaining the personal data?

53. There is no definition within the DPA 2018 of what constitutes a "legitimate interest", but the Commissioner takes the view that the terms indicates that matters in which an individual properly has an interest should be distinguished from matters about which he or she is simply inquisitive. In the Commissioner's published guidance on personal information³, it states:
- "In some cases, the legitimate interest might be personal to the applicant, e.g. he or she might want the information in order to bring legal proceedings. With most requests, however, there are likely to be wider legitimate interests, such as the scrutiny of the actions of public bodies or public safety."
54. The Applicant submitted that the Council's decision to withhold the information was of serious concern to him and others who had made representations to it. He also identified a common perception around a lack of meaningful scrutiny by the Council when dealing with legitimate complaints arising from the community. This had, the Applicant asserted, led to a widespread mistrust in regard to the manner in which the planning process had been applied by the Council. He therefore believed disclosure of the redacted information was necessary to fulfil his legitimate interests and those of the wider public.
55. The Council argued that, as the redacted information was not material to the subject of the Applicant's request, it did not consider he had a legitimate interest in obtaining the personal data.

³ <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/EIRsexceptionbriefings/Regulation11/Regulation11PersonalInformation.aspx>

56. Having considered the submissions from both the Council and the Applicant, the Commissioner accepts that the Applicant was pursuing a legitimate interest in seeking to understand actions taken by the Council in relation to the processing of these two planning applications.
57. However, because the redacted information in this case is simply the name of a Council officer involved in the processing of the information request, the Commissioner does not consider that the Applicant has a legitimate interest in receiving this information, given that this person had no role in the consideration and processing of the two planning applications.
58. As the Commissioner has concluded that the Applicant does not have a legitimate interest in receiving the personal data redacted in this case, he finds that condition (f) of Article 6(1) of the GDPR cannot be satisfied. Accordingly, he accepts that making the personal data available would be unlawful.
59. Given that the Commissioner has found that the processing (i.e. making the information available, in response to the Applicant's request) would be unlawful, he is not required to go on to consider separately whether disclosure of the personal data would be necessary to fulfil any legitimate interest, or consider the data subject's interests or fundamental rights and freedoms, and balance them against any legitimate interest in disclosure.
60. In all the circumstances of the case, in the absence of a condition in Article 6(1) of the GDPR being met, the Commissioner must conclude that making the withheld personal data available would be unlawful and would breach the data protection principle in Article 5(1)(a) of the GDPR. Consequently, he is satisfied that disclosure of the personal data is not permitted by regulation 11(2) of the EIRs.
61. As mentioned previously, the Council also argued that disclosure of the withheld personal data would breach the data protection principle in Article 5(1)(b) of the GDPR. Because the Commissioner has found that disclosure of the withheld personal data would be unlawful in terms of the data protection principle in Article 5(1)(a), he need not (and will not) go on to consider whether disclosure would also breach the data protection principle in Article 5(1)(b).

Decision

The Commissioner finds that Perth and Kinross Council (the Council) partially complied with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by the Applicant.

The Commissioner finds that the Council was entitled to apply the exception in regulation 10(4)(e) of the EIRs for withholding information in part of one document.

He also finds that the Council was entitled to rely on the exception in regulation 11(2) of the EIRs for withholding certain personal data.

However, he finds that the Council was not entitled to rely on the exceptions in regulations 10(5)(d) and 11(2) of the EIRs for withholding information it subsequently made available during the investigation. The Commissioner therefore finds that the Council failed to comply with regulation 5(1) of the EIRs in this regard.

Given that the Council made the wrongly withheld information available during the investigation, the Commissioner does not require the Council to take any action in respect of this failure, in response to the Applicant's application.

Appeal

Should either the Applicant or Perth and Kinross 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

25 November 2020

Appendix 1: Relevant statutory provisions

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;

...

"the data protection principles" means the principles set out in –

- (a) Article 5(1) of the GDPR, and
- (b) section 34(1) of the Data Protection Act 2018;

"data subject" has the same meaning as in the Data Protection Act 2018 (see section 3 of that Act):

...

"the GDPR" and references to a provision of Chapter 2 of Part 2 of the Data Protection Act 2018 have the same meaning as in Parts 5 to 7 of the Act (see section 3(10), (11) and (14) of that Act);

"personal data" has the same meaning as in Parts 5 to 7 of the Data Protection Act 2018 (see section 3(2) and (14) of that Act);

...

5 Duty to make available environmental information on request

- (1) Subject to paragraph (2), a Scottish public authority that holds environmental information shall make it available when requested to do so by any applicant.
- (2) The duty under paragraph (1)-

...

(b) is subject to regulations 6 to 12.

...

10 Exceptions from duty to make environmental information available–

- (1) A Scottish public authority may refuse a request to make environmental information available if-
 - (a) there is an exception to disclosure under paragraphs (4) or (5); and
 - (b) in all the circumstances, the public interest in making the information available is outweighed by that in maintaining the exception.
- (2) In considering the application of the exceptions referred to in paragraphs (4) and (5), a Scottish public authority shall-
 - (a) interpret those paragraphs in a restrictive way; and
 - (b) apply a presumption in favour of disclosure.
- (3) Where the environmental information requested includes personal data, the authority shall not make those personal data available otherwise than in accordance with regulation 11.
- (4) A Scottish public authority may refuse to make environmental information available to the extent that
 - (e) the request involves making available internal communications.

...

11 Personal data

...

- (2) To the extent that environmental information requested includes personal data of which the applicant is not the data subject, a Scottish public authority must not make the personal data available if -
 - (a) the first condition set out in paragraph (3A) is satisfied, or
 - (b) the second or third condition set out in paragraph (3B) or (4A) is satisfied and, in all the circumstances of the case, the public interest in making the information available is outweighed by that in not doing so.
 - (3A) The first condition is that the disclosure of the information to a member of the public otherwise than under these Regulations –
 - (a) would contravene any of the data protection principles, or
- ...
- (7) In determining for the purposes of this regulation whether the lawfulness principle in Article 5(1)(a) of the GDPR would be contravened by the disclosure of information, Article 6(1) of the GDPR (lawfulness) is to be read as if the second sub-paragraph (disapplying the legitimate interests gateway in relation to public authorities) were omitted.

General Data Protection Regulation

Article 5 Principles relating to processing of personal data

1 Personal data shall be:

- a. processed lawfully, fairly and in a transparent manner in relation to the data subject (“lawfulness, fairness and transparency”)

...

Article 6 Lawfulness of processing

1 Processing shall be lawful only if and to the extent that at least one of the following applies:

...

- f. processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require the protection of personal data, in particular where the data subject is a child.

Data Protection Act 2018

3 Terms relating to the processing of personal data

...

- (2) “Personal data” means any information relating to an identified or identifiable living individual (subject to subsection (14)(c)).
- (3) “Identifiable living individual” means a living individual who can be identified, directly or indirectly, in particular by reference to –
 - (a) an identifier such as a name, an identification number, location data or an online identifier, or
 - (b) one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
- (4) “Processing”, in relation to information, means an operation or set of operations which is performed on information, or on sets of information, such as –
 - ...
 - (d) disclosure by transmission, dissemination or otherwise making available.
 - ...
- (5) “Data subject” means the identified or identifiable living individual to whom the personal data relates.

...

- (10) “The GDPR” means Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation).

Scottish Information Commissioner

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