

Decision Notice 020/2021

Information relating to two planning applications

Applicant: The Applicant

Public authority: Perth and Kinross Council

Case Ref: 202001130



Scottish Information
Commissioner

Summary

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

The Council made some information available. It redacted other information it considered to be personal data, excepted under the EIRs.

The Commissioner accepted that the Council provided any relevant information it held. However, he found that it had not been entitled to redact certain personal data from part of one document, made available during the investigation.

Relevant statutory provisions

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (paragraphs (a), (b) and (c) of definition of “environmental information”) (Interpretation); 5(1) and (2)(b) (Duty to make available environmental information on request)

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 23 January 2020, the Applicant made a request for information 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, photographic records, etc. between Perth & Kinross Council officers and the applicants or their agents in relation to planning applications 19/00090/FLL and 19/01429/LBC not otherwise available on the Public Access portal.
2. The Applicant noted that the information requested in relation to 19/0090/FLL included all items detailed above from 28 November 2019 onward to date and should include any post-determination discussion and advice.
3. Specifically, in regard to 19/01429/LBC, the Applicant explained that the information requested included 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, photographic records, etc. between Perth and Kinross Council officers and all other agencies, including the applicants or their agents. from 28 November 2019 to date.
4. The Applicant noted that the information requested in relation to both applications also included internal and external consultations and advice, including legal advice, sought/provided by and/or obtained by Perth and Kinross Council officers, from any source, in relation to either or both of these planning applications.
5. The Council responded on 13 February 2020. The Council made some information available to the Applicant, subject to the redaction of information it considered to be personal data of third parties and therefore excepted from disclosure under regulation 11 of the EIRs. The Council explained that the individuals the personal data related to had not consented to disclosure and it believed disclosure of the information would contravene the first and second data protection principles.

6. On 2 March 2020, the Applicant wrote to the Council, requesting a review of its decision as he believed he might not have received all relevant information to which he was entitled. He commented specifically that there appeared to be little by way of a significant response to his request for all updated information relating to the processing of planning application 19/01429/LBC.
7. The Council notified the Applicant of the outcome of its review on 27 March 2020. In doing so, the Council upheld its original response and outlined to the Applicant the nature of the searches it carried out, as part of the review process, prior to concluding that the Applicant had received all available information for this request.
8. On 25 September 2020, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of the Freedom of Information (Scotland) Act 2002 (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:
 - (i) He believed he was entitled to have full access to the information requested by him and remained unconvinced that he had been given access to all documents that should be on file and on record to which he was entitled.
 - (ii) He considered it to be in his interest, and the interests of the wider public, for the requested information to be made available, in order that proper scrutiny and accountability could be exercised in the interests of best practice, openness and fairness, and of upholding public trust and confidence in the planning system.

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 2 October 2020, the Council was notified in writing that the Applicant had made a valid application. 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 the actions and searches carried out by the Council to determine what recorded information it held falling within scope of the Applicant's request.
12. During the investigation, the Council explained that it had become aware that certain of the information redacted from one email as third-party personal data was already available in the public domain. This email had been provided to the Applicant in response to his request, as the Council noted that it had been erroneously missed when responding to a previous request made by the Applicant. The Council therefore re-issued this email to the Applicant (on 16 December 2020) making available certain of the previously redacted information it considered to be third party personal data. Given that the Council has now made this information available to the Applicant, without any reasons for it being withheld earlier, the Commissioner must find that it breached regulation 5(1) of the EIRs in failing to disclose this information in response to the Applicant's request.

Commissioner's analysis and findings

13. In coming to a decision on this matter, the Commissioner considered all of 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

14. The Council processed the Applicant's request and requirement for review in accordance with the EIRs.
15. Where information falls within scope of the definition of "environmental information" in regulation 2(1) of the EIRs, 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.
16. 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, in line with those parts of the definition set out in the Appendix, and will consider the handling of the request in what follows solely in terms of the EIRs.

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

17. 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 an applicant. The obligation relates to information that is held by the authority when it receives a request.
18. On receipt of a request for environmental information, therefore, the authority must ascertain what information it holds falling within scope of the request. Having done so, regulation 5(1) requires the authority to make that information available, unless a qualification in regulations 6 to 12 applies (regulation 5(2)(b)).
19. In order to ascertain whether all relevant information had been identified, the Council was asked to explain the steps it took to establish what information it held that fell within the terms of the Applicant's request.
20. The Council explained that all information relating to a planning application is held on the electronic case management system used by the Planning Service. The Council commented that all information relating to specific planning applications is held against the planning application reference in the electronic system and, due to the experience of staff within the Planning Service, all information is transferred promptly to the case management system. This means, the Council submitted, that it has proven to be unlikely that any information relevant to a planning application would exist outside that system.
21. Regarding the searches carried out to determine what specific information was held which fell within scope of the Applicant's request, the Council stated that all information for the two specified planning applications was requested from the service area, and the Case Officer involved in the processing of the Applications was asked to provide any information they held falling within scope.

22. The Council informed the Commissioner of which staff were involved in locating and providing the information and why they were the most appropriate to carry out the work.
23. In response to the Applicant's concern that he had not been provided with all information on record or file to which he was entitled, the Council appreciated, in light of its responses to previous requests made by the Applicant (where it had later discovered information falling within scope of his requests), that this was not an unsurprising position for him to take. However, the Council explained that, as the decision for Planning Application 19/00090/FLL was taken on 24 September 2019, the likelihood of it holding any information about that application after that date was low. The Council also noted that all submissions for Planning Application 19/01429/LBC (which was for listed building consent for the same site) were received before the end of October 2019, although the Committee did not consider this application until June 2020: the Case Officer had explained that the apparent delay was attributable to internal issues, including discussion of the requirement for listed building consent.
24. The standard of proof to determine whether a public authority holds information is the civil standard of the balance of probabilities. In determining where the balance of probabilities lies, the Commissioner considers the scope, quality, thoroughness and results of the searches carried out by the public authority. He also considers, where appropriate, any reason offered by the public authority to explain why it does not hold the information.
25. Having considered all of the submissions from the Council and the terms of the request (including the time period), the Commissioner accepts that adequate and proportionate searches were carried out by the Council at the time it responded to the Applicant's request. The Commissioner acknowledges that, given the timescale covered by the request, it would have been unlikely for the Council to hold any further information about 19/00090/FLL, and that any additional information for 19/01429/LBC may not have been generated until later (given the date on which the Committee considered the application).
26. The Commissioner is therefore satisfied that the Council made available to the Applicant all information it held falling within scope of the request (subject to redaction of information which fell out with scope of the request and for which the Council relied on the exception in regulation 11 of the EIRs, which is not being considered here) and that no additional information was held.

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 carried out adequate, proportionate searches and made available to the Applicant all information it held falling within scope of his request (insofar as relevant to this application).

However, he finds that the Council was not entitled to rely on regulation 11(2) of the EIRs for withholding certain personal data from the Applicant, subsequently disclosed during the investigation. The Commissioner therefore finds that the Council failed to comply with regulation 5(1) of the EIRs in this respect.

Given that the Council disclosed the information it did not consider to be excepted from disclosure during this investigation the Commissioner does not require the Council to take any action in respect of this failure, in response to the Applicant's request.

Appeal

Should either the Applicant 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

4 February 2021

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

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- (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.

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