



Scottish Information
Commissioner
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Decision Notice 133/2024

Land use in the Highland Council area

Authority: Highland Council

Case Ref: 202201112

Summary

The Applicant made a 12-part request for information relating to land use across the Authority's area, including information relating to a specified planning complaint. The Authority provided information relating to the complaint, but withheld information identifying the complainant. The Authority considered that responding to the remaining parts of the request would be manifestly unreasonable. The Commissioner investigated and found that the Authority had generally complied with the EIRs in responding to the request.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 39(2) (Health, safety and the environment); 47(1) and (2) (Application for decision by Commissioner)

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (definitions of "the data protection principles", "data subject", paragraphs (a),(b),(c), (d), (e) and (f) of definition of "environmental information", "personal data" and "the UK GDPR" and 3A(a) (interpretation); 5(1) and (2) (Duty to make available environmental information on request); 9(1) and (3) (Duty to provide advice and assistance); 10(1), (2)(a), (3), and (4)(b) (Exceptions from duty to make environmental information available) and 11(2), (3A)(a) and (7) (Personal data); 17(1), (2)(a), (b) and (f) (Enforcement and appeal)

United Kingdom General Data Protection Regulation (the UK GDPR) articles 5(1)(a) (Principles relating to the processing of personal data) and 6(1)(f) (Lawfulness of processing)

Data Protection Act 2018 (the DPA 2018) sections 3(2), (3), (4)(d), (5), (10) and 14(a), (c) and (d) (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 16 June 2022 the Applicant made a 12-part request for information to the Authority. The information requested concerned several matters, but primarily focused on information relating to land use across the Authority's area and on a specified planning complaint. The full wording of the request can be seen at Appendix 2.
2. The Authority did not respond to the Applicant's request for information.
3. On 20 July 2022, the Applicant wrote to the Authority requiring a review of its failure to respond.
4. Following correspondence from the Commissioner, the Authority notified the Applicant of the outcome of its review on 15 September 2022. The Authority provided some information in relation to the specified planning complaint (part 1 of the request), but withheld information that would identify the complainant under regulation 11(2) of the EIRs. The Authority refused to provide the remainder of information requested (parts 2-12 of the request), as it considered it would be manifestly unreasonable to do so in terms of regulation 10(4)(b) of the EIRs.
5. On 5 October 2022, 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 that they were dissatisfied with the outcome of the Authority's review for the following reasons:
 - it had withheld the name and contact details of the complainant in a specified planning complaint
 - they considered it held information relating to a phone call, which it had failed to disclose
 - they disagreed that any part of their request was manifestly unreasonable
 - they considered the Authority had failed to provide them with advice on how they might narrow the scope of their request.

Investigation

6. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
7. On 25 October 2022, the Authority were notified in writing that the Applicant had made a valid application and the case was subsequently 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 Authority was invited to comment on this application and to answer specific questions. These related to how the Authority

established what information it held, why it considered parts 2-12 of the request manifestly unreasonable and the advice and assistance it had provided to the Applicant.

Commissioner's analysis and findings

9. The Commissioner has considered all of the submissions made to him by the Applicant and the Authority.

Handling in terms of the EIRs

10. The Authority considered the Applicant's request under the EIRs, having concluded that the information requested was environmental information as defined in regulation 2(1) of the EIRs.
11. Where information falls within the scope of this definition, a person has a right to access it (and the public authority has a corresponding obligation to respond) under the EIRs, subject to the various restrictions and exceptions contained in the EIRs.
12. The Applicant has not disputed the Authority's decision to handle their request under the EIRs and the Commissioner is satisfied, in the circumstances, that the information they requested falls within the definition of environmental information set out in regulation 2(1), in particular paragraphs (a), (b) and (c) of that definition.

Section 39(2) of FOISA – Environmental information

13. The exemption in section 39(2) of FOISA provides, in effect, that environmental information (as defined by regulation 2(1) of the EIRs) is exempt from disclosure under FOISA, thereby allowing any such information to be considered solely in terms of the EIRs. In this case, the Commissioner accepts that the Authority was entitled to apply this exemption to the information withheld under FOISA, given his conclusion that it is properly classified as environmental information.
14. As there is a statutory right of access to environmental information available to the Applicant in this case, the Commissioner accepts, in all the circumstances, that the public interest in maintaining this exemption (and responding to the request under the EIRs) outweighs any public interest in disclosing the information under FOISA. Both regimes are intended to promote public access to information and there would appear to be no reason why (in this particular case) disclosure of the information should be more likely under FOISA than under the EIRs.
15. The Commissioner therefore concludes that the Authority was correct to apply section 39(2) of FOISA and to consider the Applicant's information request under the EIRs.

Regulation 5(1) – Duty to make available environmental information

16. 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.
17. 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)).

18. Under the EIRs, a public authority may refuse to make environmental information available if one or more of the exceptions in regulation 10 applies.

Did the Authority identify all of the relevant information?

19. In their application, the Applicant questioned the completeness of the information disclosed by the Authority in relation to part 1 of their request as it had not provided information relating to a phone call it had made to them regarding the complaint.
20. In order to ascertain whether all relevant information had been identified, the Authority was asked to explain the steps it took to establish what information it held within the terms of part 1 of the Applicant's request.
21. The Authority explained that it does not record phone calls and that it confirmed with the relevant service area that it held no further information beyond that already disclosed to the Applicant.
22. 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 and thoroughness and results of searches carried out by the public authority. The Commissioner also considers, where appropriate, any reason offered by the public authority to explain why it does not hold the information.
23. Given the explanations and submissions provided, the Commissioner is satisfied that the Authority does not (and did not, on receipt of the request) hold information relating to the phone call specified by the Applicant.
24. While the Applicant believed and expected the specified information to be held by the Authority, the Commissioner is satisfied that this was not the case. The Commissioner also notes that whether a public authority should hold information which it does not hold is not a matter for him to decide.
25. The Commissioner is therefore satisfied, on balance, that the Authority does not hold any further information falling within the scope of part 1 of the Applicant's request.

Regulation 11(2) – Personal data (part 1 of request)

26. 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 disclosure would contravene any of the data protection principles in the UK GDPR or DPA 2018 (regulation 11(3A)(a)).
27. To rely on this provision, therefore, the Authority must show that the information is personal data for the purposes of the DPA 2018 and that disclosure of the information into the public domain would contravene one or more of the data protection principles in Article 5(1) of the UK GDPR. There is no public interest test to be considered where this limb of regulation 11(2) applies.
28. The Authority has submitted that the withheld information in part 1 of the request was personal data, disclosure of which in response to this request would breach the first data protection principle in Article 5(1) of the UK GDPR (“lawfulness, fairness and transparency”).

The withheld information

29. The withheld information comprises the name, telephone number, email and postal address of a third party who had made a complaint about the Applicant's alleged use of land at a specified location within the Authority's area.

Is the withheld information personal data?

30. The first question the Commissioner must address is whether the information is personal data in terms of section 3(2) of the DPA 2018.
31. "Personal data" is defined in section 3(2) of the DPA as "any information relating to an identified or identifiable 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 an identifier such as a name, an identification number, location data, or an online identifier, or one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
32. 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.
33. An individual is "identified" or "identifiable" if it is possible to distinguish them from other individuals.
34. Having considered the Authority's submissions and the withheld information, the Commissioner accepts that a living individual can be identified from the data and that the data relate to that individual.
35. The Commissioner is therefore satisfied that the redacted information is personal data as defined in section 3(2) of the DPA 2018.

Would disclosure contravene one of the data protection principles?

36. Article 5(1)(a) of the UK GDPR requires personal data to be processed "lawfully, fairly and in a transparent manner in relation to the data subject."
37. 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 doing so would be both lawful (i.e. it would meet one of the conditions for lawful processing in Article 6(1) of the UK GDPR) and fair.
38. In considering this, the Commissioner has looked at condition 6(1)(f) as the only one which might potentially apply in the circumstances.

Condition (f): legitimate interests

39. Condition (f) states that the processing will be lawful if it is necessary for the purposes of legitimate interests pursued by the data controller or 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).
40. Although Article 6 states that this condition cannot apply to processing carried out by a public authority in 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.

41. The tests which must be met before Article 6(1)(f) can apply are as follows:
- Does the Applicant have a legitimate interest in obtaining the personal data?
 - If so, would making the personal data available be necessary to achieve that legitimate interest?
 - 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 subjects?

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

42. There is no definition within the DPA 2018 of what constitutes a "legitimate interest", but the Commissioner takes the view that the terms indicate 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 information](#)¹ 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."

43. In their submissions to the Commissioner, the Applicant stated that they wanted to see the name and contact details of the individual who had made an allegation, about them, to the Authority's planning department. The Applicant noted the complaint had been investigated, but not upheld, and explained that they wished to establish if a broader pattern of "malicious complaints" existed and to take action against the complainant, including exercising their right "not to be harassed".
44. The Authority accepted that the Applicant appeared to have a legitimate interest in the information.
45. Having considered the submissions from both the Authority and the Applicant, the Commissioner accepts that the Applicant was pursuing a legitimate interest in seeking to establish the identity of the complainant. As such, the Applicant would have a legitimate interest in the information requested.

Is disclosure of the personal data necessary to achieve that legitimate interest?

46. Having accepted that the Applicant has a legitimate interest, the Commissioner must consider whether disclosure of the personal data is necessary to meet that legitimate interest.
47. "Necessary" means "reasonably" rather than "absolutely" or "strictly" necessary. When considering whether disclosure would be necessary, public authorities should consider whether the disclosure is proportionate as a means and fairly balanced as to the aims to be achieved, or whether the requester's legitimate interests can be met by means which interfere less with the privacy of the data subject.

¹ <https://www.foi.scot/sites/default/files/2023-08/EIRsGuidanceRegulation11Personaldata.pdf>

48. Having considered this question, the Authority accepted that the Applicant wished to take action against the complainant and would need to know their identity to do so.
49. Having reviewed the information previously disclosed along with that currently being withheld, the Commissioner is not satisfied that the Applicant's legitimate interests (as acknowledged above) can be met adequately without disclosure of the withheld personal data. As a result, the Commissioner considers disclosure of those data to be necessary to meet those legitimate interests.

The data subject's interests or fundamental rights and freedoms

50. Having found that disclosure would be necessary, the Commissioner must now balance the legitimate interests in disclosure against the data subject's interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if a data subject would not reasonably expect that the information would be disclosed to the public under the EIRs in response to a request, or if such disclosure would cause unjustified harm, their interests or rights are likely to override the legitimate interests in disclosure. Only if the legitimate interests of the Applicant outweigh those of the data subject can the information be disclosed without breaching the first data protection principle.
51. The Commissioner's guidance on regulation 11(2) of the EIRs lists the factors that should be taken into account in balancing the interests of parties. He notes that Recital (47) of the General Data Protection Regulation states that much will depend on the reasonable expectations of the data subjects. These are some of the factors public authorities should consider:
 - Does the information relate to an individual's public life (their work as a public official or employee) or to their private life (their home, family, social life or finances)?
 - Would the disclosure cause harm or distress?
 - Whether the individual has objected to the disclosure.
52. The Applicant considered that by taking the act of submitting a planning complaint the complainant had waived their right to privacy.
53. The Authority explained that individuals who report an alleged breach of planning control are informed via a [Planning Enforcement Charter](#)² that their identity will be protected wherever possible (short of the commencement of legal proceedings).
54. The Authority submitted that the complainant would therefore not expect their personal data to be disclosed and that to do so would breach their right to privacy, represent an unwarranted infringement of their rights, and be likely to reduce the willingness of other members of the public to report potential enforcement issues in future.
55. The Commissioner has considered the Applicant's need for transparency and understands their interest in knowing who made a planning complaint relating to them. However, the Commissioner must also consider the expectations of the data subjects, and he does not consider that individuals reporting a potential breach of planning control would expect their personal data to be disclosed in response to a request for information.
56. Having carefully balanced the legitimate interests of the individual concerned against those of the Applicant, the Commissioner finds that the legitimate interests served by disclosure of

² https://www.highland.gov.uk/downloads/file/1302/our_planning_enforcement_charter (at page 10).

the withheld personal data are outweighed by the unwarranted prejudice that would result to the rights and freedoms or legitimate interests of the data subject. Condition (f) in Article 6(1) of the GDPR cannot, therefore, be met in relation to the withheld personal data.

57. In all the circumstances of this particular case, therefore, and in the absence of a condition in Article 6 of the GDPR allowing the personal data to be disclosed, the Commissioner has concluded that disclosing the information would be unlawful and would therefore breach the data protection principle in Article 5(1)(a) of the UK GDPR.
58. Consequently, the Commissioner is satisfied that the personal data are exempt from disclosure under regulation 11(2) of the EIRs.

Regulation 10(4)(b) – Manifestly unreasonable (parts 2-12 of request)

59. Regulation 10(4)(b) provides that a Scottish public authority may refuse to make environmental information available to the extent that the request for information is manifestly unreasonable. In considering whether the exception applies, the authority must interpret it in a restrictive way and apply a presumption in favour of disclosure. Even if it finds that the request is manifestly unreasonable, it is still required to make the information available unless, in all the circumstances, the public interest in doing so is outweighed by that in maintaining the exception.
60. The EIRs do not define the term “manifestly unreasonable”, and neither does the Directive on which the EIRs were based (Directive 2003/4/EC on public access to environmental information and repealing Directive 90/313/EEC). However, the Aarhus Convention Implementation Guide, named after the Convention on which the Directive was based, makes it clear that volume and complexity alone do not make a request “manifestly unreasonable”.
61. The Commissioner's general approach is that the following factors are relevant when considering whether a request is manifestly unreasonable. These are that the request:
 - (i) would impose a significant burden on the public body
 - (ii) does not have a serious purpose or value
 - (iii) is designed to cause disruption or annoyance to the public authority
 - (iv) has the effect of harassing the public authority
 - (v) would otherwise, in the opinion of a reasonable person, be considered manifestly unreasonable or disproportionate.
62. This is not an exhaustive list. Depending on the circumstances, other factors may be relevant, provided the impact on the authority can be supported by evidence. The Commissioner recognises that each case must be considered on its merits, taking all the circumstances into account.

The Authority's submissions

63. In its review response, the Authority stated that it would be manifestly unreasonable to respond to parts 2-12 of the request for the following reasons:
 - they were broad in scope
 - it did not possess a centralised system for storing the information requested

- it would therefore impose a significant burden on it to comply with parts 2-12 of the request
 - complying with parts 2-12 of the request would also divert its employees from performing other statutory functions.
64. The Authority stated that it receives approximately 2,000 information requests each year and that to separately administer each part of a multi-strand request for information would significantly increase the administrative burden associated with responding to requests.
 65. The Authority submitted that each of parts 2-9 of the request asked for “all information” relating to specific enforcement investigations within (and beyond) Lochaber over a five-year period and that, in that period, it had logged 2,567 enforcement cases. The Authority argued that it would need to undertake the same task to respond to these and therefore it would be reasonable to treat parts 2-9 as one ‘block’.
 66. The Authority explained that it uses a CRM system to administer enforcement cases, which, due to the way it is configured, has no facility to allow it to search for the specific terms set out in parts 2-9 of the Applicant’s request.
 67. The Authority further explained responding to parts 2-5 would require an enforcement officer to search the CRM for enforcement cases logged as “LO - Lochaber” over the time period set out, and to manually preview the documentation accompanying each returned case to determine if it related to “agricultural land” and fell into one of the four specific categories set out by the Applicant.
 68. The Authority noted that, for cases within scope, the relevant case documentation would then need to be extracted from a separate, linked eRDM system (and in some cases converted into an accessible format) and redactions applied, where required.
 69. To satisfy parts 6-9 of the request, the Authority explained that it would need to repeat this process and manually exclude Lochaber cases from the results (because the limitations of the CRM do not allow for the automatic exclusion of locations from searches).
 70. The Authority stated that it had located 315 enforcement cases relating to Lochaber alone (parts 2-5) and that each of these cases would need to be manually reviewed to establish if it fell within the scope of the request.
 71. The Authority estimated that accessing an individual case within the CRM, navigating to the relevant documentation and then reviewing that information to determine whether the case was within scope would take five minutes.
 72. Based on this, the Authority calculated the following estimate for responding to parts 2-9 of the request:

2,567 files * 5 minutes = 12,835 minutes

12,835 minutes = 214 hours
 73. The Authority explained that, once located, documents relating to enforcement cases falling within scope would have to be extracted from a separate eRDM system. In view of this, and the further time required to physically redact documents and convert those in inaccessible formats, the Authority submitted that it would significantly increase the staff time and cost of providing the information in parts 2-9 and provided further cost estimates to evidence this.

74. During the investigation, the Authority disclosed some information to the Applicant relating to parts 10, 11 and 12 of their request. However, the Authority confirmed that it still considered fully responding to those parts of the request would significantly increase the burden (and cost) of responding to the request and that complying would therefore still be manifestly unreasonable.
75. Specifically, the Authority explained that it considered part 12 of the request to be manifestly unreasonable as it sought all information relating to the land owned or controlled by the Authority in Lochaber, which, in effect, encompassed almost all properties owned by the Authority in that area.
76. The Authority stated that information would be held by its legal, planning, property and economic development teams, in various locations, and would comprise tens of thousands of documents (meaning it was unable to estimate the cost of providing this information).
77. The Authority also explained that complying with the Applicant's request would divert staff members from its legal, property and planning teams which would negatively affect its ability to comply with a number of other statutory and core functions.
78. The Authority submitted that it was not suggesting the above functions should take priority over its statutory duties under FOISA and the EIRs, but was demonstrating that it needs to manage all of its statutory duties in line with its existing resources.
79. The Authority also stated it did not consider it appropriate to consider the Applicant's request in the context of business continuity arrangements, as those arrangements were reserved for emergency situations and times of crisis.
80. The Authority explained that it did not charge for the information requested, as permitted under regulation 8 of the EIRs, as its policy is not to charge for information, but to refuse to comply if the costs in doing so are likely to exceed £600.
81. The Authority noted that, while it recognised the £600 cost limit applies to information requests under FOISA, it seemed reasonable to apply the same principle to requests under the EIRs.
82. The Authority provided screenshots of its searches and systems to evidence its submissions.

The Applicant's submissions

83. The Applicant stated that they had made 12 separate requests and the Authority should have responded to them individually.
84. The Applicant submitted that the Authority was not entitled to aggregate the burden of complying with those (separate) requests.
85. The Applicant considered that their requests were specific to single subject areas within Lochaber and the Authority's area and it was unreasonable for the Authority to claim it did not possess a system capable of collating information relating to matters that it has legal powers over.
86. The Applicant stated that gathering the information requested formed part of the Authority's normal business operations and that the Authority's investigation of the specified planning complaint and their own experience of using the Authority's planning system demonstrated that the Authority's arguments about the capabilities of that system are false.

The Commissioner's view

87. In the Commissioner's briefings on sections 14(1) of FOISA and on regulation 10(4)(b) of the EIRs, the Commissioner indicates that a request will impose a significant burden on a public authority where dealing with it would require a disproportionate amount of time and the diversion of an unreasonable proportion of its financial and human resources away from its other statutory or core operations.
88. Responding to information requests is a statutory duty for the Authority, and one which must be properly resourced. The Commissioner acknowledges that, in common with all other Scottish public authorities, in addition to complying with requests for information under FOISA and the EIRs, the Authority has many other demands on its time and resources.
89. However, compliance with information requests should be considered as an element of the authority's core business, being a statutory requirement. The Commissioner will therefore not accept lightly arguments that compliance with an information request, in any given case, represents an unreasonable diversion from compliance with other statutory responsibilities.
90. Having reviewed the Authority's submissions, the Commissioner accepts that:
- parts 2-12 of the Applicant's request were drafted very broadly (e.g. requesting "all data" and "all structured and unstructured information"), thereby resulting in a significant volume of information falling within scope
 - the information requested sits across disparate systems, with a significant volume of that information requiring individual review
 - the Authority provided (where it was possible to do so) reasonable estimates of the time likely to be incurred in complying with parts 2-12 of the request
 - the cost of complying with the request would be significant, incurring staff time costs well in excess of the £600 limit at which a request considered under FOISA could be refused
 - responding to parts 2-12 of the request would take up a significant amount of staff time, which would have a detrimental impact on its ability to carry out its statutory functions.
91. As it currently stands, then, the Commissioner cannot see any other way in which the Authority could satisfy the request, and accepts that responding would be disproportionate and would impose a significant burden on the Authority.
92. The Commissioner notes that the Applicant believes the Authority should be capable of providing the information they requested, and that it was unreasonable for the Authority to claim it did not possess a central system for collating such information.
93. However, the Commissioner is required to consider whether regulation 10(4)(b) of the EIRs applies in this case, with regard to the recording systems in use by the Authority, and not with regard to what an Applicant might wish these systems to be capable of.
94. Furthermore, as noted in [Decision 050/2021](#)³ (which involved a different Authority), it is not within the Commissioner's remit to instruct a public authority to change its data recording systems.

³ <https://www.foi.scot/decision-0502021>

95. In all of the circumstances, therefore, the Commissioner accepts that parts 2-12 of the Applicant's request were manifestly unreasonable. As such, he finds that the Authority correctly applied the exception in regulation 10(4)(b) of the EIRs in this case.

EIRs: the public interest test

96. The exception in regulation 10(4)(b) is subject to the public interest test in regulation 10(1)(b) of the EIRs. This means that, although the Commissioner is satisfied that those elements of the Applicant's requests are manifestly unreasonable, he must still require the Authority to respond to those elements of the requests if the public interest in making the information available outweighs that in maintaining the exception.

The Applicant's submissions on the public interest

97. The Applicant was invited to provide specific public interest submissions, but instead provided their view on the Authority's duties in relation to a centralised system and other comments to assist the Commissioner in his investigation.

98. However, in their application to the Commissioner, the Applicant stated that they considered the Authority's refusal to provide the information requested on the basis it was manifestly unreasonable (which they considered was as a result of how that information was stored) meant it had breached its obligations under the EIRs.

The Authority's submissions on the public interest

99. The Authority explained that it considered, due to the volume of information requested and the significant burden that complying with the request would impose, that the public interest favoured maintaining the exception, which existed for this purpose, to protect public resources.

100. The Authority noted that it has a statutory duty to publish Enforcement Notices and, given this, it did not consider there was any significant public interest in publishing all of the information requested.

101. The Authority also explained that information on ownership of land is available in national registers and on its website and it regularly responds to directed requests for information about its properties. The Authority submitted that there was no public interest in publishing a significant volume of information in relation to an unfocused request.

The Commissioner's view on the public interest

102. In reaching his conclusion on the public interest, the Commissioner has considered the submissions made by both the Applicant and the Authority.

103. In the Commissioner's view, there is an inherent public interest in the disclosure of information to ensure that an authority is transparent and accountable, and to allow its decisions and actions to be scrutinised.

104. Against this, the Commissioner has considered the strong public interest in ensuring that an authority can carry out its statutory functions without unreasonable or disproportionate disruption. There is also a public interest in ensuring that the EIRs are used responsibly.

105. As stated above, the Commissioner has already accepted that providing the information requested in this case would incur significant costs to the Authority in staff time and resources and, to a certain extent, divert resources away from core functions.

106. After careful consideration, the Commissioner finds that the public interest in responding to the information request made by the Applicant is outweighed by the public interest in maintaining the exception in regulation 10(4)(b) of the EIRs.
107. Consequently, the Commissioner finds that the Authority was entitled to refuse to make the requested information available under regulation 10(4)(b) of the EIRs.

Regulation 9 – duty to provide advice and assistance

108. Regulation 9(1) of the EIRs requires Scottish public authorities to provide advice and assistance to applicants, so far as it would be reasonable to expect them to do so.
109. Regulation 9(3) of the EIRs provides that a Scottish public authority shall be taken to have complied with this duty if it conforms to the guidance contained in the Scottish Ministers' Code of Practice on the Discharge of Functions by Scottish Public Authorities under FOISA and the EIRs (the Section 60 Code of Practice).
110. The [Section 60 Code of Practice](#)⁴ states that authorities have a duty to provide advice and assistance at all stages of a request - this ranges from before a request is made to after an authority has responded (paragraph 5.1.1).
111. The Applicant explained that they were extremely dissatisfied the Authority had failed to advise them on how they might narrow the scope of parts 2-12 of their request, so that it was no longer considered manifestly unreasonable and that it was incumbent on the Authority to explain how it stored information.
112. During the investigation, the Authority confirmed that it had not sought to clarify the Applicant's request with them at any time and acknowledged it had, in this respect, handled their request poorly.
113. As noted at paragraph 74, the Authority, following correspondence from the Commissioner, disclosed some further information to the Applicant in relation to parts 10, 11 and 12 of their request.

The Commissioner's view

114. Taking all of the above into consideration, the Commissioner finds that, by failing to provide the Applicant with advice on refining the parts of their request which it considered manifestly unreasonable, the Authority failed to fulfil its duties under regulation 9 of the EIRs.
115. The Commissioner also notes that the Authority's failure to respond to the Applicant's initial request resulted in a missed opportunity to provide advice and assistance at that stage.
116. However, as the Authority has since provided further advice and assistance to the Applicant during the course of his investigation, the Commissioner does not require any further action from it in respect of this failure.

⁴ <https://www.gov.scot/publications/foi-eir-section-60-code-of-practice>

Decision

The Commissioner finds that the Authority generally complied with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by the Applicant.

For part 1 of the request, the Commissioner finds that, by providing all of the information it held that fell within the scope of the request, and by withholding the personal data of third parties under regulation 11(2) of the EIRs, the Authority complied with the EIRs.

For parts 2-12 of the request, the Commissioner finds that, in relying on the exception in regulation 10(4)(b), the Authority complied with the EIRs.

However, the Commissioner also finds that, in not explaining to the Applicant how they might narrow their request, the Authority failed to comply with the duty in regulation 9 of the EIRs to provide advice and assistance.

Given that the Authority has provided further advice and assistance to the Applicant during the course of his investigation, the Commissioner does not require the Authority to take any action in respect of this failure, in response to the Applicant's application.

Appeal

Should either the Applicant or the Authority 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.

David Hamilton
Scottish Information Commissioner

19 June 2024

Appendix 1: Relevant statutory provisions

Freedom of Information (Scotland) Act 2002

1 General entitlement

- (1) A person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority.
- (2) The person who makes such a request is in this Part and in Parts 2 and 7 referred to as the “applicant.”
- ...
- (6) This section is subject to sections 2, 9, 12 and 14.

2 Effect of exemptions

- (1) To information which is exempt information by virtue of any provision of Part 2, section 1 applies only to the extent that –
...
 - (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

39 Health, safety and the environment

- ...
 - (2) Information is exempt information if a Scottish public authority-
 - (a) is obliged by regulations under section 62 to make it available to the public in accordance with the regulations; or
 - (b) would be so obliged but for any exemption contained in the regulations.

47 Application for decision by Commissioner

- (1) A person who is dissatisfied with -
 - (a) a notice under section 21(5) or (9); or
 - (b) the failure of a Scottish public authority to which a requirement for review was made to give such a notice.

may make application to the Commissioner for a decision whether, in any respect specified in that application, the request for information to which the requirement relates has been dealt with in accordance with Part 1 of this Act.

- (2) An application under subsection (1) must -
 - (a) be in writing or in another form which, by reason of its having some permanency, is capable of being used for subsequent reference (as, for example, a recording made on audio or video tape);
 - (b) state the name of the applicant and an address for correspondence; and

(c) specify –

(i) the request for information to which the requirement for review relates;

(ii) the matter which was specified under sub-paragraph (ii) of section 20(3)(c);
and

(iii) the matter which gives rise to the dissatisfaction mentioned in subsection
(1).

The Environmental Information (Scotland) Regulations 2004

2 Interpretation

(1) In these Regulations –

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

“applicant” means any person who requests that environmental information be made available;

“the Commissioner” means the Scottish Information Commissioner constituted by section 42 of the Act;

“the data protection principles” means the principles set out in –

(a) Article 5(1) of the UK 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 of that Act):

“the Directive” means Directive 2003/4/EC of the European Parliament and of the Council on public access to environmental information and repealing Council Directive 90/313/EEC;

“environmental information” has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on –

- (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
- (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in paragraph (a);
- (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in paragraphs (a) and (b) as well as measures or activities designed to protect those elements;
- (d) reports on the implementation of environmental legislation;
- (e) costs benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in paragraph (c); and
- (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in paragraph (a) or, through those elements, by any of the matters referred to in paragraphs (b) and (c);

“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);

...

“the UK GDPR” has the same meaning as in Parts 5 to 7 of the Data Protection Act 2018 (see section 3(10) and (14) of that Act); and

...

- (3A) In these Regulations, references to the UK GDPR and the Data Protection Act 2018 have effect as if in Article 2 of the UK GDPR and Chapter 3 of Part 2 of that Act (exemptions for manual unstructured processing and for national security and defence purposes) -
- (a) the references to an FOI public authority were references to a Scottish public authority as defined in these Regulations, and

...

...

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)-
- (a) shall be complied with as soon as possible and in any event no later than 20 working days after the date of receipt of the request; and
- (b) is subject to regulations 6 to 12.

...

9 Duty to provide advice and assistance

- (1) A Scottish public authority shall provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to applicants and prospective applicants.
- ...
- (3) To the extent that a Scottish public authority conforms to a code of practice under regulation 18 in relation to the provision of advice and assistance in a particular case, it shall be taken to have complied with the duty imposed by paragraph (1) in relation to that case.

...

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
 - ...
 - (b) the request for information is manifestly unreasonable;
 - ...
- ...

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
 - ...
- (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 UK GDPR would be contravened by the disclosure of information, Article 6(1) of the UK GDPR (lawfulness) is to be read as if the second sub-paragraph (disapplying the legitimate interests gateway in relation to public authorities) were omitted.
- ...

17 Enforcement and appeal provisions

- (1) The provisions of Part 4 of the Act (Enforcement) including schedule 3 (powers of entry and inspection), shall apply for the purposes of these Regulations as they apply for the purposes of the Act but with the modifications specified in paragraph (2).
- (2) In the application of any provision of the Act by paragraph (1) any reference to -

- (a) the Act is deemed to be a reference to these Regulations;
- (b) the requirements of Part 1 of the Act is deemed to be a reference to the requirements of these Regulations;
- ...
- (f) a notice under section 21(5) or (9) (review by a Scottish public authority) of the Act is deemed to be a reference to a notice under regulation 16(4); and
- ...

UK 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 personal data relates.

...

- (10) “The UK 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 (United Kingdom General Data Protection Regulation), as it forms part of the law of England and Wales, Scotland and Northern Ireland by virtue of section 3 of the European Union (Withdrawal) Act 2018 (and see section 205(4)).

...

- (14) In Parts 5 to 7, except where otherwise provided –
 - (a) references to the UK GDPR are to the UK GDPR read with Part 2;...
- (c) references to personal data, and the processing of personal data, are to personal data and processing to which Part 2, Part 3 or Part 4 applies;
- (d) references to a controller or processor are to a controller or processor in relation to the processing of personal data to which Part 2, Part 3 or Part 4 applies.

...

Appendix 2 – 16 June 2022 request

1. All maps, diagrams, structured & unstructured information, and communications (including specifically any identification information of the complainer) relating to, and precipitating from planning complaint reference. 21/00540/ENF.
2. All data vis-a-vis agricultural land investigated for alleged commercial use in Lochaber, by the planning department, in the last five years.
3. All data vis-a-vis agricultural land investigated for alleged siting of containers in Lochaber, by the planning department, in the last five years.
4. All data vis-a-vis agricultural land investigated for alleged storage of equipment/ plant (including boats) in Lochaber, by the planning department, in the last five years.
5. All data vis-a-vis agricultural land investigated for alleged storage/ siting of caravan(s) in Lochaber, by the planning department, in the last five years.
6. All data vis-a-vis agricultural land investigated for alleged commercial use in the Highland Council area except Lochaber, by the planning department, in the last five years.
7. All data vis-a-vis agricultural land investigated for alleged siting of containers in the Highland Council area except Lochaber, by the planning department, in the last five years.
8. All data vis-a-vis agricultural land investigated for alleged storage of equipment/ plant (including boats) in the Highland Council area except Lochaber, by the planning department, in the last five years.
9. All data vis-a-vis agricultural land investigated for alleged storage/ siting of caravan(s) in the Highland Council area except Lochaber, by the planning department, in the last five years.
10. All maps, diagrams, structured & unstructured information, and communications relating to mitigating against flooding precipitating from the "Blar" housing development at the Blar, Fort William (with specific reference to the township of Camaghael).
11. All maps, diagrams, structured & unstructured information, and communications relating to the new stock fencing put up by Highland Council, precipitating from the "Blar" housing development at the Blar, Fort William (with specific reference to the township of Camaghael).
12. All maps, diagrams, structured & unstructured information, and communications relating to the land owned or controlled by Highland Council in the Lochaber area.