



Scottish Information
Commissioner
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Decision Notice 231/2024

Affordable housing commuted sum calculation

Applicant: The Applicant
Authority: Angus Council
Case Ref: 202101453

Summary

The Applicant asked the Authority for information related to the calculation of the commuted sum for a particular housing development. The Authority withheld some information it considered was commercially sensitive and stated that it held no information in relation to the second part of the request. The Commissioner investigated and found that the Authority did not hold any information falling within the scope of the second part of the request, that it had correctly withheld some information, but had wrongly withheld other information, some of which was subsequently provided during the investigation, the remainder that the Commissioner requires the Authority to disclose.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2) and (6) (General entitlement); 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) (definition of “the Act”, “the applicant” and “the Commissioner”); paragraphs (a), (b), (c) and (e) of definition of “environmental information” (Interpretation); 5(1) (Duty to make environmental information available on request); 10 (1), (2), (4)(a), (5)(e) (Exceptions from duty to make environmental information available); 17(1), (2)(a) and (b) (Enforcement and appeal provisions)

Background

1. On 28 June 2021, the Applicant made a request for information to the Authority. The Applicant asked the Authority for:
 - i) The Authority's instruction to the District Valuer (DV) including all information passed to the DV to assist in a commuted sum calculation.
 - ii) The residual method calculation breakdown including sensitivity analysis undertaken by the DV to come to the commuted sum figure reported.

The Applicant explained why it sought the information (that relevant context is not set out in this Decision but is known to the Applicant and to the Authority) but stated that if the information could not be provided in this context, then it wished its request to be processed as a "Freedom of Information request".

2. On 8 July 2021, in the absence of a response to its first letter, the Applicant wrote again to the Authority, asking that its request of 28 June 2021 be processed as a freedom of information (FOI) request. Following communications with the Authority, the Applicant confirmed on 14 July 2021 that it wanted its communication dealt with as an FOI request.
3. The Authority responded on 2 August 2021 by referring to the Applicant's request of 8 July 2021. The Authority stated that the Applicant had previously requested the Authority's instruction to the DV - the Authority quoted its FOI reference numbers - and that responses were provided, as well as responses to a number of follow-up questions. The Authority further stated that its instruction to the DV had previously been provided, but it provided this instruction again for completeness and stated that the Authority had no further information to provide to the Applicant in response to the request.
4. On 5 August 2021, the Applicant wrote to the Authority requesting a review of its decision. The Applicant stated that it was dissatisfied with the Authority's decision because the information requested had not been provided. It stated that the previous FOI requests referred to in the Authority's response had not been fully resolved, as an alternative route to resolution of the issue suggested by the Authority at that time had been pursued. The Applicant asked again for the information falling within the scope of its request. (The Applicant did also refer to its intention to obtain the information otherwise if it could not obtain it through freedom of information. The Applicant similarly set out the reasons why it sought the information – i.e. to allow it to assess if the commuted sum was reasonable – and again, as the issues involved are well known to both Applicant and Authority, the Commissioner will not narrate them here.)
5. The Authority, on being prompted by the Applicant, replied on 9 August 2021 with an apology and supplied the Applicant with redacted information.
6. On 23 August 2021, the Applicant wrote again to the Authority, asking for a review of its FOI request as it had received no further information in response to its previous email.
7. The Authority notified the Applicant of the outcome of its review on 30 September 2021. The Authority considered that the information requested fell within the EIRs and carried out its review on that basis. The Authority referred to its response of 2019, making reference to regulation 10(5)(e) (confidentiality of commercial or industrial information) of the EIRs, and that this exception still held in relation to the Applicant's current request. The Authority added that it had carried out additional searches and had found additional information not previously given. It now provided some that newly located information to the Applicant. The

Authority explained that it considered some of the information to be commercially sensitive and was therefore withholding that information (by redaction) under regulation 10(5)(e) of the EIRs.

8. With regard to the second part of the initial request (i.e. “the residual method calculation breakdown including sensitivity analysis undertaken by the DV to come to the commuted sum figure reported”), the Authority stated that this information was not held and suggested that the Applicant seek this directly from the DV and noted that this should have been advised in the Authority’s initial response.
9. The Authority also commented on the previous FOI requests, noting that there had been an opportunity at that time to request a review and make a subsequent appeal to the Commissioner, but that this had not been taken up by the Applicant, and that these issues therefore could not be commented on in this review. Additionally, the Authority withheld some information that it considered to be third party personal data under regulation 11(2) of the EIRs and had marked some information as being outwith the scope of the Applicant’s request. The Authority also made comments and responded to points raised in the Applicant’s requirement for review that the Authority did not regard as requests for recorded information under the EIRs.
10. On 24 November 2021, 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 it was dissatisfied with the outcome of the Authority’s review because it did not consider that all the information had been provided, and believed the information that had been provided by the Authority was over-redacted. The Applicant was also not satisfied that the Authority did not hold the information falling within the scope of the second part of its request.

Investigation

11. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
12. On 12 January 2022, the Authority was notified in writing that the Applicant had made a valid application. The Authority was asked to send the Commissioner the information withheld from the Applicant. The Authority provided the information, and the case was allocated to an investigating officer.
13. 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 had determined what information fell within the scope of the request, why it had determined some information should be withheld, and how it decided it held no information falling within the scope of the second part of the request.
14. Both the Authority and the Applicant have supplied reasoning and evidence to the Commissioner, to justify their respective positions in respect of the Authority’s compliance (or lack of compliance) with FOISA and/or the EIRs.

Commissioner's analysis and findings

15. The Commissioner has carefully considered all the submissions made to him by the Applicant and the Authority.
16. By way of background, the requested information concerns how a commuted sum for a particular housing development was determined. The Scottish Government have provided [planning advice](#) relating to an expectation in Scotland that developers contribute towards affordable housing within their developments. Where, for whatever reason, this is not possible, an alternative of a commuted sum of a value equivalent to the cost of providing the percentage of serviced land required by the policy may be agreed, but the decision to accept a commuted sum is one for the planning authority.
17. This advice further states that, wherever possible the parties should agree to appoint and instruct a valuer, and that the commuted sum is a matter for negotiation between the developer and the local authority. In this instance the valuer concerned was the District Valuer (DV) (using information provided by the Authority). The [District Valuer](#)¹ is a specialist property arm of the Valuation Office Agency (VOA), an executive agency sponsored by HM Revenue and Customs that provides independent, impartial valuation, and professional property advice across the public sector, and where public money or public functions are involved. The Authority's [website](#)² also has information that explains commuted sums.
18. In this case, the Applicant explained in its request and requirement for review (and in other correspondence with the Authority and with the Commissioner) that it wished to use the withheld information to instruct another valuer to repeat the calculation to determine the commuted sum, to ensure that the sum calculated was fair. The Applicant's communication to the Authority of 28 June 2021 sought information in the context of its ongoing relationship with the Authority, but also made clear that if the information could not be provided to the Applicant (by the Authority) in that context, then the Authority should supply the information to it through the FOI legislation).
19. The Commissioner is only considering in this decision the Applicant's right to the withheld information in terms of the FOI legislation, i.e. FOISA and the EIRs, and whether the Authority's review complied with FOISA and the EIRs. As stated in previous decisions, the Commissioner's remit extends only to the consideration of whether a Scottish public authority has complied with Part 1 of FOISA or with the EIRs in responding to a request. The Commissioner cannot comment on whether, or prescribe that, a Scottish public authority should record or hold information, nor can he comment on or decide in respect of any other issues between the Applicant and the Authority as to what the information is or may be relevant to.
20. Also, in this decision Commissioner must, as always, be careful not to disclose the withheld information in his reasoning, or anything which would lead to the withheld information being confirmed or otherwise discovered. This restriction limits the level of detail he can give to justify his conclusion. (This consideration has been acknowledged by the courts. In the case of [Scottish Ministers v Scottish Information Commissioner \(William Alexander's Application\)](#) [2006] CSIH 8³, the Court of Session commented that, in giving reasons, the Commissioner

¹ [District Valuer Services \(DVS\) - GOV.UK \(www.gov.uk\)](#)

² https://www.angus.gov.uk/housing/information_for_developers/commuted_sums

³ <https://webarchive.nrscotland.gov.uk/20240713015729/https://scotcourts.gov.uk/search-judgments/judgment?id=a94886a6-8980-69d2-b500-ff0000d74aa7>

is necessarily restrained by the need to avoid disclosing information which ought not to be disclosed.) However, as far as he can without revealing the content of information that is withheld, the Commissioner will explain his reasoning below.

Application of the EIRs

21. In its review response, the Authority considered the Applicant's request under the EIRs, having concluded that the information requested was environmental as defined in regulation 2(1) of the EIRs, and applied the exemption in section 39(2) of FOISA. The Applicant has not disputed the Authority's decision to deal with the request under the EIRs.
22. Having considered the terms of the request and the information identified by the Authority as falling within those terms, the Commissioner accepts that any recorded information falling within the request's scope would be environmental information as defined in regulation 2(1) of the EIRs. The Commissioner would regard such information as falling within definitions (a), (b) and (c) of "environmental information" contained in regulation 2(1) of the EIRs, in being information on measures such as policies and plans likely to affect the elements of the environment and/or factors likely to affect those elements. In this context, part (e) of the definition also appears relevant, as any relevant information would be likely to pertain to economic analyses and assumptions relating to these measures. The Commissioner will consider the request in what follows solely in terms of the EIRs.
23. Given that the information requested is environmental information, the Authority had a duty to consider it in terms of regulation 5(1) of the EIRs and in doing so the Authority complied with regulation 5(1) in this regard.

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

24. 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.
25. 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)).
26. Under the EIRs, a public authority may refuse to make environmental information available if one or more of the exceptions in regulation 10 applies, but only if (in all the circumstances) the public interest in maintaining the exception or exceptions outweighs the public interest in making the information available.

The information held by the Authority

27. In its submissions to the Commissioner, the Authority detailed the searches it had carried out to determine what information it held falling within part (i) of the Applicant's request. It provided the Commissioner with a spreadsheet that showed where these files had come from. The Authority informed the Commissioner that it had carried out no searches in relation to part (ii) of the request, as it did not hold the information.
28. The standard of proof to determine whether a Scottish public authority holds information is the civil standard of the balance of probabilities. Having considered the submissions provided, and the information both disclosed and withheld by the Authority, the Commissioner accepts that, on the balance of probabilities, the Authority identified the information it held that fell within part (i) of the Applicant's request.

29. In relation to part (ii) of the request for the calculation carried out by the DV, the Authority explained that it provided information to the DV in order for them to apply their calculation. The DV provided a final figure back to the Authority as the commuted sum, but the Authority did not and would not expect to see the calculations.
30. The Commissioner notes that the Applicant followed the Authority's advice to make an information request to the DV for this information, but that this information was not provided. The Applicant supplied the Commissioner with a copy of the correspondence with the VOA for this request. The Applicant argued that the Authority could have provided the DV with permission for this information to be shared with it.
31. As this was a separate request, to another public authority, no further comment can be made upon how that other request was dealt with – by the VOA - in this decision. It should also be noted that the DV – as part of the VOA – is a UK public authority and is therefore covered by the UK Freedom of Information Act 2000 (FOIA) and the UK Environmental Information Regulations (EIR), which are enforced by the UK Information Commissioner (the ICO).
32. Regulation 10(4)(a) of the EIRs states that a Scottish public authority may refuse to make environmental information available to the extent that it does not hold that information when an applicant's request is received.
33. As stated above, the standard of proof to determine whether a Scottish 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. While it may be relevant as part of this exercise to explore expectations about what information the authority should hold, ultimately the Commissioner's role is to determine what relevant recorded information is (or was, at the time of the request was received) actually held by the public authority.
34. Given the submissions from the Authority on the relationship between the Authority and DV, and the context involved, the Commissioner is satisfied, on the balance of probabilities, that the Authority does not (and did not at the time the request was received from the Applicant) hold the information falling within part (ii) of the Applicant's request. The Authority was therefore entitled to rely on the exception in regulation 10(4)(a) of the EIRs, on the basis that it did not hold the recorded information requested. The Commissioner noted that the EIRs and FOISA place no obligation on Scottish public authorities to facilitate access to information held by other organisations.
35. The exception in regulation 10(4)(a) of the EIRs is subject to the public interest test in regulation 10(1)(b) of the EIRs, but – as stated in previous decisions where this exception has been found to apply - the Commissioner can identify no conceivable public interest in requiring disclosure of information which the Authority does not hold: on balance, therefore, the Commissioner is satisfied that the public interest in maintaining the exception should prevail. He accepts that the Authority complied with the EIRs in its response to part (ii) of the Applicant's request.

Withheld information

36. The Applicant requested the Authority's instruction to the DV, including all information passed to the DV to assist in the commuted sum calculation.

37. The withheld information comprises 37 documents, with one document being withheld completely while the remaining were provided to the Applicant with some information redacted. The Applicant had not contested the redaction of third-party personal data and the Commissioner will therefore not consider whether the Authority complied with the EIRs in withholding this information. The Commissioner does, however, note that in most instances the Applicant would be able to assess from the context of the redaction what type of personal data has been redacted – for example contact information.
38. The information withheld in many documents is the same type of information that has been withheld for the specific year in question. The Authority did supply to the Commissioner information that it did not consider to fall within the scope of the request. Having considered the terms of the request and the information within the documents, the Commissioner was satisfied that the information the Authority had deemed outwith the scope of the request had been correctly withheld as not falling within scope.
39. During the investigation, the Authority provided some further information to the Applicant that it had previously withheld.
40. After this, the remaining documents that contained redactions that were contested were documents 2-10 (inclusive), 18, 20, 21, 26, 27, 30, 33, 34, 35 and 37. These are considered below.

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

41. Regulation 10(5)(e) provides that a Scottish public authority may refuse to make environmental information available to the extent that its disclosure would, or would be likely to, prejudice substantially the confidentiality of commercial or industrial information, where such confidentiality is provided for by law to protect a legitimate economic interest.
42. [The Aarhus Convention: An Implementation Guide](#)⁴, which offers guidance on the interpretation of the Convention from which the EIRs derived, notes (at page 88) that the first test for considering this exception is whether national law expressly protects the confidentiality of the withheld information. The law must explicitly protect the type of information in question as commercial or industrial secrets. Secondly, the confidentiality must protect a “legitimate economic interest”; this term is not defined in the convention, but its meaning is further considered below.
43. Having taken this guidance into consideration, the Commissioner’s view is that, before regulation 10(5)(e) can be engaged, authorities must consider the following matters
 - (i) Is the information publicly available?
 - (ii) Is the information industrial or commercial in nature?
 - (iii) Does a legally binding duty of confidence exist in relation to the information – express or implied?
 - (iv) Would disclosure of the information cause, or be likely to cause, substantial harm to a legitimate economic interest?

⁴ [Aarhus Implementation Guide interactive eng.pdf \(unece.org\)](#)

Submissions from the Applicant on regulation 10(5)(e)

44. In summary, the Applicant submitted that it could not take part in the annual commuted sum consultation process without the requested information and argued, on that basis, that it could not be in the public interest for it not to be able to participate in a public consultation process.
45. The Applicant considered that disclosure would enhance scrutiny of the decision-making process, and thereby accountability and participation, as it would allow the Applicant, a member of the public, the necessary information to respond in full to a public consultation.
46. The Applicant also submitted that disclosure would contribute to the effective oversight of expenditure of public funds and that the public are obtaining value for money.
47. It submitted that disclosure would contribute to the administration of justice and enforcement of law, as the Applicant had concerns that the commuted sum could be inflated as a result of information provided by the Authority to the DV.

Submissions from the Authority on regulation 10(5)(e)

48. The Authority explained that none of the withheld information was publicly available.
49. It submitted that the information was commercial in nature as it related to the commercial activities of third parties, including the development viability statements from developers and their recent development costs.
50. The Authority explained how some of the figures used came from actual tender returns for recently completed projects and that, as such, the commercial sensitivity of the information was undiminished as insufficient time had passed since their completion, at the time of the Applicant's request. Other data was financial information that did not belong to the Authority, and it was long established that this type of information was not disclosed due to its commercial nature.
51. The Authority argued that disclosure could harm the legitimate economic interest of developers who had provided this information to it, by providing competitors with valuable commercial information. It also considered that disclosure could affect future developers of large-scale builds where a commuted sum had to be applied.
52. It submitted that the information was provided to it by various developers on the understanding and knowledge that it would be given to the DV in order to support the commuted sum calculation, but not provided to other competing businesses in the same trade. The Authority was concerned that disclosure would undermine the willingness of other organisations to provide their information in the future, and that without such information the commuted sum was likely to be higher in future as it would be based on estimates as opposed to actual figures.

The Commissioner's view about regulation 10(5)(e)

53. In the following, the Commissioner will consider if the Authority was justified in withholding information under regulation 10(5)(e) of the EIRs. The Commissioner must consider whether the Authority's review complied with the EIRs and must consider disclosure – and any detriment – as at the time of the request or as at date of the Authority's review. He is therefore not considering the position as at the date of the Applicant's application for a decision by the Commissioner, or the intervening period between the application date and the date of this decision.

54. Also, as stated in many previous decisions, the disclosure or withholding of information in one case should not be taken to mean that information in a similar case would necessarily require to be disclosed or withheld. As the Commissioner has made clear in many other decision notices, each case must be considered separately and on a case-by-case basis.

Is the information publicly available?

55. The Commissioner has examined the withheld information and accepts that the majority of it was not in the public domain. Some of the information that was withheld was (at the time of the request) – and still is - in the public domain. The exception does not apply to the information that was in the public domain.

Is the information commercial or industrial in nature?

56. The withheld information comprises information relating to particular developers and financial information related to specific developments, both of which are commercial enterprises.
57. In the circumstances, the Commissioner accepts that some of the information withheld is commercial in nature for the purposes of regulation 10(5)(e) of the EIRs.
58. However, it is difficult to accept that all of the information withheld is commercial or industrial in nature. Some of the information that was withheld cannot be regarded on an objective reading as being information of commercial or industrial nature in the sense intended by the exception in the EIRs. Although the information may occur within a context accepted by the Commissioner (above) as commercial, there are instances where the actual information does not have that nature.

Does a legally binding duty of confidence exist?

59. In terms of regulation 10(5)(e), confidentiality “provided by law” will include confidentiality imposed on any person under the common law of confidence, under a contractual obligation, or by statute.
60. The Commissioner does not accept that custom and practice, in itself, means that all information identified should be, or will be, automatically considered confidential. To accept such a proposition would essentially give public authorities the ability to withhold such information under the EIRs, regardless of whether the information in question is actually confidential. The Commissioner is required to focus on the nature of any withheld information to determine whether the duty of confidence should stand.
61. The Commissioner accepts, in the circumstances, that some of the information relating to the developers and developments, provided to the Authority to assist in the calculation of the commuted sum, was subject to an obligation of confidence. The information comprised build costs that developers were not obliged to provide to the Authority, and would not have expected them to be placed into the public domain, which is the result of a disclosure under the EIRs.
62. As the Commissioner noted above, other information that is being withheld can be found in the public domain, on, for example, the Authority’s planning portal or through using [Scotland’s Land Information Service](#)⁵. The Commissioner will not list the examples in this decision notice as to do so would in essence be to disclose information that the Authority

⁵ [Search land register - ScotLIS - Registers of Scotland \(ros.gov.uk\)](#)

withheld. Given this, it is difficult to then determine that there is an obligation to keep this information confidential.

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

63. The term “legitimate economic interest” is not defined in the EIRs. In the Commissioner’s view, the interest in question should be financial, commercial or otherwise “economic” in nature. The prejudice to that interest must be substantial; in other words, it must be of real and demonstrable significance.
64. Although the Authority identified no specific provision in law to protect the confidentiality of those economic interests, the Commissioner accepts that some of the withheld information was provided to the Authority voluntarily to assist in the calculation of the commuted sum, and that there was no expectation that this information would be put into the public domain.
65. Having considered the submissions, and the information itself, the Commissioner recognises the information was provided with an expectation of maintaining confidentiality. He also taken account of the fact that, at the time of the request, this information may have been of more commercial value than with the passage of time.
66. In the circumstances, the Commissioner accepts that disclosure some of the withheld information in this case would be likely to prejudice the legitimate economic interest of those developers who provided the Authority with the information.
67. The Commissioner is satisfied, therefore, that the Authority was entitled to apply the exception in regulation 10(5)(e) to some of the information falling within the scope of the request.
68. In relation to other information that has been withheld, the Commissioner is not satisfied that the Authority has demonstrated disclosure of that information would cause, or be likely to cause, the substantial harm necessary for this exception to be engaged. Just because information relates to a commercial enterprise does not in itself mean that its disclosure will cause harm. Consequently, in relation to this information, he cannot accept that the Authority can justify the application of regulation 10(5)(e).
69. Therefore, the Commissioner must find that, by wrongly withholding some information under regulation 10(5)(e), the Authority failed to comply with regulation 5(1) of the EIRs of the EIRs.
70. He requires the Authority to disclose this information to the Applicant.

Public interest test - Regulation 10(5)(e)

71. Having accepted that the exception in regulation 10(5)(e) applies to some of the information, the Commissioner is required to consider the public interest test in regulation 10(1)(b) of the EIRs. This states that a Scottish public authority may only withhold information to which an exception applies where, in all the circumstances, the public interest in making the information available is outweighed by the public interest in maintaining the exception.
72. The Applicant’s view on the public interest is detailed in paragraphs 44-47 above.
73. The Authority recognised that disclosure would be in the public interest as it would enhance transparency and scrutiny of the actions of public authorities.

74. It considered that the nature of the commercial information, the commuted sum, how it affects the Angus area, and the ongoing yearly review and submissions process for calculating the commuted sum all favoured maintaining the exemption.
75. The Authority believed that disclosure could cause harm to the commercial interest of those submitting information and the Authority itself, and that the risk of this outweighed the public interest in making this information available.

The Commissioner's view on the public interest

76. The Commissioner has already concluded that disclosure of this information would be likely to cause substantial prejudice to a legitimate economic interest and has also found an implied duty of confidence in relation to the withheld information.
77. The Commissioner also recognises there is a considerable public interest in transparency and public scrutiny in relation to how public authorities make decisions.
78. However, he must also take into account the harm he has acknowledged above, and his acceptance that the information was provided in confidence. There is a clear public interest in ensuring that commuted sums are calculated using actual, as opposed to estimated, data.
79. The Commissioner has considered carefully all the public interest arguments he has received. He must consider whether the Authority was correct in its decision, at the time it responded to the request and subsequent requirement for review. That position may change in time, but the issue here is whether the Authority responded to this particular request correctly at the relevant time. As has been stated in previous decisions, it is important to appreciate that the sensitivity of information may alter over time and information that may have been properly withheld at one point in time may be capable of disclosure at another.
80. In all of the circumstances of the case, therefore, the Commissioner finds that the public interest in maintaining the exception outweighed that in making the information available, at the time the Authority responded to the Applicant's request and requirement for review. He therefore concludes that the Authority was entitled to withhold the information under regulation 10(5)(e) of the EIRs.
81. The Commissioner, having carefully considered the public interest arguments put forward by both the Applicant and the Authority, has concluded that the public interest making the information available is outweighed by the public interest in maintaining the exception in regulation 10(5)(e) of the EIRs. He is, therefore, satisfied that the Authority was entitled to withhold the remaining information under regulation 10(5)(e).

Conclusions

82. The information disclosed by the Authority during the investigation should have been disclosed by the Authority at review (at the latest). By failing to disclose this and the further information that the Commissioner has determined did not fall within the exception cited, the Authority failed to comply with regulation 5(1) in this regard. The Commissioner will provide the Authority with a marked-up copy of the information to be disclosed.

Decision

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

The Authority correctly identified the requested information as environmental information, as defined in regulation 2(1) of the EIRs.

The Commissioner finds that the Authority was entitled to withhold some information under regulation 10(5)(e) of the EIRs, and correctly applied the exception at 10(4)(a) to part (ii) of the request (and by doing so complied with the EIRs).

However, the Commissioner also finds that the Authority failed to comply with regulation 5(1)(a) of the EIRs when it wrongly withheld information under regulation 10(5)(e).

The Commissioner therefore requires the Authority to provide the Applicant with the information that was wrongly withheld by 9 December 2024.

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

24 October 2024