

Decision Notice

Decision 177/2016: Mrs L and the Scottish Environment Protection Agency

Correspondence between SEPA and a third party

Reference No: 201600053

Decision Date: 19 August 2016



Summary

On 27 May 2015, Mrs L asked the Scottish Environment Protection Agency (SEPA) for correspondence between itself and a third party. SEPA disclosed some information and withheld the remainder.

The Commissioner investigated and found that SEPA had properly responded to Mrs L's request for information in accordance with the EIRs. She accepted that information was correctly withheld under the exceptions which SEPA relied upon. She did not require SEPA to take any action.

Relevant statutory provisions

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (definitions (a), (b) and (c) "environmental information") and 2(3) (definitions (b) ("the data protection principles" and (d) ("personal data")); 5(1) and (2) (Duty to make available environmental information on request); 10(1), (2), (3), (5)(f) and (6) (Exceptions from duty to make environmental information available); 11(2), (3)(a)(i) and (b) (Personal data)

Data Protection Act 1998 (the DPA) sections 1(1) (Basic interpretative provisions) (definition of "personal data"); Schedules 1 (The data protection principles, Part I - the principles) (the first data protection principle) and 2 (Conditions relevant for purposes of the first principle: processing of any personal data) (Condition 6)

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 27 May 2015, Mrs L made a request for information to SEPA. She asked (amongst other requests not the subject of this decision) for all documentation, including letters, emails and telephone calls, between a third party and SEPA from the beginning of 2010 to the present day in connection with a specified matter.
2. SEPA responded on 24 June 2015. It disclosed some redacted documents, withholding some information within these documents under regulation 11(2) of the EIRs (Personal information). SEPA withheld other documents in their entirety under regulation 10(5)(b) of the EIRs (Course of justice, etc.).
3. On 25 June 2015, Mrs L emailed SEPA requesting a review of its decision. She provided detailed arguments as to why the requested information should not be withheld.
4. SEPA notified Mrs L of the outcome of its review on 28 August 2015. SEPA disclosed further information. It continued to withhold information under regulation 11(2) of the EIRs. SEPA modified its previous response in relation to the remaining information, which it now considered excepted from disclosure under regulation 10(5)(f) of the EIRs (Prejudice to the interests of a third party) and not regulation 10(5)(b).
5. On 21 December 2015, Mrs L applied to the Commissioner for a decision in terms of section 47(1) of FOISA. By virtue of regulation 17 of the EIRs, Part 4 of FOISA applies to the

enforcement of the EIRs as it applies to the enforcement of FOISA, subject to specified modifications.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that Mrs L made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to her for a decision.
7. On 12 January 2016, SEPA was notified in writing that Mrs L had made a valid application. SEPA was asked to send the Commissioner the information withheld from her. SEPA provided the information and the case was 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. SEPA was invited to comment on the application and answer specific questions, including justifying its reliance on any provisions of the EIRs it considered applicable to the information requested.
9. SEPA provided its submission on 19 April 2016. It identified a number of documents falling within scope of the request, and noted that one of the documents had been considered in a previous decision by the Commissioner.
10. Mrs L was informed that one document had been previously considered by the Commissioner in another decision, and agreed that this document need not be considered again in this decision.
11. SEPA was asked for additional submissions on the information being withheld. SEPA responded to these questions (its submissions are considered below).
12. Mrs L was invited to provide her views as to why the withheld information should be disclosed, and did so. Mrs L confirmed that she did not require SEPA to provide information which was her own personal information.
13. Mrs L put forward the view that the withheld information related to emissions and, consequently, regulation 10(6) of the EIRs was engaged and regulation 10(5)(f) could not be relied upon. She provided comments to support her view.
14. SEPA was invited to provide its comments on whether regulation 10(6) was engaged, and did so.

Commissioner's analysis and findings

15. In coming to a decision on this matter, the Commissioner has considered all of the withheld information and the relevant submissions, or parts of submissions, made to her by both Mrs L and SEPA. She is satisfied that no matter of relevance has been overlooked.
16. In reaching her decision, the Commissioner would emphasise that her remit is to assess and decide upon SEPA's compliance with the EIRs (and other FOI legislation). The Commissioner does not have the powers to assess SEPA's performance in relation to other statutory duties, or the accuracy of the information provided. Where the Commissioner has considered the processes SEPA followed, this was purely in the context of establishing and considering what relevant information SEPA holds in relation to the matter specified by Mrs L.

Application of the EIRs

17. The Commissioner is satisfied that the information covered by this request is environmental information, as defined in regulation 2(1) of the EIRs (paragraphs (a) to (c) of the definition of “environmental information”). The information relates substantially to factors affecting the elements of the environment. Mrs L has not disputed SEPA’s decision to handle the request under the EIRs and so the Commissioner will consider the information solely in terms of the EIRs in what follows.

Regulation 10(5)(f)

18. SEPA withheld the majority of the information falling in scope of the request under the exception in regulation 10(5)(f) of the EIRs.

19. Under regulation 10(5)(f) of the EIRs, 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 interests of the person who provided the information where that person:

- (i) was not under, and could not have been put under, any legal obligation to supply the information;
- (ii) did not supply it in circumstances such that it could, apart from the EIRs, be made available; and
- (iii) has not consented to its disclosure.

20. Regulation 10(2) of the EIRs provides that this exception must be interpreted in a restrictive way and that the public authority shall apply a presumption in favour of disclosure. The exception is also subject to the public interest test in regulation 10(1)(b).

21. There are a number of factors that should be addressed in considering whether this exception applies. These include:

- (i) Was the information provided by a third party?
- (ii) Was the provider, or could the provider be, required by law to provide it?
- (iii) Is the information otherwise publicly available?
- (iv) Has the provider consented to disclosure?
- (v) Would disclosure of the information cause, or be likely to cause, substantial harm to the interests of the provider?

22. Although question (iv) makes reference to the consent (or otherwise) of the provider of information, it is the responsibility of the public authority to formulate and make submissions to the Commissioner to show why the information should be withheld.

Does regulation 10(5)(f) apply in this case?

23. SEPA provided the Commissioner with a copy of its correspondence with the third party regarding the potential disclosure of the withheld information.

24. SEPA had explained to the third party that some of the information falling in scope of Mrs L’s request had been placed in the public domain by disclosure of other documents. SEPA told the third party that it was content to disclose this information in response to Mrs L’s request, but intended to withhold other information covered by her request under regulation 10(5)(f) and regulation 11 of the EIRs.

25. The third party confirmed to SEPA that they objected to the disclosure of the remaining information and stated that they had provided the information voluntarily. The third party also stated that the withheld information was material to them in their preparations for legal proceedings.
26. Mrs L disputed that the information had been provided voluntarily by the third party. She considered that the information related to drainage arrangements which had affected her property and her land, and which had to be formally approved by SEPA. Mrs L asserted that there were no ongoing court proceedings.
27. SEPA confirmed to the Commissioner that the withheld information was not required for a regulatory purpose. The information was not part of an application form or any other document that would be available through the SEPA Public Register.
28. The Commissioner accepts that the majority of the information withheld under regulation 10(5)(f) was provided voluntarily to SEPA by a third party, namely the third party whose correspondence was recorded either in the form of emails or telephone notes. It is clear that, for the most part, the correspondence was instigated by the third party, who contacted SEPA for advice. The correspondence does not relate to a formal application to SEPA. The Commissioner is satisfied from the explanation provided by SEPA, that the third party was not legally obliged to provide SEPA with this information.
29. The Commissioner notes that some of the telephone notes contain information that was not provided by the third party and, consequently, regulation 10(5)(f) cannot apply to this information. The Commissioner will consider later whether regulation 11(2) of the EIRs applies to this information.
30. The exception in regulation 10(5)(f) cannot apply to information which is otherwise publicly available. The Commissioner has received no evidence that the information which has been withheld from Mrs L is, or has been, publicly available.
31. The Commissioner is satisfied that the third party:
 - (i) was under no obligation, and could not be put under an obligation, to provide the information to SEPA;
 - (ii) did not supply the information about the options in circumstances such that it could be made available apart from under the EIRs; and
 - (iii) has not consented to the information being disclosed.
32. She will therefore go on to consider whether disclosure of the information would, or would be likely to, prejudice substantially, the interests of the third party who provided it. Unless disclosure would, or would be likely to, cause substantial prejudice, the information must be disclosed.

Substantial prejudice

33. If a Scottish public authority withholds information under regulation 10(5)(f), it must identify the harm that disclosure would cause to the interests of the person who provided the information. The harm must be real, actual and of substance.

SEPA's submissions

34. SEPA considered that disclosure of the information would adversely affect the interests of the third party, and provided copies of correspondence from the third party which supported this view.

Mrs L's submissions

35. In her correspondence with SEPA, Mrs L submitted that disclosure of the documentation would only substantially prejudice the outcome of legal proceedings if something that has been agreed between SEPA, the relevant local authority and the contractors is fundamentally wrong, is covert, or outwith normal procedures and normal practice by which everyone else has to comply.
36. Mrs L also submitted that SEPA was not in a position to judge what could or could not be prejudicial: this has to be determined in a court of law and, therefore, SEPA has to be seen to be transparent, open-handed and above all honest and equitable. She stated that if SEPA and the local authority have agreed an approach having followed the correct procedures and policies, then there was no reason why the associated documentation could not be disclosed.
37. Mrs L submitted that the work that had taken place at the third party's property was not in line with the requirements from SEPA that she had to comply with when a new system was installed in her house. (It is understood from Mrs L that she is comparing the process she had to undergo to install drainage at her own house with the process that seems to have been undertaken by the third party.)

The Commissioner's findings

38. The Commissioner notes Mrs L's concerns, and accepts it is reasonable for her to want to understand the discussions that took place on a matter she believes to have affected her property, and to understand why a particular approach was adopted.
39. The Commissioner notes that the withheld information forms part of a general discussion, seeking guidance and assistance from SEPA and providing updates on the current situation. The Commissioner accepts that correspondence did not form part of any formal regulatory process. She concludes that the correspondence came about after an individual sought guidance from a public authority. The Commissioner also accepts that, in seeking such guidance from SEPA, the third party had no expectation that their correspondence and the telephone notes of their telephone calls would be information which would be requested under FOI legislation. From the correspondence provided to the Commissioner, it is clear that the third party was extremely concerned when informed that this was the case.
40. In the circumstances of this case, the Commissioner is satisfied that disclosure of the withheld information would, or would be likely to, substantially prejudice the third party who provided the information to SEPA. She notes that this person has objected to its disclosure and has specified the nature of the harm that disclosure would cause.
41. The Commissioner has therefore found that SEPA correctly applied the exception in regulation 10(5)(f) to the majority of the information under consideration, except for some information in the telephone notes to which the exception does not apply. She will now go on to consider the balance of the public interest in relation to withholding or disclosing the information to which regulation 10(5)(f) has been found to apply.

Public interest test

42. The exception in regulation 10(5)(f) is subject to the public interest test in regulation 10(1)(b) of the EIRs. Even if an exception has been judged to apply, a Scottish public authority may only refuse a request to make environmental information available if, in all the circumstances, the public interest in making the information available is outweighed by that in maintaining the exception (that is, in withholding the information).

SEPA's submissions

43. SEPA's arguments in relation to the public interest test focussed heavily on the public interest in avoiding the harm that would follow disclosure of the information withheld in this case, in terms of prejudice to the interests of the third party. In the circumstances, SEPA did not consider that the disclosure of the withheld information would promote public interest factors such as "transparency and accountability of public authorities, greater public awareness and understanding of environmental matters, a free exchange of views, and more effective public participation in environmental decision-making".

Mrs L's submissions

44. Mrs L considered that there was considerable public interest in disclosure of the withheld information, since it concerned her, neighbouring properties and adjacent land and the public who use the nearby road.
45. Mrs L gave reasons for her arguments, focussing on the natural history, historical significance and condition of the land and road in question.

The Commissioner's conclusions

46. The Commissioner's briefing on the public interest¹ states:
- "The EIRs do not define the public interest, but it has been described elsewhere as "something which is of serious concern and benefit to the public", not merely something of individual interest. It has also been described as "something that is "in the interest of the public", not merely "of interest to the public." In other words, it serves the interests of the public."
47. In considering the public interest in disclosure against that in maintaining the exception, the Commissioner acknowledges the general public interest in transparency in environmental matters, and the detailed reasons Mrs L has given to show why she believes disclosure of the information would be in the public interest.
48. Against this, the Commissioner must balance the public interest in avoiding harm to the interests of the third party. She is mindful that the withheld information does not relate to a regulatory matter, and is a record of what were, in effect, private discussions between the third party and SEPA.
49. The Commissioner notes that the third party has strongly objected to disclosure of the information and has referred to the possibility of legal proceedings, which Mrs L disputes. Taking all of these matters into consideration, the Commissioner finds that disclosure would not be in the public interest. The information concerns private matters that are not related to SEPA's regulatory process. Although disclosure would serve Mrs L's interests, the

¹ <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/ThePublicInterestTest/ThePublicInterestTestEIRs.aspx>

Commissioner is not persuaded, on balance, that disclosure of information from the third party's conversations and correspondence with SEPA is in the public interest in a general sense. Consequently, she finds that the public interest in maintaining the exception in regulation 10(5)(f) of the EIRs outweighs the public interest in disclosure of the withheld information, and that SEPA was entitled to withhold the information in question under regulation 10(5)(f) of the EIRs.

Regulation 10(6)

50. Regulation 10(6) states:

"To the extent that the environmental information to be made available relates to information on emissions, a Scottish public authority shall not be entitled to refuse to make it available under an exception referred to in paragraph (5)(d) to (g)."

51. The term "emissions" is not explicitly defined in the EIRs, or in the European Directive on access to environmental information (2003/4/EC) which they are intended to implement. The Aarhus Convention: An Implementation Guide (2013)² refers to the definition of "emissions" contained in the Industrial Emissions Directive as:

"direct or indirect release of substances, vibrations, heat or noise from individual or diffuse sources in the installation into air, water, or land"

Mrs L's submissions

52. Mrs L submitted that as the withheld information related to emissions, regulation 10(6) of the EIRS was engaged and regulation 10(5)(f) could not apply.

53. Mrs L has submitted that the withheld information "specifically surrounds emissions" and explained why. Mrs L noted that, technically, an emission is anything that has been released out into the open, including car exhaust, burps and radio broadcasts, although more often it refers to gases released into the air, like greenhouse gases or emissions from power plants and factories. She argued that any substance emitted from a body is also an emission.

SEPA's submissions

54. In providing its submissions, SEPA referred to guidance on emissions published by the Commissioner and by the (UK) Information Commissioner (ICO). SEPA referred in particular to paragraph 11 of an ICO guidance document on emissions³, which states:

"Applying these definitions, emissions will generally be:

- the by-product of an activity or process;
- which is added (or potentially added) to and affecting the elements of the environment;
- over which any control is relinquished"

55. SEPA submitted that the potential discharge in this case does not meet all the criteria above, in that control is not relinquished. SEPA provided a copy of the Controlled Activities Regulations (CAR registration) authorisation for the discharge concerned. SEPA noted that this authorisation specifies the Authorised Activity and the location of the permitted

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http://www.unece.org/fileadmin/DAM/env/pp/Publications/Aarhus_Implementation_Guide_interactive_eng.pdf

³ <https://ico.org.uk/media/for-organisations/documents/1616/information-on-emissions-eir-guidance.pdf>

discharge. SEPA explained that it also contains detailed Conditions of Authorisation with the intention that the authorised activity “shall not have a significant adverse impact on, or cause pollution of the water environment”.

56. SEPA referred to paragraphs 43 to 46 of the Commissioner’s *Decision 242/2014: Friends of Loch Etive and Argyll and Bute Council*⁴, specifically:
43. *When considering the definition of emissions, the Commissioner has also taken account of a ruling of the EU General Court (T-545/11, Stichting Greenpeace Nederland and PAN Europe v European Commission*⁵) which required the European Commission to disclose environmental pesticide information to NGOs. The Court rejected the Commission’s claim that the notion of emissions into the environment should be interpreted restrictively. It ruled that:
- “...in order for the disclosure to be lawful, it suffices that the information requested relate in a sufficiently direct manner to emissions into the environment”*
44. *On the other hand, the Commissioner can find no basis for attaching any weight to the double reference to “information” in regulation 10(6). The equivalent provision in Directive 2003/4/EC (applied by the ECJ in case T-545/11) simply refers to “information on emissions into the environment” and the Commissioner is satisfied in the circumstances that the phrasing of the regulation is simply an error in transposition. She does not believe “information relating to information”, in this context, has any wider import than “information”. She believes the approach taken by the ECJ should be followed in interpreting the EIRs in this case.*
45. *The Commissioner must therefore consider whether the withheld information can be considered to relate in a sufficiently direct manner to emissions into the environment. She must consider the actual information withheld and the actual arguments she has received.*
46. *The Commissioner understands the reasoning given by [Friends of Loch Etive] (summarised from paragraph 37 above) about the operations of fish-farms, but she must take into account the actual information withheld, not the expectation of what is held. Having considered the withheld information, the Commissioner is satisfied that it does not relate in a sufficiently direct manner to emissions into the environment.*
57. SEPA found it relevant to consider the actual information being withheld in this case in relation to regulation 10(6). It concluded that the notes of the telephone conversations and email correspondence that have been withheld “are pertinent to discussions relating to legal issues, including servitude rights between the relevant parties, and to the potential regulatory interpretation of the ongoing matters. Furthermore, discussions were also recorded regarding the potential regulatory options that were available to the parties and to SEPA. The discussions pre-date the granting of the CAR Registration [to the third party] ...”.
58. SEPA noted that analytical reports of sampling undertaken prior to the CAR registration to assess the environmental impact of the combined septic tank outfall to watercourses in the relevant vicinity was disclosed to Mrs L in its review response. SEPA considered that this information would fall within the scope of regulation 10(6).

⁴ <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2014/201400694.aspx>

⁵ <http://curia.europa.eu/juris/liste.jsf?num=T-545/11>

59. In relation to the information under consideration in this decision, however, SEPA is of the view that the information does not “relate in a sufficiently direct manner to the emissions into the environment” and does not fall within the scope of regulation 10(6) of the EIRs. Consequently SEPA considered that regulation 10(5)(f) had been correctly applied.

The Commissioner’s conclusions

60. In reaching a decision, the Commissioner must consider whether the withheld information relates to emissions into the environment in a sufficiently direct manner. She must consider the actual information withheld as well as the arguments she has received.
61. Having considered the actual withheld information, the Commissioner agrees with SEPA that it relates to legal issues, including servitude rights between the relevant parties, and to the potential regulatory interpretation of the ongoing matters.
62. After considering the definition of emissions and relevant case law to which reference has already been made, the Commissioner has concluded that the withheld information is not about emissions in the direct way required for the information to engage regulation 10(6) of the EIRs. It is different in nature from the information disclosed by SEPA to Mrs L in its review response, which was about emissions and which was disclosed in line with the requirements of regulation 10(6) of the EIRs. The Commissioner finds there is no information about emissions within the withheld information being considered in this decision.
63. Therefore the Commissioner finds that SEPA correctly withheld the information under regulation 10(5)(f) of the EIRs.

Regulation 11(2) of the EIRs - personal data of third parties

64. As noted, the Commissioner found that some of the information in the telephone notes was not excepted under regulation 10(5)(f). SEPA also relied upon regulation 11(2) to withhold the information, so the Commissioner will consider whether this exception was correctly applied to the information in the telephone notes not excepted under regulation 10(5)(f).
65. In order for a Scottish public authority to rely on the exception in regulation 11(2) of the EIRs, it must show (i) that the information is personal data for the purposes of the DPA, and (ii) that making it available would contravene at least one of the data protection principles laid down in the DPA. In this case, SEPA argued that the first data protection principle would be contravened if the information was disclosed.

Is the withheld information personal data?

66. The definition of “personal data” is contained in section 1(1) of the DPA. “Personal data” means data which related to a living individual who can be identified from those data or from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller. (The definition is set out in full in Appendix 1.)
67. In the Commissioner’s briefing on personal data⁶, she has accepted that, in most cases, it will be easy to tell if information is personal data. (The briefing focuses on the personal data exemptions in FOISA, but is equally relevant to the personal data exceptions in the EIRs.) The two main elements of personal data are that the information must “relate to” a living person, and that the person must be identifiable. Information will “relate to” a person if it is

⁶ <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section38/Section38.aspx>

about them, linked to them, has some biographical significance for them, is used to inform decisions affecting them, has them as its main focus or impacts on them in any way.

68. The Commissioner accepts that both elements can be met here. Mrs L already knows the identity of the data subject (so the third party is identifiable) and the information clearly relates to the third party.

The first data protection principle

69. The first data protection principle states that the processing of personal data (in this case, making those data publicly available in response to a request made under the EIRs) must be fair and lawful and, in particular, that personal data shall not be processed unless at least one of the conditions in Schedule 2 to the DPA is met. In the case of sensitive personal data, at least one of the conditions in Schedule 3 to the DPA must also be met. The Commissioner has considered the definition of sensitive personal data set out in section 2 of the DPA and does not consider any of the withheld information to be sensitive personal data.
70. There are three separate aspects to the first data protection principle:
- (i) fairness
 - (ii) lawfulness and
 - (iii) the conditions in the schedules.

These three aspects are interlinked. For example, if there is a specific condition which permits the personal data to be made available, it is likely that disclosure will also be fair and lawful.

71. The Commissioner will now go on to consider whether there are any conditions in Schedule 2 to the DPA which would permit the personal data to be made available. If any of these conditions can be met, she must then consider whether the disclosure of these personal data would also be fair and lawful.

Can any of the conditions in Schedule 2 to the DPA be met?

72. When considering whether personal data can be disclosed under FOISA or the EIRs, in practice it is only conditions 1 and 6 which are likely to be relevant.
73. Condition 1 allows personal data to be disclosed where the data subject has consented to the information being disclosed. Consent has to be given freely and on the understanding that the personal data will be put into the public domain.
74. SEPA provided evidence to show that the third party had not given consent to disclose the information, when consulted. Therefore, condition 1 cannot be met.
75. The Commissioner has considered the remaining conditions in Schedule 2 and considers that condition 6 is the only one which might be relevant in this case. Condition 6 allows personal data to be processed if the processing is necessary for the purposes of legitimate interests pursued by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subjects (i.e. the individuals to whom the data relates; in this case, the third party). The processing in this case would be making the data available in response to Mrs L's request.
76. There are, therefore, a number of different tests which must be satisfied before condition 6 can be met. These are:

- (i) Is Mrs L pursuing a legitimate interest or interests?
- (ii) If yes, is the processing involved necessary for the purposes of those interests? In other words, is the processing proportionate as a means and fairly balanced as to ends, or could these interests be achieved by means which interfere less with the privacy of the data subjects?
- (iii) Even if the processing is necessary for Mrs L's legitimate interests, is that processing nevertheless unwarranted in this case by reason of prejudice to the rights and freedoms or legitimate interests of the data subjects?

Is Mrs L pursuing a legitimate interest or interests?

77. There is no definition within the DPA of what constitutes a "legitimate interest", but the Commissioner takes the view that the term indicates that matters in which an individual properly has an interest should be distinguished from matters about which he or she is simply inquisitive. In the Commissioner's published guidance on personal information⁷, 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."

- 78. SEPA accepted that Mrs L was pursuing a legitimate interest in making her information request. However, the third party did not accept that Mrs L had a legitimate interest in the withheld information.
- 79. Mrs L believed that she was entitled to receive the withheld correspondence and explained why. She also questioned whether the information was not, in effect, already in the public domain.
- 80. Having considered the submissions from both Mrs L and SEPA, the Commissioner accepts that Mrs L is pursuing a legitimate interest in seeking to understand the actions taken by the third party.
- 81. The Commissioner notes the arguments presented by the third party, but she must reach a balanced decision. In the circumstances of this case, she accepts that Mrs L does have a legitimate interest in the withheld information.

Is the processing necessary for the purposes of those legitimate interests?

- 82. In its review response to Mrs L, SEPA submitted that the specific reasons given by Mrs L in her request for review would not, in its opinion, achieve her legitimate interests.
- 83. The Commissioner notes SEPA's comments, but she considers that disclosure of the withheld correspondence is the only viable means for Mrs L to be satisfied that she has a complete understanding of the matters discussed. The Commissioner not found any viable means which would interfere less with the privacy of the data subjects than the provision of the withheld personal data. In the circumstances, she is satisfied that making those personal data available is necessary to meet the legitimate interests in question.

⁷ <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section38/Section38.aspx>

Is the processing unwarranted in this case by reason of prejudice to the rights, freedoms or legitimate interests of the data subjects?

84. The Commissioner must now consider whether the processing is unwarranted by reason of prejudice to the rights and freedoms or legitimate interests of the individuals concerned. This test involves a balancing exercise between the legitimate interests of Mrs L and the rights, freedoms and legitimate interests of the third party. Only if the legitimate interests of Mrs L outweigh those of the third party concerned can the information be made available without breaching the first data protection principle.
85. In the Commissioner's guidance on personal information, she notes a number of factors which should be taken into account in carrying out the balancing exercise. These include:
 - (i) whether the information relates to the individual's public life (i.e. their work as a public official or employee) or their private life (i.e. their home, family, social life or finances)
 - (ii) the potential harm or distress that may be caused by the disclosure
 - (iii) whether the individual objected to the disclosure
 - (iv) the reasonable expectations of the individuals as to whether the information should be disclosed.
86. The Commissioner is satisfied that the remaining withheld information comes from correspondence or conversation with SEPA which the third party believed to be private. From Mrs L's correspondence, the Commissioner understands she expects the withheld information to relate to the regulatory process. However, this is not the case. As discussed above, the withheld information did not form part of a regulatory process.
87. The third party is aware of Mrs L's interest in the withheld information, and has not chosen to share the information with Mrs L. The third party has been adamant that the withheld information should not be disclosed.
88. The Commissioner notes that Mrs L and the third party have received some of the other correspondence exchanged with SEPA on these matters, sometimes in redacted form. Mrs L has commented that as her correspondence can be disclosed to the third party, she should have reciprocal access to the third party's correspondence. The Commissioner notes this point, but concludes that the disclosed correspondence has been in relation to regulatory matters that SEPA is required to disclose, whilst protecting personal information.
89. The Commissioner has to reach a decision in this case on the matters under consideration and the facts that apply to this specific case. She cannot comment on matters that have occurred elsewhere and which do not relate directly to the information under consideration.
90. Having considered the competing interests in this particular case, the Commissioner finds that Mrs L's legitimate interests are outweighed by the prejudice to the rights and freedoms of the third party that would result from disclosure. On balance, therefore, she must find that the requirements of condition 6 cannot be met here.
91. Given this conclusion, the Commissioner finds that there is no condition in Schedule 2 which would permit disclosure of the information. In the absence of a condition permitting disclosure, that disclosure would be unlawful. Consequently the Commissioner finds that disclosure of the information would breach the first data protection principle and that the information is therefore excepted from disclosure (and properly withheld) under regulation 11(2) of the EIRs.

Decision

The Commissioner finds that SEPA complied with Part 1 of the Environmental Information (Scotland) Regulations 2004 in responding to the information request made by Mrs L.

Appeal

Should either Mrs L or SEPA 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.

Rosemary Agnew
Scottish Information Commissioner

19 August 2016

Appendix 1: Relevant statutory provisions

The Environmental Information (Scotland) Regulations 2004

2 Interpretation

(1) In these Regulations –

...

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

-

- (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
- (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in paragraph (a);
- (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in paragraphs (a) and (b) as well as measures or activities designed to protect those elements;

...

(3) The following expressions have the same meaning in these Regulations as they have in the Data Protection Act 1998, namely-

...

(b) "the data protection principles";

...

(d) "personal data".

...

5 Duty to make available environmental information on request

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

(2) The duty under paragraph (1)-

...

(b) is subject to regulations 6 to 12.

10 Exceptions from duty to make environmental information available–

- (1) A Scottish public authority may refuse a request to make environmental information available if-
 - (a) there is an exception to disclosure under paragraphs (4) or (5); and
 - (b) in all the circumstances, the public interest in making the information available is outweighed by that in maintaining the exception.
- (2) In considering the application of the exceptions referred to in paragraphs (4) and (5), a Scottish public authority shall-
 - (a) interpret those paragraphs in a restrictive way; and
 - (b) apply a presumption in favour of disclosure.
- (3) Where the environmental information requested includes personal data, the authority shall not make those personal data available otherwise than in accordance with regulation 11.
...
- (5) A Scottish public authority may refuse to make environmental information available to the extent that its disclosure would, or would be likely to, prejudice substantially-
...
 - (f) the interests of the person who provided the information where that person-
 - (i) was not under, and could not have been put under, any legal obligation to supply the information;
 - (ii) did not supply it in circumstances such that it could, apart from these Regulations, be made available; and
 - (iii) has not consented to its disclosure; or
- (6) To the extent that the environmental information to be made available relates to information on emissions, a Scottish public authority shall not be entitled to refuse to make it available under an exception referred to in paragraph (5)(d) to (g).
....

11 Personal data

- ...
- (2) To the extent that environmental information requested includes personal data of which the applicant is not the data subject and in relation to which either the first or second condition set out in paragraphs (3) and (4) is satisfied, a Scottish public authority shall not make the personal data available.
- (3) The first condition is-
 - (a) in a case where the information falls within paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998 that making the information available otherwise than under these Regulations would contravene-
 - (i) any of the data protection principles; or
...

- (b) in any other case, that making the information available otherwise than under these Regulations would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.

...

Data Protection Act 1998

1 Basic interpretative provisions

- (1) In this Act, unless the context otherwise requires –

...

“personal data” means data which relate to a living individual who can be identified –

- (a) from those data, or
- (b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,

and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual;

...

Schedule 1 – The data protection principles

Part I – The principles

- 1. Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –
 - (a) at least one of the conditions in Schedule 2 is met, and
 - (b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.

...

Schedule 2 – Conditions relevant for purposes of the first principle: processing of any personal data

...

- 6. (1) The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.

Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews, Fife
KY16 9DS

t 01334 464610

f 01334 464611

enquiries@itspublicknowledge.info

www.itspublicknowledge.info