

Decision Notice



Decision 190/2011 Dr Nader Yakoub and Perth and Kinross Council

Information relating to a noise complaint

Reference No: 201100514

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Summary

Dr Yakoub made two separate requests for information to Perth and Kinross Council (the Council) regarding a complaint he had made about noise. When responding to Dr Yakoub's first request, the Council disclosed some information, subject to the redaction of certain information which it considered exempt from disclosure under section 38(1)(b) of the Freedom of Information (Scotland) Act 2002 (FOISA). It explained that this information was considered personal data, disclosure of which would breach the first and second data protection principles. When responding to the second request, the Council notified Dr Yakoub (in line with section 17(1) of FOISA) that it did not hold certain of the requested information, but it disclosed other relevant information to him. Following a review of both requests, Dr Yakoub remained dissatisfied and applied to the Commissioner for a decision.

During the course of the investigation, the Council was advised that the information requested by Dr Yakoub appeared to comprise environmental information, in which case, his requests should have been considered under the EIRs. The Council agreed that the requested information was environmental information and so reconsidered both requests in terms of the EIRs.

Further information relevant to Dr Yakoub's requests was identified and disclosed to him by the Council during the investigation.

Following an investigation, the Commissioner found that, by initially failing to recognise that Dr Yakoub's requests sought environmental information, and respond to them in terms of the EIRs, it had failed to comply with the EIRs. The Commissioner also found that the Council failed to comply with regulation 5(1) and (2)(b) of the EIRs in not providing Dr Yakoub with all recorded information held by it failing within the scope of his requests. However, the Commissioner found that the Council was entitled to withhold certain information on the basis that it was excepted from disclosure under regulation 11(2) of the EIRs.

Since the Council had rectified the breaches identified above by disclosing additional information during the investigation, the Commissioner did not require any action to be taken in response to this decision.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1) (Effect of exemptions) and 39(2) (Health, safety and the environment)



The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (Interpretation) (definitions (a), (b), (c) and (f) of “environmental information”); 5(1) and 2(b) (Duty to make environmental information available on request), 10(1), (2), (3) and (4)(a) (Exceptions from duty to make environmental information available on request) and 11(2) and (3)(a)(i) and (b) (Personal data)

Data Protection Act 1998 (the DPA) sections 1(1) (Basic interpretative provisions) (definition of “personal data” and 2(e) (Sensitive personal data); Schedules 1 (The data protection principles) (the first principles) and 3 (Conditions relevant for purposes of the first principle: processing of sensitive personal data) (conditions 1 and 5)

The full text of each of the statutory provisions cited above is reproduced in the Appendix to this decision. The Appendix forms part of this decision.

Background

1. This decision concerns two separate information requests which were made to the Council by Dr Yakoub. These are referred to as Dr Yakoub’s first and second information requests in what follows.

Dr Yakoub’s first information request

2. On 12 October 2010, Dr Yakoub wrote to the Council concerning complaints he had made regarding noise from a property neighbouring his own. He requested information in the following terms:

“I would like to have access to all the documentation you have regarding this case and hereby make a formal request under the Freedom of Information Act for a copy of this information.”
3. The Council responded on 10 November 2011. It released relevant information to Dr Yakoub, subject to redaction of information relating to third parties, which it considered to be exempt from disclosure under section 38(1)(b) of FOISA. The Council stated that the redacted information was personal data as defined in the DPA and its disclosure would breach the first and second data protection principles.
4. The Council commented that some information coming within the scope of Dr Yakoub’s request was his own personal data, which would be exempt under section 38(1)(a) of FOISA. However, seeking to avoid unnecessary bureaucracy, the Council released this information to Dr Yakoub in line with his rights under section 7 of the Data Protection Act 1998.



5. On 14 November 2010, Dr Yakoub wrote to the Council requesting a review of its decision, on the basis that the information supplied did not appear to be complete. In particular, Dr Yakoub highlighted that the information provided did not include all he expected in relation to certain matters and communications (including telephone calls, a meeting and emails). He referred to four reference numbers generated within the Council's case management computer system ("Flare"), which were not included within the information supplied (520328, 520563, 525733 and 525845). Dr Yakoub also expressed dissatisfaction with the Council's decision to redact information regarding one particular communication within the information supplied (in relation to Flare reference 520996).
6. The Council notified Dr Yakoub of the outcome of its review on 8 December 2010. It upheld its decision to withhold the information highlighted by Dr Yakoub under the exemption in section 38(1)(b) of FOISA. However, it acknowledged that the information supplied was incomplete, and indicated that it was now providing reports held in relation to the Flare reference numbers 520328, 520563 and 525845. It explained that the reference 525733 was created in error, but the relevant information was added to the record under reference 520996.
7. The Council also explained that details of telephone conversations, where held, are contained in the Flare reports. It provided a phone system report detailing calls from the Council's phone numbers to those provided by Dr Yakoub. The Council also provided minutes and handwritten notes relating to meetings with a third party, and emails sent between a specific member of staff and Dr Yakoub.

Dr Yakoub's second information request

8. Dr Yakoub submitted a second request to the Council on 1 December 2010, and subsequently clarified it on 2 December 2010. This (following his clarification) sought;
 - a. The date and time each entry in Flare record 520996 was made
 - b. Details of any new data added to that Flare record on or after 28 October 2010.
9. The Council responded on 23 December 2010. The Council notified Dr Yakoub (in line with section 17(1) of FOISA) that it did not hold information as to the actual date and time that each entry in the Flare record was made. It explained that it could (and it did) provide details of the dates and times when that record was accessed in the system's "update mode", but it explained that this did not necessarily mean that any modifications were made at these points.
10. The Council also provided Dr Yakoub with a description of the additions and changes that were made to the relevant Flare record on or after 28 October 2010.
11. Also on 23 December 2010, Dr Yakoub wrote to the Council requesting a review of its decision. Dr Yakoub expressed his dissatisfaction that it was not possible for the Council to detail the date and time that each single entry was made. Dr Yakoub also indicated that he was not satisfied that the list of dates and times provided in the Council's response were accurate, and that he had not been provided with any new data which was added after 28 October 2010.



12. The Council notified Dr Yakoub of the outcome of its review, which was to uphold its previous response, on 25 January 2011. The Council provided a further explanation of how the Flare case management system operates, and reiterated that it does not record when each modification is made. It commented that the information supplied was that held, and FOISA is concerned only with the provision of the information that is held, whether or not it is accurate. The Council also maintained that it had provided Dr Yakoub with all of the requested information held concerning any new data that was added to the specified Flare record.
13. On 19 March 2011, Dr Yakoub wrote to the Commissioner, stating that he was dissatisfied with the outcome of the Council's reviews in relation to his first and second requests for information and applying 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 certain specified modifications.
14. The application was validated by establishing that Dr Yakoub had made requests for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its responses to those requests.

Investigation

15. On 19 April 2011, the Council was notified in writing that an application had been received from Dr Yakoub and was asked to provide the Commissioner with any information withheld from him. The Council responded with the information requested and the case was then allocated to an investigating officer.
16. The investigating officer subsequently contacted the Council, giving it an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking it to respond to specific questions.
17. The matters that gave rise to Dr Yakoub's dissatisfaction with the Council's handling of his first request were:
 - a. the review did not supply information on Flare references 525733 or 525845 (two of those mentioned in his request for review – the first being that which the Council had indicated was created in error, and the second being one for which the Council had purported to supply the relevant information).
 - b. the review did not supply any information regarding calls made between Dr Yakoub and a named Council officer on a particular date in October 2010.
 - c. the review did not include all correspondence between Dr Yakoub and a named Council officer, in the period leading to a particular meeting in October 2010.
 - d. the Council's decision to withhold information relating to a particular communication (within Flare reference 520996) on the grounds that it was exempt under section 38(1)(b) of FOISA.



18. With respect to the second request, Dr Yakoub expressed dissatisfaction with the Council's response, because:
 - a. He did not accept that it was not possible to trace the date and time when every entry was made in the Flare record 520996.
 - b. He did not accept that the list supplied was complete and accurate.
19. In relation to Dr Yakoub's first request, the Council was asked to justify its application of the exemption in section 38(1)(b) of FOISA when withholding the relevant information. The Council was also invited to comment on the other matters which had been raised by Dr Yakoub in his application to the Commissioner (as detailed above). With respect to the gaps in the information supplied as identified by Dr Yakoub, the Council was asked whether it would be willing to release any further relevant information that was now found to be held. If such information was not held, the Council was also asked to advise the Commissioner of the searches carried out in order to determine if the information was held.
20. In relation to Dr Yakoub's second request, the Council was asked to explain the nature of the searches that it had carried out to determine whether the information requested by Dr Yakoub was held by it. The Council was also asked to provide an explanation of how its Flare case management system operates in relation to recording interactions, how it can be interrogated and the nature of any records or queries that can be run to determine whether relevant information is held.
21. The Council was also asked if it had considered whether Dr Yakoub's information requests should have been processed under the EIRs rather than FOISA. If it had not done so already, the Council was asked to consider whether the information requested by Dr Yakoub constituted environmental information as defined in regulation 2 of the EIRs, and if so, what, if any, exceptions in the EIRs it would seek to apply in relation to information covered by these requests. The Council was also asked whether it wished to apply the exemption in section 39(2) of FOISA, which applies to environmental information which the authority is obliged to make available in accordance with the EIRs.
22. A response was received from the Council on 31 May 2011. In relation to Dr Yakoub's first request, the Council provided submissions to justify its reliance on the exemption in section 38(1)(b) when withholding the information under consideration.
23. The Council also provided comments on the apparent gaps identified by Dr Yakoub in the information supplied in response to his first request. It indicated that it had provided all of the relevant Flare records when responding to Dr Yakoub's request for review. It noted that its letter had explained that three of the four records were enclosed and that, while the fourth had been created in error, its contents were copied within one of the other three records supplied.
24. With respect to records of telephone calls on the specified date, the Council commented that the information disclosed had included a record of a call from a Council employee on the relevant date, and that the list of calls it had provided to Dr Yakoub covered all calls made from Council extensions to Dr Yakoub across a three month period (which covered the relevant date). It also explained that it does not record incoming calls in the same way.



25. In relation to the correspondence in the period leading to a particular meeting, the Council submitted that it was confident that it had provided Dr Yakoub with all the information that it held. It noted that Dr Yakoub had not detailed what had been omitted, and in the absence of specifics, it commented that it would be pointless to speculate about other information.
26. In relation to Dr Yakoub's second request, the Council gave an explanation of how its Flare case management system operates, including the records created by the system and how this can be interrogated to determine whether relevant information is held.
27. The Council also considered whether it should have processed Dr Yakoub's requests for information under the EIRs, and concluded that the requested information was likely to fall within definition (f) of environmental information in regulation 2(1) of the EIRs.
28. The Council explained that it was now seeking to apply section 39(2) of FOISA to the information covered by both requests, and would apply the exception in regulation 11(2) to the information previously withheld in terms of section 38(1)(b) of FOISA when responding to Dr Yakoub's first request. The Council indicated that it wished to apply the exception in regulation 10(4)(a) (which applies to information that is not held) where it had notified Dr Yakoub that it did not hold the requested information in response to his second request. The Council explained that it was relying on the arguments advanced in relation to the equivalent provisions in FOISA to justify its view that these exceptions in the EIRs were applicable to the information covered by the two requests.
29. Dr Yakoub was invited to comment on the matters raised by this case, in particular in relation to his legitimate interests in accessing the withheld information insofar as it was personal data of a third party. Dr Yakoub comments were received on 6 June 2010.
30. Dr Yakoub was also invited to provide further details of the telephone calls and correspondence which he considered had been omitted from the Council's response to his first request. His response on this point provided further background on the communications around the relevant times, and also identified three emails that he considered should be held by the Council. He also commented on there having been a significant number of both incoming and outgoing telephone calls between himself and a named Council employee on which he had received no information from the Council.
31. Further correspondence was entered into with the Council regarding the information identified by Dr Yakoub. The Council was asked to carry out additional searches to determine whether this further relevant information was held and, if so, whether it would disclose this to Dr Yakoub.
32. Having undertaken further searches, the Council disclosed to Dr Yakoub a further 30 emails and documents, which fell within the scope of his first request, subject to the redaction of certain information which it considered to be third party personal data, excepted from disclosure under regulation 11(2) of the EIRs.



33. The information identified and disclosed at this stage included one of the emails supplied by Dr Yakoub. The Council advised the Commissioner that it did not hold the other two emails that Dr Yakoub had identified.
34. Within these further communications with the investigating officer, the Council also acknowledged that the Flare report under reference 525845, which it had indicated was enclosed with its response to Dr Yakoub's request for review, had been omitted in error from that response. The Council also provided a copy of this record to Dr Yakoub, subject to the redaction of some third party personal data.
35. Dr Yakoub advised the Commissioner that he accepted the Council's redactions within the information provided during the investigation, and did not require the Commissioner to consider these within this decision.
36. During the investigation, the Council also provided further information in response to Dr Yakoub's second request. It disclosed the audit log for the relevant Flare record (from which the list of dates and times previously disclosed had been extracted) in full.

Commissioner's analysis and findings

37. In coming to a decision on this matter, the Commissioner has considered all of the withheld information and the submissions made to him by both Dr Yakoub and the Council and is satisfied that no matter of relevance has been overlooked.

FOISA v EIRS?

38. The Commissioner set out his thinking on the relationship between FOISA and the EIRs in some detail in *Decision 218/2007 Professor A D Hawkins and Transport Scotland* and need not repeat it in full here. However, the central point set out therein is that when a person requests information which would fall within the definition of environmental information set out in regulation 2(1) of the EIRs, that request should be considered and responded to in line with the EIRs.
39. Where information falls within the definition of environmental information, it is exempt from disclosure under section 39(2) of FOISA, allowing its consideration solely in terms of the EIRs.
40. In this case, the Council initially handled Dr Yakoub's requests for information in terms of FOISA. During the investigation, the Council indicated that it considered the information requested by Dr Yakoub to fall within the definition of environmental information in regulation 2(1)(f) of the EIRs, and so to be exempt from disclosure under section 39(2) of FOISA.



41. Given the subject matter of the information covered by both requests and the content of the information that has been disclosed to Dr Yakoub, the Commissioner is satisfied that the information requested by Dr Yakoub would meet the definition of environmental information within paragraph (f) of regulation 2(1) of the EIRs. Since both of Dr Yakoub's information requests sought information about complaints regarding noise in a domestic environment, the information under consideration relates to the state of human health and safety (the wellbeing of the complainant or other affected parties) in as much as it may be affected through the elements of the environment mentioned in paragraph (a) (in this case especially land [including buildings] and air), or through these elements, by factors mentioned in paragraph (b) (in this case, particularly noise).
42. While the Commissioner is pleased to note that the Council accepted this in the course of the investigation, he must note that it did not do so (and act accordingly under the EIRs) when initially dealing with Dr Yakoub's information requests and his subsequent requests for review. Consequently the Commissioner finds that in failing to identify the information requested as environmental information (as defined in regulation 2(1)) and deal with the request accordingly under the EIRs, the Council failed to comply with regulation 5(1) and (2)(b) of the EIRs.

Section 39(2) of FOISA – environmental information

43. The exemption in section 39(2) of FOISA provides 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. This exemption is subject to the public interest test required by section 2(1)(b) of FOISA. In relation to Dr Yakoub's two information requests, the Commissioner finds that the Council was entitled to apply the exemption to the relevant information, given his conclusion that it is properly considered to be environmental information.
44. As there is a separate statutory right of access to environmental information available to the applicant in this case, the Commissioner also accepts that the public interest in maintaining this exemption and dealing with the request in line with the requirements of the EIRs outweighs any public interest in disclosure of the information under FOISA. The Commissioner has consequently proceeded to consider this case in what follows solely in terms of the EIRs.
45. The Commissioner has considered each of Dr Yakoub's requests separately in what follows below.

Dr Yakoub's first information request

46. When considering Dr Yakoub's first information request, the Commissioner first considered the Council's decision to withhold information relating to a particular communication, before turning to consider the other matters raised in Dr Yakoub's application for decision.



Regulation 11(2) of the EIRs – third party personal data

47. Dr Yakoub has asked the Commissioner to consider whether this exception was correctly applied to information that was withheld within Flare record 520996, relating to a communication on a particular date that is of interest to him.
48. Regulation 11(2) of the EIRs allows authorities to withhold third party personal data if either “the first condition” (set out in regulation 11(3)) or “the second condition” (set out in regulation 11(4)) applies to the information. The Council has submitted that the information under consideration comprised personal data, the release of which would breach the first and second data protection principles.
49. As the Council’s arguments relate to “the first condition” and, in particular, the parts of the first condition which consider whether disclosure of the information would breach the data protection principles (regulation 11(2) read in conjunction with regulation 11(3)(a)(i) or (b)), this is what the Commissioner will focus on in this decision.
50. In order for a public authority to rely on this exception, it must show firstly that the information under consideration is personal data for the purposes of the DPA and secondly that disclosure of the information would contravene one or more of the data protection principles set out in Schedule 1 to the DPA.

Is the information under consideration personal data?

51. Personal data is defined in section 1(1) of the DPA as data which relate 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 the Appendix).
52. In this case, the Commissioner is satisfied that the withheld information relates to the person residing at the address being complained about, and also includes details, which, if taken together with other information which was released to Dr Yakoub from the same Flare record, would enable the identification of the person being complained about. The Commissioner is therefore satisfied that this information is personal data.
53. The Commissioner must now go on to consider whether disclosure of the personal data of the person being complained about would breach any of the data protection principles contained in Schedule 1 to the DPA. As noted above, the Council argued that disclosure would breach the first and second data protection principles.

Would disclosure breach the first data protection principle?

54. The first data protection principle states that personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless at least one of the conditions in Schedule 2 to the DPA is met and, in the case of sensitive personal data, at least one of the conditions in Schedule 3 to the DPA is also met.



55. The Commissioner considers that the withheld information falls within the definition of sensitive personal data in terms of section 2(e) of the DPA (information as to the data subject's physical or mental health or condition).
56. Given the additional restrictions surrounding the disclosure of sensitive personal data, it makes sense to look at whether there are any conditions in Schedule 3 which would permit the data to be disclosed, before considering the Schedule 2 conditions.
57. The conditions listed in Schedule 3 to the DPA have been considered by the Commissioner, as have the additional conditions for processing sensitive personal data as contained in legislation such as the Data Protection (Processing of Sensitive Personal Data) Order 2000¹.
58. In guidance issued by the Commissioner regarding the exemption in section 38(1)(b)², it is noted that the conditions in Schedule 3 are very restrictive in nature and, as a result, generally only the first and fifth conditions are likely to be relevant when considering a request for sensitive personal data under FOISA.
59. Condition 1 allows processing where the data subject has given explicit (and fully informed) consent to the release of the information. Condition 5 allows processing where information contained in the personal data has been made public as a result of steps deliberately taken by the data subject.
60. The Council informed the Commissioner that it had not sought consent from the data subject, and it did not consider it reasonable to do so. The Commissioner has therefore concluded that condition 1 is not met in this case.
61. Having considered condition 5, the Commissioner is satisfied that none of the information under consideration has been made public as a result of steps deliberately taken by the data subject, and so condition 5 is not met in this case.
62. Having reached these conclusions, and also finding that no other condition in Schedule 3 is applicable in the circumstances of this case, the Commissioner finds that there are no conditions in Schedule 3 which would permit the disclosure of the information under consideration in response to Dr Yakoub's information request. As such, he is required to find that the disclosure of the personal data would breach the first principle of the DPA and that, as a consequence, the personal data is excepted from disclosure under regulation 11(2) (read in conjunction with 11(3)(a)(i) or (b) of the EIRs).
63. In light of the above, the Commissioner is not required to consider whether disclosure of the information would breach the second data protection principle. He finds that the Council acted in accordance with the EIRs when withholding this information in response to Dr Yakoub's first information request.

¹ http://www.legislation.gov.uk/ukxi/2000/417/pdfs/ukxi_20000417_en.pdf

² <Http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section38.asp>



Other matters to be considered in relation to Dr Yakoub's first request

64. Regulation 5(1) of the EIRs requires authorities which hold environmental information to make it available when requested to do so by any applicant. Regulation 5(2)(b) qualifies regulation 5(1), providing that it is subject to regulations 6 and 12, which contain a number of exceptions from disclosure and other provisions which disapply the right to access in certain circumstances.
65. As noted above, in his application to the Commissioner, Dr Yakoub indicated that the Council had not supplied all of the information sought by his first request. In particular, he expressed dissatisfaction that the Council's response to his request for review had not provided;
 - a. Flare record reference number 525845
 - b. Any information recorded on Flare record reference number 525733
 - c. Any documentation of phone calls between Dr Yakoub and a named Council employee on a particular date in October 2010
 - d. All correspondence between Dr Yakoub and a named Council employee in the days leading up to a meeting in October 2010.
66. In relation to a., the Council conceded during the investigation that it had failed to disclose Flare record 525845 when it had indicated that it was enclosed in response to his request for review. It disclosed this record during the investigation, subject to redaction of information it considered to be third party personal data.
67. With regard to b., the Commissioner has considered the information that was disclosed to Dr Yakoub in response to his request and request for review. In particular, he notes that information contained in Flare record 520996 states that Flare record 525733 was created in error and all of the relevant information was inputted to 520996. The Commissioner is therefore satisfied that the Council provided Dr Yakoub with the information contained in Flare record 520996 in response to his request for information, and provided an explanation as to why no separate information was disclosed in relation to Flare record 525773 when it responded to his requirement for review. In so doing, it complied with regulation 5(1) of the EIRs.
68. Regarding c. and d., the Council's further searches during the investigation located further information falling within the scope of Dr Yakoub's request. Following these searches, the Council disclosed 30 documents to Dr Yakoub (subject to redaction of information it considered to be third party personal data), which it had omitted when responding to his request for review. Although these contained communications wider than those highlighted in Dr Yakoub's application for decision, the Commissioner is satisfied that each of these documents fell within the scope of Dr Yakoub's first information request.
69. Following receipt of the additional information disclosed during the investigation, Dr Yakoub indicated that he did not object to the Council's redactions, and so this withheld information is not considered any further in this decision.



70. However, with respect to the information within Flare record 525845, and the other additional documentation that was disclosed during the investigation, the Commissioner must note that the Council failed to supply this information by the point when it notified Dr Yakoub of the outcome of its review. Nor did the Council at any stage seek to rely upon any provision in regulations 6 to 12 and claim that its duty to disclose this information was disapplied. The Commissioner must therefore conclude that the Council failed to comply with regulation 5(1) by failing to supply the (now disclosed) information regarding Flare reference 525845 and other information falling within the scope of Dr Yakoub's first information request prior to the commencement of the Commissioner's investigation.
71. The Commissioner is satisfied, however, on the basis of the submissions received from the Council regarding the nature of the searches that it carried out, that by the end of the investigation adequate searches had been carried out, and all recorded information held by the Council falling within the scope of Dr Yakoub's first request had been disclosed to him.

Dr Yakoub's second information request

Regulation 10(4)(a) – Information not held

72. Dr Yakoub requested information as to i) the date and time each single entry in Flare record 520996 was made and ii) in relation to further editing to Flare record 520996, details of any new data that has been added on or after 28 October 2010.
73. In response, the Council notified Dr Yakoub that it did not hold any relevant information in relation to the date and time each single entry was made in Flare record 520996. It did, however, provide a list of dates as to when Flare record 520996 was accessed in "update mode". During the course of the investigation, the Council explained that it was relying on the exception in regulation 10(4)(a) of the EIRs in respect of this information.
74. In his application, Dr Yakoub expressed dissatisfaction on the basis that he did not accept that the Council was unable to trace the date and time of every entry, and that he did not consider that the list of information supplied to him was complete and accurate.
75. 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.
76. In order to explain its position that it did not hold the exact information sought by Dr Yakoub, the Council has provided background information on the functioning of the Flare case management system. It explained that it allows the creation of a case containing the details of the person originating the case and the nature of the case. The Council explained that for all cases a free text record can be maintained which allows officers to record information about the case throughout its duration.



77. It noted that the Flare system maintains an audit log of all the changes made to the record of a case. The Council explained the audit log shows the date and time of the modification, the initials of the user who made the change, the section of the record that was modified, and whether it was added to or modified. However, the audit log does not show any information about what the modification actually was.
78. The Council also explained that it is possible for a Flare record to be accessed in “update mode” and exit without any change being made to the record. In such cases, the audit log would still hold a record of a “modification”.
79. It explained also that the Flare system includes a facility for the user to add their user-identification and the date/time to the free text record. It explained that this information is generated by the system, but only when instructed to do so by the user. However, while a date stamp is added at the top of the free text section of the record, the Council explained that as it is possible to add or amend text anywhere in the record, and so the date stamp information, while valid, is not necessarily complete or comprehensive.
80. The Council submitted that it is not possible to access the information that Dr Yakoub has specifically requested via the audit log facility. The Council acknowledged that it did hold the information that was supplied to Dr Yakoub by way of the date and time when Flare 520996 was accessed in “update” mode, but that it does not hold the exact information that he requested.
81. Having considered the submissions from the Council, together with the copy of the audit log for Flare record 520996, the Commissioner accepts that the operation of the Flare system would not allow confirmation of the time and date when each entry within record 520996 was made. He recognises that the information within the audit log provides some relevant information, but it is limited, in that the list of modifications therein cannot be fully correlated with actual entries on the record, and in some cases entries will be made where no changes were made to the record. As such, the audit log cannot be used to provide the complete record sought by Dr Yakoub.
82. Therefore, the Commissioner considers the Council was correct to indicate that it was not able to provide in full the information sought by Dr Yakoub’s second request.
83. However, the Commissioner considers that the information contained in this audit log does provide some information that is relevant to and falls within the terms of Dr Yakoub’s request. It provides details of dates and times where modifications were made to the record, even if these cannot necessarily be correlated with individual changes, and may contain some null entries.
84. The Commissioner takes this view as the audit log provides an insight into the occasions when Flare record 520996 was accessed and modified, and this, taken together with the categorisation on the audit log which gives an indication of which part of the record was opened, and by whom, would give Dr Yakoub some understanding of when work was undertaken relevant to this record.



85. Having found that the audit log for Flare record 520996 does come within the scope of Dr Yakoub's request, the Commissioner notes that where the Council provided Dr Yakoub with details of the dates and times when the record was accessed in "update" mode, this did not include all of the entries shown on the audit log presented to the Commissioner. Following discussion, the Council disclosed the actual audit log to Dr Yakoub during the course of the investigation.
86. The Commissioner is satisfied, on the basis of the submissions from the Council regarding the operation and functionality within its Flare case management system, that it does not hold any other information falling within the scope of this part of Dr Yakoub's second request. However, given that he has found that the information contained in the audit log for Flare record 520996 did come within the scope of Dr Yakoub's request, he cannot accept that the Council was correct to apply regulation 10(4)(a) of the EIRs to that information. As the Commissioner is not satisfied that the Council was correct to apply regulation 10(4)(a) of the EIRs to this information he is not required to go on to consider the application of the public interest test.
87. In the light of his findings on this matter, the Commissioner finds that, by failing to disclose the information contained within the audit log to Dr Yakoub by the point where it notified him of the outcome of its review, the Council failed to comply with regulation 5(1) of the EIRs.
88. However, the Commissioner notes that the Council released the information in the audit log to Dr Yakoub during the course of the investigation. He is therefore satisfied that all recorded information held by the Council falling within the scope of this part of Dr Yakoub's request had been provided to him by the time of issuing this decision.
89. In reaching this conclusion, the Commissioner notes that he can only consider the extent of information that was held by the Council at the time it received Dr Yakoub's request. The Commissioner is satisfied that the Council has identified and provided all available information regarding the dates and times when the relevant Flare record was modified. He cannot comment in this decision on whether this represents an accurate reflection of the Council's activity with respect to the matters of concern to him.

DECISION

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

The Commissioner finds that the Council should have dealt with both of Dr Yakoub's information requests under the EIRs and that, in initially failing to do so, the Council failed to comply with regulation 5(1) and 2(b) the EIRs.

In relation to Dr Yakoub's first request, the Commissioner finds that the Council complied with the EIRs by withholding the information contained in Flare record 520996 considered in this decision. He finds that this information was excepted from disclosure under regulation 11(2) of the EIRs.

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However, the Commissioner finds that the Council breached regulation 5(1) and 2(b) of the EIRs by failing to identify and to provide to Dr Yakoub all relevant recorded information falling within the terms of his first request (and which was not considered to be excepted from disclosure).

With respect to the second request, the Commissioner finds that the Council failed to comply with the EIRs by indicating to Dr Yakoub that it held no further relevant information beyond that supplied in response to part a of this request. He finds that by failing to identify and supply further relevant information contained within its audit log, the Council breached regulation 5(1) and 2(b) of the EIRs.

The Commissioner is satisfied in relation to each request that, by the end of the investigation, the Council had undertaken reasonable searches to locate relevant information, and that it had properly identified the information sought by Dr Yakoub, to the extent that it was held.

By the end of the investigation, the Council had rectified the breaches identified above, by providing the additional information identified during the investigation to Dr Yakoub. Therefore, the Commissioner does not require the Council to take any action in response to these failures.

Appeal

Should either Dr Yakoub or Perth and Kinross Council wish to appeal against this decision, there is an 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 notice.

Margaret Keyse
Head of Enforcement
16 September 2011



Appendix

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.

...

- (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 –

- (a) the provision does not confer absolute exemption; and
(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.

...



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;
- ...
- (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);

...

5 Duty to make available environmental information on request

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

(2) The duty under paragraph (1)-

...



- (b) is subject to regulations 6 to 12.

10 Exceptions from duty to make environmental information available–

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

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^[6] 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;

...

2 Sensitive personal data

In this Act “sensitive personal data” means personal data consisting of information as to-

...

(e) his physical or mental health or condition,

...

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 3 – Conditions relevant for purposes of the first principle: processing of sensitive personal data

1. The data subject has given his explicit consent to the processing of the personal data.
...
5. The information contained in the personal data has been made public as a result of steps deliberately taken by the data subject.
...