

Decision Notice 202/2021

Information relating to planning application

The Applicants

Public authority: West Lothian Council

Case Ref: 202001433



Scottish Information
Commissioner

Summary

The Council was asked for information relating to a named planning application. The Council responded by providing information that was not already publicly available subject to redaction. The Applicants were not satisfied with the extent of the redactions.

The Commissioner investigated and found that the Council had complied with the EIRs in responding to the request.

Relevant statutory provisions

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

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (definition of “the data protection principles”; paragraphs (a), (b) and (c) of definition of “environmental information” and definitions of “personal data” and “the UK GDPR”) (Interpretation); 5(1) and (2)(b) (Duty to make available environmental information on request); 11(2)(b), (3A)(a) and (7) (Personal data)

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

Data Protection Act 2018 (the DPA 2018) sections 3(2), (3), (4)(d), (5), (10) and (14)(a), (c) and (d) (Terms relating to the processing of personal data)

The full text of each of the statutory provisions cited above is reproduced in Appendix 1 to this decision. The Appendix forms part of this decision.

Background

1. On 17 September 2020, the Applicants made a request for information to West Lothian Council (the Council), asking that the request be considered under both FOISA and the EIRs. The request was for:

“copies of all documents, notes, minutes and all correspondence relating to [planning application 0074/PO/20]. This should be taken to include correspondence of any form whatsoever, and between any person in or outside of the council, whether elected representative including MP, MSP or Elected Member, with whom correspondence has been entered into, whether verbal or written.”
2. The Council responded on 29 October 2020, apologising for the delay. The Council provided the Applicants with copies of all documents which were not already publicly available online, subject to the redaction of personal data and commercially sensitive information.
3. The next day, the Applicants wrote to the Council requesting a review of its decision on the basis that:
 - (i) the request was made under both FOISA and the EIRs, but the Council had made no mention of the assessment process between these two pieces of legislation and had not made any reference to the EIRs
 - (ii) email addresses had been redacted “without a proper approach”

- (iii) the redactions were excessive
 - (iv) the Council's redactions on commercially sensitive grounds would not necessarily be allowed under the EIRs.
4. The Council notified the Applicants of the outcome of its review on 27 November 2020. The Council confirmed that it was relying on the EIRs, applying section 39(2) of FOISA. It provided a revised copy of the information and stated why redactions were made under regulation 11(2) of the EIRs (Personal data) with an explanation why it no longer considered any commercially sensitive information to fall within the scope of the request.
 5. On 1 December 2020, the Applicants wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. By virtue of regulation 17 of the EIRs, Part 4 of FOISA applies to the enforcement of the EIRs as it applies to the enforcement of FOISA, subject to specified modifications. The Applicants stated they were dissatisfied with the outcome of the Council's review because they were unhappy with how the Council interpreted their request, with the extent of the redactions made and with the explanations given for the redactions.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that the Applicants made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to him for a decision.
7. On 15 December 2020, the Council was notified in writing that the Applicants had made a valid application. The Council provided the Commissioner with the information withheld from the Applicants 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. The Council was invited to comment on this application and to answer specific questions. These related to the searches undertaken, the determination of the scope of the request and its application of exceptions.

Commissioner's analysis and findings

9. In coming to a decision on this matter, the Commissioner considered all of the withheld information and the relevant submissions, or parts of submissions, made to him by both the Applicants and the Council. He is satisfied that no matter of relevance has been overlooked.

Handling in terms of the EIRs

10. The Council confirmed at review that it had considered the Applicants' request and requirement for review in accordance with the EIRs, citing section 39(2) of FOISA.
11. "Environmental information" is defined in regulation 2(1) of the EIRs (paragraphs (a), (b) and (c) of the definition are reproduced in full in Appendix 1). Where information falls within the scope of this definition, a person has a right to access the information under the EIRs, subject to qualifications and exceptions.
12. The Commissioner has considered the information covered by the Applicants' request, and is satisfied that it is environmental information as defined in regulation 2(1) of the EIRs. Given the terms of the request (related directly to a planning application, specifically a variation to an agreed affordable housing contribution), the Commissioner is satisfied that the information

it covers is environmental information, as defined in regulation 2(1) of the EIRs (paragraphs (a), (b) and (c)).

Section 39(2) of FOISA – Environmental information

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

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

16. In terms of regulation 5(1) of the EIRs, a Scottish public authority that holds environmental information is required make it available when requested to do so. This obligation is subject to various other provisions in terms of regulation 5(2)(b), including the exceptions in regulation 10. A Scottish public authority is required to interpret these exceptions restrictively (regulation 10(2)(a)) and apply a presumption in favour of disclosure (regulation 10(2)(b)).
17. On receipt of a request for environmental information, therefore, the authority must ascertain what information it holds falling within scope of the request. Having done so, regulation 5(1) requires the authority to provide that information to the requester, unless a qualification in regulations 6 to 12 applies (regulation 5(2)(b)).

Scope of request

18. The Applicants stated that their request encompassed all information "relating" to planning application 0074/PO/20 which was in reference to a legal agreement affecting the delivery of the Heartlands project which they considered should affect the whole of the Heartlands project.
19. In order to ascertain whether all relevant information had been identified, the Council was asked to explain the steps it took to establish what information it held that fell within the terms of the Applicants' request and to provide an explanation for its understanding of the scope of the request.
20. The Council provided background to the Heartlands project, a development site of over 600 hectares on the western side of Whitburn, involving the restoration and redevelopment of a former colliery site. Planning history for the site goes back 20 years with a significant number of planning applications. The Council explained that it considered the Applicants' request to be very specific and to relate only to the named planning application which sought to vary the way in which affordable housing is to be provided on the site.

21. The Applicants considered the scope of their request to be much wider. They commented that, given that the application for affordable housing variance would affect utility services, public amenity, road safety and other issues, they expected this information to be included in the response.
22. However, the Council took the view that information which does not refer to the variance in the provision of affordable housing was outwith scope of the request. It commented that, as the request was for information relating to the specified planning application and did not mention any other aspect of the project, it would not be reasonable to have included information relating to other planning applications or matters regarding the wider Heartlands project in its response.
23. The Council submitted that the original request was clear, with specific reference to a named planning application. The Council stated that, although the Applicants referred to the “Heartlands project” in their application, this is not what was originally requested – there was no reference to a property or project. The Council also submitted that the request was clear and gave no indication that any advice and assistance was required by the Applicants in relation to making the request.
24. Having considered all the relevant submissions provided in this case, the Commissioner accepts that the Council was justified in limiting the provision of information to that specifically “relating to” planning application 074/PO/20 in this case. That is a plain reading of what the Applicants requested and there is nothing to suggest, from the request, that the request should have been interpreted more widely.
25. The Commissioner has reviewed the information which was deemed to be out of the scope by the Council and is satisfied, given his finding as to the scope of the request, that it does not fall within the scope of this request. The Commissioner is satisfied that the Applicants have extensive knowledge of the development in question and, therefore, that it was reasonable for the Council to conclude that the Applicants’ specific reference to this planning application (a variation application) restricted the scope of the request to information relating to that application and not to the wider development.
26. In response to questions about the searches carried out by the Council, the Council confirmed that a search was conducted by the Planning Officer responsible for this file. The officer conducted their own search of the case file and asked other colleagues who had been involved to provide them with any emails relating to this application. The Planning Officer carried out a search using the search terms ‘0074/PO/20’ and ‘Heartlands Affordable Housing’ from the date of the application until the date of the request.
27. In the circumstances, the Commissioner is satisfied that the Council took a reasonable interpretation of the request. He is satisfied that the searches conducted were reasonable and proportionate and were sufficient to identify all information falling within the scope of this request. He is satisfied that information which was originally withheld on the basis that it was commercially confidential does not fall with the scope of this request. (The Commissioner notes that a minute forming part of document 1, deemed outwith the scope of this request, was supplied to the Applicants as a result of another request.)

Regulation 11(2) of the EIRs – Personal data

28. The Council relied on the exception in regulation 11(2) (as read with regulation 11(3A)(a)) for withholding personal data.

29. Regulation 10(3) of the EIRs provides that a Scottish public authority can only make personal data in environmental information available in accordance with regulation 11. Regulation 11(2) provides that personal data shall not be made available where the applicant is not the data subject and other specified conditions apply. These include where disclosure would contravene any of the data protection principles in the UK GDPR or DPA 2018 (regulation 11(3A)(a)).
30. The Council has submitted that the redacted information constituted personal data, and that disclosure of the data in response to this request would breach the first and second data protection principles in Article 5(1) of the UK GDPR (“lawfulness, fairness and transparency” and “purpose limitation”).

Is the withheld information personal data?

31. The first question the Commissioner must address is whether the information is personal data.
32. “Personal data” is defined in section 3(2) of the DPA 2018 as “any information relating to an identified or identifiable individual”. Section 3(3) of the DPA 2018 defines “identifiable living individual” as a living individual who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, or an online identifier, or one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
33. Information will “relate to” a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them, or has them as its main focus.
34. An individual is “identified” or “identifiable” if it is possible to distinguish them from other individuals.
35. In its submissions, the Council explained that the withheld information comprises personal data of third parties (not of Council employees), specifically signatures, mobile telephone numbers and parts of email addresses).
36. Having considered the Council’s submissions and the withheld information, the Commissioner accepts that the redacted information taken on its own, or in conjunction with other information contained in the documents, can be linked to a named individual (to whom it can be said to relate, in the circumstances) and is satisfied that individual data subjects can be identified from the redacted information.
37. The Commissioner is therefore satisfied that the redacted information is personal data as defined in section 3(2) of the DPA 2018.

Would disclosure contravene one of the data protection principles?

38. Article 5(1)(a) of the UK GDPR requires personal data to be processed “lawfully, fairly and in a transparent manner in relation to the data subject.”
39. The definition of “processing” is wide and includes (section 3(4)(d) of the DPA 2018) “disclosure by transmission, dissemination or otherwise making available”. For the purposes of the EIRs, personal data are processed when made available in response to a request under regulation 5(1). This means that the personal data can only be made available if making it available would be both lawful (i.e. it would meet one of the conditions for lawful processing in Article 6(1) of the UK GDPR) and fair.

40. As noted above, Article 5(1) of the UK GDPR states that personal data should be processed lawfully, fairly and in a transparent manner in relation to the data subject. The Commissioner must therefore consider if disclosure (the processing of the personal data) would be fair, lawful and transparent. In considering lawfulness, he must consider whether any of the conditions in Article 6 to the UK GDPR would allow the data to be disclosed.
41. The Commissioner considers condition (f) of Article 6(1) of the UK GDPR to be the only condition which could possibly apply in this case.

Condition (f): legitimate interests

42. Under condition (f), the disclosure of the personal data would be lawful if it is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require the protection of personal data, in particular where the data subject is a child.
43. Although Article 6 states that this condition cannot apply to processing carried out by a public authority in the performance of their tasks, regulation 11(7) of the EIRs (see Appendix 1) makes it clear that public authorities can rely on Article 6(1)(f) when responding to requests under the EIRs.
44. The tests which must be met before Article 6(1)(f) can be met are as follows:
 - (i) Do the Applicants have a legitimate interest in obtaining the personal data?
 - (ii) If so, is the disclosure of the personal data necessary to achieve that legitimate interest?
 - (iii) Even if the processing is necessary to achieve that legitimate interest, is that overridden by the interests or fundamental rights and freedoms of the data subjects?

Do the Applicants have a legitimate interest in obtaining the information?

45. There is no definition within the UK GDPR of what constitutes a “legitimate interest”, but the Commissioner takes the view that the terms indicate that matters in which an individual properly has an interest should be distinguished from matters about which he or she is simply inquisitive. In the Commissioner’s published guidance on personal information¹ 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.”
46. The Council acknowledged the Applicants’ legitimate interest, including objecting to the planning application, but did not consider that legitimate interest to extend to the personal data of third parties when all relevant Council data had been provided and when the remaining personal data did not have to be disclosed to understand the information provided.
47. The Applicants submitted that they consider redaction may be appropriate for officers at lower levels but presumption should be to release. They stated it is a long-standing tradition that communication data and names are never redacted and forms part of public domain information in publication of planning documentation. They considered that whilst planning

¹ <https://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/EIRsexceptionbriefings/Regulation11/Regulation11PersonalInformation.aspx>

was ongoing there should be no special approach to further communications. They expressed concern that hiding information will conceal identifiable patterns of behaviour; disclosing it could be key to uncovering inappropriate or corrupt behaviour.

48. Having considered the submissions from the Council and the Applicants, the Commissioner accepts that, while the Applicants were pursuing a legitimate interest in seeking to understand actions taken, and the process followed, by the Council in respect of the processing of this planning application, they do not have a legitimate interest in the disclosure of the withheld information. Disclosure of the personal data in question would not add anything to the Applicants' understanding of why decisions were taken in the way that they were, or how well the process was followed when considering, discussing or processing the specified planning application. The identity of Council officers is already clear from the information disclosed to the Applicants.
49. As the Commissioner has concluded that the Applicants do not have a legitimate interest in receiving the personal data redacted in this case, he finds that condition (f) of Article 6(1) of the UK GDPR cannot be satisfied. Accordingly, he accepts that making the personal data available would be unlawful.
50. In all the circumstances, in the absence of a condition in Article 6(1) of the GDPR being met, the Commissioner must conclude that making the personal data available would breach the data protection principle in Article 5(1)(a) of the UK GDPR. (He is not required to go on to consider separately whether disclosure would also breach the data protection principle in Article 5(1)(b).) Consequently, he is satisfied that regulation 11(2) of the EIRs does not allow the Council to make the personal data available.

Decision

The Commissioner finds that West Lothian Council complied with the Environmental Information (Scotland) Regulations 2004 in responding to the information request made by the Applicants.

Appeal

Should either the Applicants or the Council wish to appeal against this decision, they have the right to appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days after the date of intimation of this decision.

Margaret Keyse
Head of Enforcement

16 December 2021

Appendix 1: Relevant statutory provisions

Freedom of Information (Scotland) Act 2002

1 General entitlement

- (1) A person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority.

...

- (6) This section is subject to sections 2, 9, 12 and 14.

2 Effect of exemptions

- (1) To information which is exempt information by virtue of any provision of Part 2, section 1 applies only to the extent that –

...

- (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

...

39 Health, safety and the environment

...

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

...

The Environmental Information (Scotland) Regulations 2004

2 Interpretation

- (1) In these Regulations –

...

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

- (a) Article 5(1) of the UK GDPR, and
- (b) section 34(1) of the Data Protection Act 2018;

...

"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;

...

“personal data” has the same meaning as in Parts 5 to 7 of the Data Protection Act 2018 (see section 3(2) and (14) of that Act);

...

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

...

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.

...

11 Personal data

...

- (2) To the extent that environmental information requested includes personal data of which the applicant is not the data subject, a Scottish public authority must not make the personal data available if -

...

- (b) the second or third condition set out in paragraph (3B) or (4A) is satisfied and, in all the circumstances of the case, the public interest in making the information available is outweighed by that in not doing so.

- (3A) The first condition is that the disclosure of the information to a member of the public otherwise than under these Regulations –

- (a) would contravene any of the data protection principles, or

...

- (7) In determining for the purposes of this regulation whether the lawfulness principle in Article 5(1)(a) of the UK GDPR would be contravened by the disclosure of information, Article 6(1) of the UK GDPR (lawfulness) is to be read as if the second sub-paragraph (disapplying the legitimate interests gateway in relation to public authorities) were omitted.

UK General Data Protection Regulation

Article 5 Principles relating to processing of personal data

1 Personal data shall be:

- a. processed lawfully, fairly and in a transparent manner in relation to the data subject (“lawfulness, fairness and transparency”)

...

Article 6 Lawfulness of processing

1 Processing shall be lawful only if and to the extent that at least one of the following applies:

...

- f. processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require the protection of personal data, in particular where the data subject is a child.

...

Data Protection Act 2018

3 Terms relating to the processing of personal data

...

- (2) “Personal data” means any information relating to an identified or identifiable living individual (subject to subsection (14)(c)).
- (3) “Identifiable living individual” means a living individual who can be identified, directly or indirectly, in particular by reference to –
- (a) an identifier such as a name, an identification number, location data or an online identifier, or
- (b) one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.

- (4) “Processing”, in relation to information, means an operation or set of operations which is performed on information, or on sets of information, such as –
- ...
- (d) disclosure by transmission, dissemination or otherwise making available,
- ...
- (5) “Data subject” means the identified or identifiable living individual to whom the data relates.
- (10) “The UK GDPR” means Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (United Kingdom General Data Protection Regulation), as it forms part of the law of England and Wales, Scotland and Northern Ireland by virtue of section 3 of the European Union (Withdrawal) Act 2018 (and see section 205(4)).
- ...
- (14) In Parts 5 to 7, except where otherwise provided –
- (a) references to the UK GDPR are to the UK GDPR read with Part 2;
- ...
- (c) references to personal data, and the processing of personal data, are to personal data and processing to which Part 2, Part 3 or Part 4 applies;
- (d) references to a controller or processor are to a controller or processor in relation to the processing of personal data to which Part 2, Part 3 or Part 4 applies.

...

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