

# Decision Notice

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**Decision 260/2014: Ms Caragh O'Neill and South Lanarkshire Council**

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**Replacement of Biggar Primary School**

Reference No: 201402177

Decision Date: 18 December 2014



Scottish Information  
Commissioner

## Summary

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On 2 July 2014, Ms O'Neill asked South Lanarkshire Council (the Council) for information in five emails relating to the new Biggar Primary School. The Council responded by disclosing some information. It also decided that some of the information within the emails (which it redacted) was excepted from disclosure under the EIRs.

The Commissioner accepted that the information was excepted from disclosure: it related to internal communications and the public interest favoured the information being withheld.

## Relevant statutory provisions

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and 1(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) (Interpretation) (paragraphs (a) and (c) of definition of "environmental information"); 5(1) and (2)(b) (Duty to make available environmental information on request); 10(1), (2) and (4)(e) (Exceptions from duty to make environmental information available)

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

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1. On 2 July 2014, Ms O'Neill made a request for information relating to the new Biggar Primary School. The information she sought was located within five emails between the Council's Planning and Education services. Ms O'Neill described the information she was seeking by specifying the subject, date and time of each email.
2. The Council responded on 30 July 2014. It released some information but withheld other information, citing regulation 10(4)(e) of the EIRs (which relates to internal communications) and regulation 11(2) (which relates to third party personal data).
3. On 31 July 2014, Ms O'Neill wrote to the Council requesting a review of its decision. She did not agree that the request should have been handled under the EIRs. In relation to the information withheld under regulation 10(4)(e), she did not accept that the public interest favoured withholding the information, noting that the planning application had been approved several months previously.
4. The Council notified Ms O'Neill of the outcome of its review on 29 August 2014. It explained that some information had been redacted because it did not fall within the scope of her request (i.e. it formed part of emails other than those referred to in her request). The Council went on to explain why it had concluded that the information was environmental information, and had therefore responded under the EIRs. It confirmed its decision to withhold information under regulation 10(4)(e), with an explanation of its conclusions in relation to the public interest. As Ms O'Neill did not suggest that she was unhappy with the withholding of personal data, the Council confirmed it was not reviewing its application of regulation 11(2) of the EIRs.

5. On 3 September 2014, Ms O'Neill wrote to the Commissioner. She 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. Ms O'Neill stated she was dissatisfied with the outcome of the Council's review because;
  - (i) it had dealt with her information request under EIRs rather than FOISA;
  - (ii) parts of the internal communications were withheld from her when, in her view, this information should have been disclosed; and
  - (iii) she disputed the Council's explanations for redacting the information in earlier emails.

## **Investigation**

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6. The application was accepted as valid. The Commissioner confirmed that Ms O'Neill 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 8 September 2014, the Council was notified in writing that Ms O'Neill had made a valid application. The Council was asked to send the Commissioner the information withheld from her. The Council 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. The Council was invited to comment on this application and answer specific questions, including justifying its reliance on the exception in regulation 10(4)(e) of the EIRs. The Council was also asked to comment on whether some of the information could be released in the light of the contents of the relevant Planning Committee report, published on its website.

## **Commissioner's analysis and findings**

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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 her by both Ms O'Neill and the Council. She is satisfied that no matter of relevance has been overlooked.

### **Handling in terms of the EIRs**

10. The Council dealt with the request under the EIRs, having concluded that the information requested by Ms O'Neill was environmental information, as defined in regulation 2(1) of the EIRs.
11. Where information falls within the scope of this definition, a person has a right to access it (and the public authority has a corresponding obligation to respond) under the EIRs, subject to the various restrictions and exceptions contained in the EIRs.
12. The information requested by Ms O'Neill concerns the siting of and building of a school, a reasonably substantial development. The information in the emails relates to plans (for the new school) affecting or likely to affect the elements of the environment, particularly land and landscape, and also measures (in particular, the planning process) designed to protect those elements. In the circumstances, the Commissioner is satisfied that the information requested by Ms O'Neill falls within the definition of environmental information set out in regulation 2(1), in particular paragraphs (a) and (c) of that definition.

13. The Commissioner therefore concludes that the Council was correct (and indeed required) to consider Ms O'Neill's information request under the EIRs.

### **Section 39(2) of FOISA – environmental information**

14. 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 the exemption to the withheld information, given her conclusion that it is properly classified as environmental information.
15. As there is a statutory right of access to environmental information available to Ms O'Neill 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. Ms O'Neill's reasons for wishing the request to be responded to under FOISA are not clear, but 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 redacted information should be more likely under FOISA than under the EIRs.

### **The information withheld**

16. The Council disclosed some information within the five emails to Ms O'Neill, but also withheld some information. Some information was withheld by the Council as third party personal data. Ms O'Neill did not refer to the redaction of this information, either in her requirement for review or in her application to the Commissioner, so it is not a matter the Commissioner can consider here.
17. Ms O'Neill did, however, query the Council's redaction of information contained in the emails which preceded those she identified in her request (i.e. within the same "chain" of correspondence). At review stage, the Council apologised for not making it clearer why it was redacting this information. It explained that Ms O'Neill's request had been specific in defining the scope of her request, by reference to five particular emails. Therefore, information which was not contained in these emails did not fall within the scope of her request.
18. In her application, Ms O'Neill stated that she did not believe the information should be withheld because it originated in an earlier email.
19. The Commissioner has given careful consideration to the points above. She can only consider the information Ms O'Neill described in her request. On the very specific terms of that request, she can only agree with the Council. It seeks the information in five particular emails. She does not consider it reasonable to extend that interpretation to information in other emails, simply because at some point those other emails appear in the same "chain" as an email specified in the request.
20. The Commissioner will now go on to consider the information withheld under regulation 10(4)(e) of the EIRs.

### **Regulation 10(4)(e) of the EIRs (internal communications)**

21. The Council considered the exception in regulation 10(4)(e) of the EIRs to apply to information in two of the five emails Ms O'Neill specified in her request.

22. Under regulation 10(4)(e), a Scottish public authority may refuse to make environmental information available to the extent that the request involves making available internal communications. For information to fall within the scope of the exception, it need only be established that the information is an internal communication.
23. The Commissioner notes that the two emails originated from and were received by Council staff. She is satisfied that all the information to which the Council has applied this exception can be described as internal communications, and therefore that the exception in regulation 10(4)(e) of the EIRs was correctly applied to this information.
24. The application of the exception is subject to the public interest test in regulation 10(1)(b), which the Commissioner will now consider.

### ***Public interest test***

25. The public interest test in regulation 10(1)(b) states that a Scottish public authority may only withhold information to which an exception applies where, in all the circumstances, the public interest in making the information available is outweighed by the public interest in maintaining the exception.

### ***Ms O'Neill's submissions***

26. Ms O'Neill did not accept that this information should be withheld, noting that the planning decision in relation to the new school had been made publicly several months previously. She highlighted concerns in relation to the new school's compliance with legal requirements and the process by which the Council obtained planning permission for it, submitting that it was vitally important for the local community to know two things:
  - (i) If the Council knew, or had considered, that the school might fail to meet legislative requirements, and (if so) what actions were taken to remedy this situation, and
  - (ii) If the Council acted improperly at any point during the planning process, for example by concealing information or taking actions demonstrably in its own interests rather than those of local residents..
27. Ms O'Neill considered transparency to be of particular importance in this case, given that it related to a public building. She understood the planning application was now the subject of Judicial Review. She believed this, and what she described as a breakdown of trust between the Council and local residents, underscored the public interest in transparency in this case.

### ***The Council's submissions***

28. The Council acknowledged the public nature of the planning process, and the general public interest in ensuring that appropriate matters were taken into account in reaching planning decisions. However, it pointed out that ownership of land (to which some of the withheld information related) was not a planning consideration.
29. It recognised the general expectation that planning matters should be open and transparent, including internal discussions regarding a planning application. However, it suggested that there were times when these discussions would involve information of a more confidential nature: this would have to be considered on an individual basis, but it would not always be in the public interest to disclose such information.
30. The Council stated that no Judicial Review proceedings had been raised in relation to the planning application. It also asked the Commissioner to consider whether disclosure of the

withheld information would actually advance the public interests highlighted by Ms O'Neill. It did not believe it would, submitting that a suspicion of illegality or impropriety should not weigh highly in relation to the public interest.

31. During the investigation, the investigating officer asked the Council to consider whether its report to its Planning Committee in relation to the new school, published on its website the month before Ms O'Neill submitted her request, contained any information withheld from Ms O'Neill. The Council distinguished the contents of the report from internal discussions leading to the preparation of the report. It did not follow from the eventual publication of elements of these discussions in the report that it should release details of the consideration process that led to the relevant conclusions.
32. The Council remained of the position that it was entitled to withhold all of the information to which it had applied regulation 10(4)(e).

#### *The Commissioner's conclusions*

33. The Commissioner has considered carefully the submissions made by both the Council and Ms O'Neill. Whether or not Judicial Review proceedings were in contemplation at the time the Council responded to Ms O'Neill's request and her requirement for review, the proposal for the new school was clearly a matter of some public concern. As the Council has acknowledged, there is a general public interest in relation to transparency in the planning process (although there may be occasions on which other considerations merit greater weight).
34. As indicated above, Ms O'Neill has highlighted two specific areas of concern, which she believes add weight to the public interest in disclosure. The Commissioner has taken these into account, but she also believes she must acknowledge as reasonable the Council's point that she must look at the actual information withheld and whether the disclosure of that information would contribute to any public interest advanced by the applicant. Having considered the information (which, of course, the applicant cannot) the Commissioner has concluded that it is incapable of casting any light on either the new school's compliance with legislative requirements or any potential impropriety in obtaining planning permission for the school.
35. As the Council has noted, land ownership is not generally a planning consideration. The Commissioner would also note that Ms O'Neill's public interest arguments do not pertain to land ownership. To the extent that the withheld information relates to land ownership, there would appear to be only the most generic arguments for disclosure. It would, however, have been helpful for the Council to explain the nature of some of the withheld information (as it did in responding to the investigating officer), given the focus of Ms O'Neill's concerns.
36. The Commissioner has also considered the Council's arguments on the nature of the withheld information, as elements of the discussions leading to the preparation of the planning report, rather than the report itself. She acknowledges that there may be strong public interest arguments for withholding such information, depending on the particular content of the information concerned. In this case, she would also acknowledge that disclosure of the withheld information, insofar as it relates to planning matters, would add nothing of any real substance to what is already published in the report.
37. In all the circumstances, taking account of the arguments advanced by Ms O'Neill and the content of the redacted information, the Commissioner is unable to identify strong arguments in favour of disclosure in the public interest. While the Council's arguments in favour of

withholding the information could have been more focused on the particular information withheld, in all the circumstances she is satisfied that they are strong enough to prevail in this particular case. The Commissioner therefore concludes that the Council was entitled to withhold the information to which it applied regulation 10(4)(e) of the EIRs.

## Decision

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The Commissioner finds that South Lanarkshire Council complied with the Environmental Information (Scotland) Regulations 2004 in responding to the information request made by Ms O'Neill.

## Appeal

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Should either Ms O'Neill or South Lanarkshire 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**

**18 December 2014**

### 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 –

...

"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;

...

(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;

...

## 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.

...

(4) A Scottish public authority may refuse to make environmental information available to the extent that

...

(e) the request involves making available internal communications.

**Scottish Information Commissioner**

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