



Scottish Information
Commissioner
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Decision Notice 105/2022

Postal address of a named individual who objected to a planning application

Applicant: The Applicant
Authority: Glasgow City Council
Case Ref: 202101560

Summary

The Applicant asked the Authority for the postal address of a named individual who had objected to a planning application. The Authority refused to disclose the information on the basis that it was personal data and disclosure would breach data protection principles. The Commissioner investigated and found that the Authority did not hold the information requested. He also found that the request ought to have been considered under the EIRs.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2) and (6) (General entitlement); 2(1)(a) and (2)(e)(ii) (Effect of exemptions); 38(1)(b), (2A)(a) and (2B) (Personal information); 39(2) (Health, safety and the environment); 47(1) and (2) (Application for decision by Commissioner)

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (definitions of “the Act”, “applicant”, “the Commissioner”, “environmental information” (paragraphs (c) and (f)), “personal data” and “the UK GDPR”) (Interpretation); 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); 11(2)(a) and (3A)(a) (Personal data); 17(1), (2)(a), (b) and (f) (Enforcement and appeal provisions)

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 14 March 2021, the Applicant made a request for information to the Authority. He asked for the postal address and contact details of a named individual who, in 2013, had submitted to the Authority an objection to a Class 3 planning application relating to a specified property in Glasgow.
2. The Authority responded on 9 April 2021. It refused to provide the information requested under section 38(1)(b) of FOISA, on the basis that disclosure involved releasing an individual's personal information into the public domain - which would breach the data protection principles in Article 5(1) of the UK General Data Protection Regulation (the UK GDPR).
3. On 4 June 2021, the Applicant wrote to the Authority requesting a review of its decision. The Applicant stated that he was dissatisfied with the Authority's response because comments on planning applications submitted to the Authority, including details of those who sent them, were in the public domain.
4. The Authority notified the Applicant of the outcome of its review on 1 July 2021, fully upholding its original decision. It explained that its planning portal, which was available to the public, detailed the individuals who had commented on the specific application referred to in the request, but their contact details and postal addresses were not available online. The Authority stated that disclosure of this personal information would breach the data protection principles in Article 5(1) of the UK GDPR which required the Authority to process personal information in a lawful, fair and transparent manner, and this would be unfair to the individuals concerned who would not expect their personal details to be released in response to an information request.
5. On 22 December 2021, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. By virtue of regulation 17 of the EIRs, Part 4 of FOISA applies to the enforcement of the EIRs as it applies to the enforcement of FOISA, subject to specified modifications. The Applicant stated he was dissatisfied with the outcome of the Authority's review because, having also commented on the planning application, the Authority had published his name and address along with his comments. He argued that this demonstrated that planning application comments, and the name and address of those who made them, were in the public domain. In light of this, he believed that the address of the other objector should be made available.

Investigation

6. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
7. On 24 January 2022, the Authority was notified in writing that the Applicant had made a valid application and the case was subsequently 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 Authority was asked to send the Commissioner the information withheld from the Applicant. It was also invited to comment on the application and answer specific questions. These focussed on the Authority's justification for withholding the information under the exemption in section 38(1)(b) of FOISA. The

Authority was also asked whether the request should have been handled as a request for environmental information under the EIRs, as it related to a planning matter.

9. The Applicant was also invited to comment on why the personal information withheld under section 38(1)(b) was important to him or of value to the public.
10. Both parties provided submissions to the Commissioner.
11. During the investigation, the Applicant confirmed that his application was limited to seeking the full postal address of the named individual who had submitted an objection to the specific planning application in 2013. As such, the Commissioner's decision, in this case, will consider the disclosure of that information only.
12. The Commissioner has considered all of the submissions made to him by both the Applicant and the Authority.

Application of the EIRs

13. In [Decision 218/2007](#)¹, the Commissioner confirmed (at paragraph 51) that, where environmental information is concerned, there are two separate statutory frameworks for access to that information and, in terms of the legislation, an authority is required to consider the request under both FOISA and EIRs.
14. As stated above, the Authority was asked whether it believed the request ought to have properly been considered under the EIRs, given the nature of the information requested.
15. In its submissions to the Commissioner, having considered the request and the Commissioner's guidance on [What is Environmental Information?](#)², the Authority conceded that the request should have been more appropriately dealt with under the EIRs.
16. The Authority confirmed that it now wished to rely on the exemption in section 39(2) of FOISA, where the public interest lay in favour of applying the exemption. It considered that the public interest in disclosing any relevant information under FOISA was outweighed by that in considering a request for environmental information in accordance with the EIRs.
17. For this exemption to apply, any information requested would require to be environmental information as defined in regulation 2(1) of the EIRs. The Authority agreed that the information requested by the Applicant related directly to a planning application, and could reasonably be considered to be environmental information, as it pertained to planning and the built environment.
18. Having considered the terms of the request and the Authority's submissions on this point, it is clear that any information falling within the scope of the request would be environmental information, as defined in regulation 2(1) of the EIRs. The information in question relates to an objection to a planning application concerning a change of use for a specified site, the outcome of which may affect the state of human health. As such, the Commissioner is satisfied that it would fall within paragraphs (c) and (f) of the definition of environmental information in regulation 2(1) of the EIRs (reproduced in Appendix 1 to this decision).
19. In this case, therefore, the Commissioner accepts that the Authority was entitled to apply the exemption in section 39(2) of FOISA, given his conclusion that it is properly considered to be

¹ <https://www.itspublicknowledge.info/decision-2182007>

² <https://www.itspublicknowledge.info/sites/default/files/2022-03/EIRBriefingsDefinition.pdf>

environmental information. This exemption is subject to the public interest test in section 2(1)(b) of FOISA.

20. As there is a separate statutory right of access to environmental information available to the Applicant in this case, the Commissioner 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. In the circumstances, he will consider this case, in what follows, solely in terms of the EIRs.
21. The Commissioner recognises that, in this case, the outcome would have been the same regardless of whether the request was dealt with under FOISA or the EIRs. However, as the Authority failed to recognise and respond to the request as a request for environmental information, the Commissioner must find that it failed, in this respect, to respond in accordance with regulation 5(1) of the EIRs.

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

22. Regulation 5(1) of the EIRs requires a Scottish public authority which holds environmental information to make it available when requested to do so by any applicant. This obligation relates to information that is held by the authority when it receives a request.
23. On receipt of a request for environmental information, therefore, the authority must ascertain what information it holds falling within the scope of the request. Having done so, regulation 5(1) requires the authority to provide that information to the requester, unless a qualification in regulations 6 to 12 applies (regulation 5(2)(b)).
24. Under the EIRs, a public authority may refuse to make environmental information available if one or more of the exceptions in regulation 10 applies, but only if (in all the circumstances) the public interest in maintaining the exception or exceptions outweighs the public interest in making the information available.

The information held by the Authority

25. In its initial submissions to the Commissioner, having recognised that the request should have been more appropriately dealt with under the EIRs, the Authority confirmed that it now wished to rely on regulation 11(2) (Personal data) of the EIRs to withhold the information requested.
26. The Authority provided the Commissioner with a copy of the objection from the named individual, made in 2013 in respect of the planning application specified in the request.
27. The Authority submitted that it was standard practice to publish the names and postal addresses of individuals who submit representations on its planning portal, and in Committee documents presented at the Planning Local Review Committee. It explained that, when submitting representations via the planning portal, individuals are required to complete a registration process in the first instance. This requires the individual to supply contact details – either a postal or email address. During the processing of the application, the names and postal addresses of all representatives are made available for inspection both online and at the Authority's offices. Representations online will be removed once the application has been determined, although a copy will be retained in the application file. Where representations are received by email, the Authority accepts this as the representative's contact details in the absence of a full address.

28. The Authority confirmed that the named individual had submitted their objection via email, and did not provide a postal address. As the postal address was not provided, it was therefore not published on the Authority's online planning portal or in the Planning Local Review Committee documents.
29. The Authority further submitted, with supporting evidence, that searches of both Outlook and Uniform (the Authority's internal database used to store information on properties, including actions raised, e.g. complaints or repairs) confirmed that it did not hold the named individual's postal address in respect of the planning application specified in the request.
30. In light of the Authority's apparent reliance on regulation 11(2) for information that it did not appear to hold, the Authority was asked to clarify its position.
31. In response, the Authority reconfirmed that the named individual did not provide a postal address when he submitted his representation in 2013 in respect of the planning application specified in the request. It submitted that it now wished to change its position, and rely on regulation 10(4)(a) of the EIRs, on the basis that it did not hold the information requested.
32. Regulation 10(4)(a) of the EIRs states that a Scottish public authority may refuse to make environmental information available to the extent that it does not hold that information when an applicant's request is received.
33. The standard of proof to determine whether a Scottish public authority holds information is the civil standard of the balance of probabilities. In determining where the balance of probabilities lies, the Commissioner considers the scope, quality, thoroughness and results of the searches carried out by the public authority. He also considers, where appropriate, any reason offered by the public authority to explain why it does not hold the information. While it may be relevant as part of this exercise to explore expectations about what information the authority should hold, ultimately the Commissioner's role is to determine what relevant recorded information is (or was, at the time the request was received) actually held by the public authority.
34. The Commissioner has fully considered the terms of the request along with all relevant submissions from both parties and the supporting evidence provided by the Authority.
35. He accepts that the Authority had taken adequate, proportionate steps with a view to identifying and locating any relevant information falling within the scope of the request under consideration here. He is satisfied that any such information held would have been identified as a result of the searches carried out.
36. As stated above, the Commissioner can only consider whether any relevant information is actually held by an authority. He cannot consider what information it should hold, or what an applicant might believe it should hold.
37. The exception in regulation 10(4)(a) is subject to the public interest test in regulation 10(1)(b) of the EIRs and can only be upheld if, in all the circumstances, the public interest in maintaining the exception outweighs the public interest in making the information available.
38. In this case, for the reasons set out above, the Commissioner is satisfied that the Authority does not (and did not, on receiving the request) hold the information requested. Consequently, he does not consider there to be any conceivable public interest in requiring that information be made available. The Commissioner therefore concludes that the public interest in making the requested information available is outweighed by that in maintaining the exception in regulation 10(4)(a) of the EIRs.

39. In all the circumstances, therefore, the Commissioner is satisfied, on the balance of probabilities, that the Authority does not (and did not, at the time it received the Applicant's request) hold the information requested, i.e. the postal address of the named individual who objected to the specified planning application in 2013. He is satisfied that, by the conclusion of his investigation, the Authority was entitled to rely on regulation 10(4)(a) of the EIRs, on the basis that it did not hold the information requested.
40. However, the Commissioner also finds that the Authority was not entitled to inform the Applicant, at review stage, that the information requested was exempt from disclosure under section 38(1)(b) of FOISA. In doing so, the Authority breached Part 1 of FOISA.

Decision

The Commissioner finds that the Authority failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) and with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by the Applicant.

He finds that, by failing to recognise and respond to the request as a request for environmental information, the Authority failed to comply with regulation 5(1) of the EIRs.

He also finds that the Authority breached Part 1 of FOISA by wrongly informing the Applicant, at review stage, that the information requested was exempt from disclosure under section 38(1)(b) of FOISA.

However, the Commissioner is satisfied that, by the conclusion of his investigation, the Authority did not hold any information falling within the scope of the Applicant's request.

The Commissioner does not require the Authority to take any action in response to these failures in response to the Applicant's application.

Appeal

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

Margaret Keyse
Head of Enforcement

17 October 2022

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.
- (2) The person who makes such a request is in this Part and in Parts 2 and 7 referred to as the “applicant.”
- ...
- (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
 - ...
- (2) For the purposes of paragraph (a) of subsection 1, the following provisions of Part 2 (and no others) are to be regarded as conferring absolute exemption –
 - (e) in subsection (1) of section 38 –
 - ...
 - (ii) paragraph (b) where the first condition referred to in that paragraph is satisfied.

38 Personal information

- (1) Information is exempt information if it constitutes-
 - ...
 - (b) personal data and the first, second or third condition is satisfied (see subsections (2A) to (3A);
 - ...
- (2A) The first condition is that the disclosure of the information to a member of the public otherwise than under this Act -
 - (a) would contravene any of the data protection principles, or
 - ...
- (2B) The second condition is that the disclosure of the information to a member of the public otherwise than under this Act would contravene Article 21 of the UK GDPR (general processing: right to object to processing).

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.

...

47 Application for decision by Commissioner

- (1) A person who is dissatisfied with -
- (a) a notice under section 21(5) or (9); or
 - (b) the failure of a Scottish public authority to which a requirement for review was made to give such a notice.

may make application to the Commissioner for a decision whether, in any respect specified in that application, the request for information to which the requirement relates has been dealt with in accordance with Part 1 of this Act.

- (2) An application under subsection (1) must -
- (a) be in writing or in another form which, by reason of its having some permanency, is capable of being used for subsequent reference (as, for example, a recording made on audio or video tape);
 - (b) state the name of the applicant and an address for correspondence; and
 - (c) specify –
 - (i) the request for information to which the requirement for review relates;
 - (ii) the matter which was specified under sub-paragraph (ii) of section 20(3)(c); and
 - (iii) the matter which gives rise to the dissatisfaction mentioned in subsection (1).

...

The Environmental Information (Scotland) Regulations 2004

2 Interpretation

- (1) In these Regulations –
- “the Act” means the Freedom of Information (Scotland) Act 2002;
- “applicant” means any person who requests that environmental information be made available;

“the Commissioner” means the Scottish Information Commissioner constituted by section 42 of the Act;

...

"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

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...

(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);

“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.

...

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, a Scottish public authority must not make the personal data available if -
 - (a) the first condition set out in paragraph (3A) is satisfied, or
- ...
- (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

...

17 Enforcement and appeal provisions

- (1) The provisions of Part 4 of the Act (Enforcement) including schedule 3 (powers of entry and inspection), shall apply for the purposes of these Regulations as they apply for the purposes of the Act but with the modifications specified in paragraph (2).
 - (2) In the application of any provision of the Act by paragraph (1) any reference to -
 - (a) the Act is deemed to be a reference to these Regulations;
 - (b) the requirements of Part 1 of the Act is deemed to be a reference to the requirements of these Regulations;
- ...
- (f) a notice under section 21(5) or (9) (review by a Scottish public authority) of the Act is deemed to be a reference to a notice under regulation 16(4); and

...