



Scottish Information
Commissioner
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Decision Notice 063/2024

Correspondence relating to a planning application

Authority: City of Edinburgh Council

Case Ref: 202200525

Summary

The Applicant asked the Authority for correspondence sent to or by four named employees regarding a specified planning application. The Authority considered the request under the EIRs, and (following payment, by the Applicant, of the fee levied by the Authority) provided some information. The Authority withheld the remainder of the information on the basis that it was either personal data, or that disclosure would breach confidentiality of the Authority's proceedings in relation to the planning application, or that it comprised internal communications.

The Commissioner investigated and found that, with the exception of any personal data, and one piece of information withheld as internal communications, the Authority had not been entitled to withhold the remainder of the information under the exceptions claimed.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) section 47(1) and (2) (Application for decision by Commissioner)

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (definition of "the Act", "applicant", "the Commissioner" and "environmental information" (paragraphs (a) and (c)) (Interpretation); 5(1) and (2)(b) (Duty to make environmental information available on request); 10(1), (2), (4)(e) and (5)(d) (Exceptions from duty to make environmental information available); 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 29 December 2021, the Applicant made a request for information to the Authority. The request was made on behalf of the Applicant by their solicitors, and the submissions referred to in this decision as being from the Applicant should be taken to include submissions from the Applicant's solicitors on their behalf. The information request was as follows:

Our client's request may involve information which relates to the development of land, and thus a request for "environmental information" within the meaning of the Regulations. If any of the information requested is not "environmental information" please treat the request for such information as a request in accordance with the FOISA.

We refer to our client's application for planning permission in principle for residential development, ancillary retail use, active travel route, open space, landscaping, access, services and all associated infrastructure on land 269 metres northeast of 210 Craigs Road, Edinburgh (your reference 21/04210/PPP).

Our client seeks all correspondence (including emails, and notes of telephone calls) to and from [four named members of the Authority's staff], in relation to this application.

2. The Authority responded on 7 February 2022. It explained that the planning application in question was a live application which was still being considered and, as such, information held relating to the decision process, not yet published on the planning portal, could not be released as it was not a public document. The Authority stated that, should information on concerns raised during the application process be released into the public domain, this could potentially prejudice the outcome of the application, and the information would be withheld under regulation 10(5)(d) of the EIRs. The Authority further explained that there may be information in the 126 documents held, which did not directly relate to the decision process, and which could be disclosed in response to the request. It informed the Applicant that it had calculated the cost of complying with the request to be £315, and that it was charging a fee for this amount under regulation 8 (Charging) of the EIRs.
3. The Applicant duly paid the fee.
4. On 9 March 2022, the Authority responded, having considered the request under the EIRs. It partially disclosed the information requested and withheld the remainder under regulation 10(5)(d) of the EIRs for the reasons set out in its response of 7 February 2022. The Authority recognised the public interest in transparency and accountability for its actions. However, it considered that this was outweighed by the substantial prejudice to the confidentiality of planning proceedings, and the way in which it dealt with planning applications, were the information to be disclosed prior to completion of the planning application process.
5. The Authority also withheld some personal data under regulation 11(2) (Personal data) of the EIRs on the basis that its disclosure would be unfair and unlawful, and would breach the first data protection principle in the Data Protection Act 2018.
6. On 4 April 2022, the Applicant wrote to the Authority requesting a review of its decision. The Applicant stated that they were dissatisfied with the decision because they did not agree that the exception in regulation 10(5)(d) applied, and they believed the public interest favoured disclosure. The Applicant argued that the Authority's response had not referred to any national law that provided a basis for confidentiality of the withheld information, and there was no clear legal basis upon which the exception was relied. The Applicant noted that the

planning application was no longer with the Authority for determination, as an appeal against the Authority's failure to do so had been submitted to the Scottish Ministers on 25 February 2022. As such, the Applicant believed there was no decision for the Authority to make which could be prejudiced by disclosure of the information. Further, given the application was now at appeal, the Applicant argued that there was a clear public interest in disclosure of the information to promote transparency and accountability in the Authority's actions while it was considering the planning application.

7. The Authority notified the Applicant of the outcome of its review on 4 May 2022, upholding its original decision with modification. The Authority maintained its position that the matter was, in the wider sense, still "live", in that it was subject to, and awaiting, final determination from the Government body. It considered that the public interest in this matter favoured the current deliberations and determinations proceeding as planned. The Authority noted that all consultations and letters of objections regarding the application are/were already publicly available, as per normal practice.
8. Turning to the legal basis upon which the Authority relied in support of regulation 10(5)(d), the Authority explained that, in many cases where this exception applied, there existed a statutory provision prohibiting disclosure. It stated, however, that the Scottish Information Commissioner had previously considered that there may also be cases where the common law of confidence will protect the confidentiality of the proceedings, and that a statutory provision was not always required or necessary, depending upon the merits and details of the case.
9. Having reviewed the in-scope information, the Authority informed the Applicant that it was no longer relying on regulation 10(5)(d) to withhold five of the files originally withheld, and it disclosed these to the Applicant. It explained that four files additionally fell under the exception in regulation 10(4)(e) on the basis that they were internal communications. The Authority believed this exception applied to those communications, given they were created in the course of deliberations that were ultimately published in their final form, rather than a matter which was not able to, or simply did not, proceed and progress as normal. The Authority also found that two emails fully comprised third party personal data, including details of the respondents to the normal consultative aspects of the planning application, and withheld this information under regulation 11, as cited in its initial response.
10. On 6 May 2022, 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 that they were dissatisfied with the outcome of the Authority's review because they disagreed that the exceptions in regulations 10(4)(e) and 10(5)(d) of the EIRs applied, and that the public interest favoured disclosure. The Applicant also confirmed that they were raising no dissatisfaction with the Authority's decision to withhold certain information [personal data] under regulation 11 of the EIRs.

Investigation

11. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
12. On 6 June 2022, the Authority was notified in writing that the Applicant had made a valid application. The Authority was asked to send the Commissioner the information withheld

from the Applicant. The Authority provided the information and the case was subsequently allocated to an investigating officer.

13. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Authority was invited to comment on this application and to answer specific questions. These focussed on the Authority's justification for withholding some of the information requested under (variously) the exceptions in regulations 10(4)(e) and 10(5)(d) of the EIRs, including its consideration of the application of the public interest test.
14. During the investigation, it became clear to the Investigating Officer that the Authority had not provided the Commissioner with all of the information being withheld. The Authority was asked to provide the outstanding information (and clarification of the relevant exceptions being applied) along with further submissions, at various stages during the investigation.
15. The Applicant was also invited to provide their comments on the public interest in disclosure of the information being withheld by the Authority under the exceptions claimed.
16. Both parties provided submissions to the Commissioner.
17. During the investigation, the Authority changed its position for some of the information withheld at review stage. For the files fully withheld under regulation 11 at review (referred to in the Authority's review outcome), it withdrew reliance on this provision for all of that information, except email addresses. For the files withheld under both regulations 10(4)(e) and 10(5)(d) at review, it withdrew reliance on these exceptions for that particular information, with the exception of one paragraph in one document which it continued to withhold under regulation 10(4)(e). The Authority disclosed the information no longer being withheld to the Applicant on 17 November 2023.
18. As stated previously, the Applicant did not challenge the Authority's decision to withhold some personal data under regulation 11 of the EIRs, and so the Commissioner will not consider this matter in this Decision Notice.

Commissioner's analysis and findings

19. The Commissioner has considered all of the submissions made to him by the Applicant and the Authority.

Handling in terms of the EIRs

20. The Authority considered the Applicant's request in accordance with the EIRs, on the basis that the information requested was environmental information as defined in regulation 2(1) of the EIRs.
21. 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.
22. The Authority submitted that the request sought information relating to the large-scale development of land which, accordingly, would have a significant impact on the state of the environment. In light of this, it considered the request to be for environmental information, as a planning application was an administrative measure designed to manage the environment, and the correspondence requested related to the decision-making process within that

measure. As such, the Authority considered it would fall within the definition of environmental information in regulation 2(1)(a) and (c) of the EIRs.

23. The Commissioner accepts this as a reasonable description and, in the circumstances, is satisfied that the information requested by the Applicant falls within the definition of environmental information set out in regulation 2(1), in particular paragraphs (a) and (c) of that definition. The Applicant has not challenged the Authority's decision to deal with the request as one for environmental information and the Commissioner will consider the handling of the request in what follows solely in terms of the EIRs.

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

24. 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.
25. 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 make that information available, unless a qualification in regulations 6 to 12 applies (regulation 5(2)(b)).
26. 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.

Regulation 10(4)(e) – Internal Communications

27. Regulation 10(4)(e) of the EIRs provides that a Scottish public authority may refuse to make environmental information available to the extent that the request involves making available internal communications.
28. In order for information to fall within the scope of this exception, it need only be established that the information is an internal communication.
29. As with all of the exceptions under regulation 10, a Scottish public authority applying this exception must interpret it in a restrictive way and apply a presumption in favour of disclosure (regulation 10(2)). Even where the exception applies, the information must be disclosed unless, in all the circumstances, the public interest in making the information available is outweighed by that in maintaining the exception (regulation 10(1)(b)).

The Applicant's submissions on regulation 10(4)(e)

30. In their application to the Commissioner, the Applicant believed that, as the planning application had been appealed to the Scottish Ministers, the Scottish Ministers (not the Authority) were the decision-maker in relation to the appeal and therefore disclosure was not capable of prejudicing the determination of the appeal.

The Authority's submissions on regulation 10(4)(e)

31. In its initial comments to the Commissioner, the Authority explained that, at the time of the request, the application was being determined by the Planning Authority. Within the in-scope information there were copies of draft reports and comments by planning officers in relation to the application, and the Authority's position was that this information could not be publicly disclosed as it would prejudice the determination process. However, since the time of the Authority's handling of the request and request for review, the application was concluded and

rejected by the Scottish Ministers and, as such, much of the information requested was made available in finalised form on the Authority's planning portal.

32. As noted above, during the investigation, the Authority informed the Commissioner that it wished to change its position for some of the information it had withheld, at review stage, under regulation 10(4)(e). It confirmed it no longer wished to rely on this exception for the majority of the information previously withheld under regulation 10(4)(e) and disclosed this to the Applicant on 17 November 2023.
33. For the remaining information being withheld under regulation 10(4)(e) (which comprised one paragraph in one document), the Authority submitted that this information related to a staff member giving an opinion, disclosure of which, the Authority believed, would prejudice the City Plan. Given the Applicant's stated intention to make a further application to develop the land in question, the Authority believed that this information could be used to undermine an impartial decision-making process.

The Commissioner's view on regulation 10(4)(e)

34. In respect of the information withheld under regulation 10(4)(e) at review stage which, the Authority confirmed during the investigation, it was no longer seeking to withhold under that exception, in the absence of any submissions persuading him otherwise, the Commissioner must find that the Authority was not entitled to withhold that particular information under regulation 10(4)(e). As the Authority has already disclosed this information to the Applicant, he does not require the Authority to take any further action in that respect.
35. For the remainder of the information being withheld by the Authority under regulation 10(4)(e), the Commissioner recognises that this records the opinion of the author on the viability of the development. He is therefore satisfied that this information comprises internal communications and is therefore subject to the exception in regulation 10(4)(e).
36. The Commissioner must therefore go on to consider whether, in all the circumstances, the public interest in making the information available is outweighed by the public interest in maintaining the exception.

The Applicant's submissions on the public interest – regulation 10(4)(e)

37. In their application to the Commissioner, the Applicant considered that there was a clear public interest in disclosure of internal communications recording the Authority's deliberations, to promote transparency and accountability in the Authority's actions while it was considering the planning application.
38. In their later submissions to the Commissioner, the Applicant believed that the Authority had failed to explain why it considered the public interest lay in withholding the information. The Applicant argued that the Authority's position, that information could be withheld because it constituted internal communications created in the course of deliberations, was simplistic and did not accord with the express presumption in favour of disclosure in the EIRs.
39. The Applicant referred to [Decision 147/2018](#)¹ where the Commissioner had concluded, at paragraph 98, that "*Where the withheld information simply records the views and discussions of Council staff, the public interest favours disclosure*". They argued that the Authority's statement, in its review response, that the internal communications were "...created in the

¹ <https://www.itspubliknowledge.info/decision-1472018>

course of deliberations...” suggested that it simply recorded reviews and discussions, and the public interest therefore favoured disclosure.

40. The Applicant believed there was a clear public interest in promoting transparency and accountability in the Authority’s exercise of its public function, as the Planning Authority, in handling the planning application. In the Applicant’s view, disclosure would enhance scrutiny of the Authority’s decision-making process, improve transparency and accountability, and ensure fairness.
41. In conclusion, the Applicant considered that the public interest in transparency and accountability, in enhancing scrutiny of the Authority’s decision-making process, and in ensuring fairness, outweighed the public interest in withholding internal communications which simply recorded the discussions of Authority staff.

The Authority’s submissions on the public interest – regulation 10(4)(e)

42. The Authority explained the factors it had taken into account when considering the public interest test.
43. In favour of disclosure, the Authority recognised the benefits of an open and transparent planning process, and the fact that the information related to the development of a substantial number of housing units which, both at the time of the request and presently, was of great interest to the public.
44. In contrast, however, the Authority also considered that there was a public interest in maintaining the private space for deliberation to allow its officers to make decisions that had an intended positive impact.
45. The Authority acknowledged the benefit of transparency in decision-making, but was also aware of the emotional investment that the public had in relation to planning matters, and so believed it was important to allow a space for officers to hold discussions outwith the public glare. Noting that the public were also provided with adequate means to provide their views at all points during the planning deliberation process (outwith the EIRs), the Authority was of the view that, on balance, the public interest in maintaining the exception outweighed that in disclosure of the information.

The Commissioner’s view on the public interest – regulation 10(4)(e)

46. The Commissioner has considered the submissions from both parties on the public interest test, in relation to the withheld information itself. He has done so with regard to the circumstances at the time of the Authority’s review outcome, by which time, he notes, the planning application had been referred to the Scottish Ministers for determination.
47. The Commissioner notes that the majority of the report (which contains the paragraph being withheld) is largely factual, based on the circumstances, at the time, pertaining to the location of the land in question, with regard to relevant policy requirements. He also recognises that while the withheld information itself has regard to the factual information which has already been disclosed in that report, it goes a stage further in recording the author’s view on the feasibility of the development.
48. The Commissioner has also considered the Authority’s claim that disclosure would undermine the decision-making process or prejudice the City Plan. He does not agree that the Authority has sufficiently evidenced that this would occur as a result of disclosure of this particular information. In his view, if the planning application, to which the information relates, did not concur with the City Plan, then there are statutory processes in place that

would identify this. Indeed, this appears to be what has happened in this case, resulting in the planning application being subsequently rejected by the Scottish Ministers.

49. The Commissioner has further considered the Authority's arguments that the information was created in the course of deliberations that were ultimately published in the public domain in their final form. He notes that a version of the [report](#)², which does not include the withheld information, is publicly available on the Planning and Environmental Appeals Division's section of the Scottish Government website. In the Commissioner's view, this goes some way to support the Authority's arguments on the public interest in maintaining a private space for deliberation so that staff can hold discussions outwith the public eye.
50. The Commissioner recognises the public interest in openness and accountability with regard to the Authority's handling of the planning application. In the Commissioner's view, the public interest has been fulfilled through the Authority's decision to disclose the remainder of the report (originally withheld at review) during the investigation. This provides the Applicant with information on the matters considered by the author of the report in reaching a view on the practicability of the development.
51. On balance, in all the circumstances of the case, and having applied a presumption in favour of disclosure, the Commissioner considers that the public interest arguments in favour of maintaining the exception outweigh those for making the information available – for this particular information, he believes there is a greater public interest in allowing a safe space for internal comment, views and discussion.
52. The Commissioner therefore finds that the information was properly withheld under regulation 10(4)(e) of the EIRs.

Regulation 10(5)(d) – Prejudice to confidentiality of proceedings

53. Regulation 10(5)(d) provides that a Scottish public authority may refuse to make environmental information available to the extent that its disclosure would, or would be likely to, prejudice substantially the confidentiality of the proceedings of any public authority where such confidentiality is provided for by law.
54. Regulation 10(2) of the EIRs provides that this exception must be interpreted in a restrictive way and the public authority shall apply a presumption in favour of disclosure. The exception is also subject to the public interest test in regulation 10(1)(b).
55. The [Aarhus Convention: An Implementation Guide](#)³ (which offers guidance on the interpretation of the Aarhus Convention, from which the EIRs are derived) looks at this exception on page 86 but does not comprehensively define "proceedings of any public authorities". It suggests that one interpretation is that these may be proceedings concerning the internal operations of a public authority rather than substantive proceedings conducted by the public authority in its area of competence. The confidentiality under this exception must be provided for under national law.
56. The first matter for the Commissioner to consider is whether the information relates to proceedings of the Authority, the confidentiality of which is protected by law. The Commissioner must then consider whether disclosure of the information would, or would be likely to, prejudice substantially the confidentiality of those proceedings.

² <https://www.dpea.scotland.gov.uk/Document.aspx?id=826115>

³ <https://unece.org/environment-policy/publications/aarhus-convention-implementation-guide-second-edition>

The Applicant's submissions on regulation 10(5)(d)

57. In their application to the Commissioner, the Applicant submitted that the common law of confidence being relied upon by the Authority did not create a blanket confidentiality of proceedings, and that the Authority had not demonstrated that there was a common law protection of the confidentiality of planning application proceedings. In their view, there was no clear legal basis upon which the exception was relied.
58. The Applicant further argued that, as an appeal had been submitted to the Scottish Ministers in relation to the Authority's failure to determine the planning application, the application was therefore no longer with the Authority for determination and the Authority had since confirmed its position on the appeal to the Scottish Ministers (in March 2022). In the Applicant's view, the ongoing deliberations and determinations would be carried out by the Reporter appointed by the Scottish Ministers to consider the appeal, not by the Authority, and there were no ongoing deliberations on the part of the Authority.
59. Given that the Authority had submitted its final position on the appeal to the Scottish Ministers, and there was no ongoing process at the Authority in relation to the planning application, the Applicant believed there was a clear public interest in the information being disclosed to promote transparency and accountability of the Authority's actions while it was considering the planning application.
60. In their later submissions to the Commissioner, the Applicant acknowledged that the determination of planning applications was one of the Authority's public functions as the Planning Authority. The Applicant believed it was of serious concern and benefit to the public to promote transparency and accountability in relation to the Authority's actions while it was considering planning applications in the exercise of its public function as Planning Authority.
61. In the Applicant's view, disclosure would enhance public scrutiny of the Authority's decision-making process in relation to the planning application, and would also ensure fairness by enabling the Authority's position on the planning application to be fully understood.
62. Referring to the appeal to the Scottish Ministers against the Authority's failure to determine the planning application, the Applicant further argued that, once the Scottish Ministers became the decision-maker in relation to the appeal, any public interest in withholding the information was reduced, as disclosure was no longer capable of prejudicing the Authority's determination of the planning application.
63. The Applicant believed it was in the interests of the public for the Scottish Ministers to have all relevant information to hand when exercising its function as the Planning Authority in relation to planning appeals, to help ensure the delivery of high quality places. In the Applicant's view, the public interest therefore favoured disclosure of the information, to allow them to submit any such relevant information to the Scottish Ministers.
64. The Applicant noted that the appeal to the Scottish Ministers had been determined on 22 December 2022 (i.e. subsequent to the Applicant's application to the Commissioner). In light of this, the Applicant believed the likelihood of disclosure substantially prejudicing the confidentiality of planning proceedings was therefore limited, and there was no competing public interest in withholding the requested information.
65. In the Applicant's view, the Authority had failed to take into account the express presumption in favour of disclosure in regulation 10(2)(b) of the EIRs, rather it had taken the approach that any public interest in withholding the requested information meant that it may be withheld.

The Authority's submissions on regulation 10(5)(d)

66. In its initial comments to the Commissioner, the Authority explained that, at the time of the request, the application was being determined by it as the Planning Authority, and the in-scope information included copies of draft reports and comments by planning officers in relation to the application, disclosure of which would prejudice the determination process. However, since the time of the Authority's handling of the request and request for review, the application was concluded and rejected by the Scottish Ministers and, as such, much of the information requested was made available in finalised form on the Authority's planning portal.
67. As noted above, during the investigation, the Authority informed the Commissioner that it wished to change its position for some of the information it had withheld, at review stage, under regulation 10(5)(d). It confirmed it no longer wished to rely on this exception for certain of the information previously withheld under regulation 10(5)(d) and disclosed this to the Applicant on 17 November 2023.
68. For the remaining information being withheld under regulation 10(5)(d), the Authority confirmed it wished to continue to rely on this exception for that information as, whilst proceedings were now complete, this information did capture the then "live" views of its officers, disclosure of which would substantially prejudice its functions as a planning authority. The Authority subsequently confirmed that, for any personal data contained within that information, it also wished to rely on regulation 11 of the EIRs to withhold that particular information.

Does the information relate to the proceedings of the Authority?

69. In its submissions to the Commissioner, the Authority explained that, at the time of the request, the application was still live as it had been appealed to the Scottish Ministers for their consideration. The Authority's position was, therefore, that disclosure of this information would prejudice those proceedings as the Applicant sought to receive draft views and opinions of its officers on a matter that had yet to be decided upon.
70. The Commissioner notes that "proceedings", in the context of this regulation, will cover a range of activities, but usually confined to internal deliberation in some form or another. The matter under consideration here is information relating to the determination of a planning application by the Authority, in its role as the Planning Authority. Having considered the Authority's submissions on this point, the Commissioner accepts that the Authority's actions - broadly, in determining the planning application (notwithstanding the subsequent appeal to the Scottish Ministers) – fell within the intended meaning of "proceedings".
71. Having accepted that the information falls within the definition of "proceedings" for regulation 10(5)(d), the Commissioner must now determine whether the confidentiality of those proceedings is protected by law.

Is the confidentiality of the Authority's proceedings protected by law?

72. In many cases where this exception applies, there is a specific statutory provision prohibiting the release of the information. However, there will also be cases where the common law of confidence will protect the confidentiality of the proceedings. One aspect of this is the law relating to confidentiality of communications, which embraces the rules and principles applying to legal professional privilege. This includes legal advice privilege, which applies to communications in the course of which legal advice is sought or provided.
73. For information to be confidential under common law, two main requirements must be met:

- (i) The information must have the necessary quality of confidence about it, and it must not be generally accessible to the public already; and
- (ii) The information must have been communicated in circumstances importing an obligation of confidentiality.

Does the information have the necessary quality of confidence?

- 74. The Authority submitted that, while a decision on the planning application had now been reached by the Scottish Ministers, the Applicant retained an interest in the land and had submitted a proposal of application notice to the Authority. The Authority explained that the original application was found not to be compliant with the City Plan in terms of land development. In the Authority's view, disclosure of planning officers' views and opinions, which had been shared internally and in confidence, would lead to prejudicing the City Plan in any future planning applications regarding the development of the piece of land to which the planning application in question related to.
- 75. The Authority argued that, while there was no statutory provision for the maintenance of such confidence within the planning process, it was of the view that one did exist in common law. In its role as Planning Authority, the Authority submitted, it had a duty to ensure that the administration of the planning system was carried out in a manner that was within the public interest in terms of the development and management of land.
- 76. The Authority considered that it had legitimate concerns that disclosure of the requested information would undermine this function and therefore confidentiality should be maintained.

The Commissioner's views on the confidentiality of the information

- 77. The Commissioner has carefully considered all relevant submissions, together with the withheld information. He has done so with regard to the circumstances at the time of the Authority's review outcome, by which time, he notes, the planning application had been referred to the Scottish Ministers for determination.
- 78. The Commissioner notes that some of this information was already publicly available on the Authority's planning portal (and was so at the time of the Applicant's request). The Commissioner cannot, therefore, agree that this information can be accepted to have the quality of confidence claimed by the Authority.
- 79. The Commissioner further notes that certain of this information had already been disclosed to the Applicant in its initial response, with personal data redacted under regulation 11 of the EIRs. Again, the Commissioner cannot accept that this information has the necessary quality of confidence required to engage regulation 10(5)(d) of the EIRs, as claimed by the Authority.
- 80. As such, the Commissioner must find that the Authority was not entitled to withhold this information, at review stage, under regulation 10(5)(d) of the EIRs. As this information was either already publicly available on the Authority's planning portal, or had already been disclosed to the Applicant with personal data redacted, he does not require the Authority to take any further action in this respect.
- 81. As such, the Commissioner must find that the Authority was not entitled to withhold this information, at review stage, under regulation 10(5)(d) of the EIRs.
- 82. For the remainder of the information being withheld under regulation 10(5)(d), the Commissioner considers that the majority of this information is somewhat innocuous, and

records exchanges and discussions on what appear to be mainly technical issues, and with no indication of any obligation of confidentiality. While much of the earlier information in the correspondence has already been disclosed to the Applicant, the Commissioner notes that more recent emails in certain of these exchanges have not, and he can see no harm in their disclosure.

83. The Commissioner does not consider that the Authority has made sufficient arguments to evidence that the particular information being withheld under regulation 10(5)(d) commands a quality of confidence, or has been exchanged with an expectation of confidentiality. In his view, disclosure of this information would not substantially prejudice the handling of the planning application (or indeed any future planning applications), as claimed by the Authority.
84. The Commissioner has also considered the Authority's claim that disclosure would prejudice the City Plan in any future planning applications regarding the development of the land to which the planning application related. He does not agree that the Authority has sufficiently evidenced that this would occur as a result of disclosure of this particular information. As he has commented for regulation 10(4)(e) above, if a planning application was not compliant with the City Plan, then there are statutory processes in place that would identify this. In addition, the Commissioner can see value in the disclosure of information that would lead to the submission of planning applications tailored to ensure they concur with the City Plan.
85. Notwithstanding the Authority's position on this information, the Commissioner does not accept that any of the information withheld under this exception has the quality of confidence necessary for it to be excepted from disclosure under regulation 10(5)(d) of the EIRs.
86. As such, the Commissioner must find that the Authority was not entitled to withhold this information under regulation 10(5)(d) of the EIRs and requires it to be disclosed to the Applicant (subject to the redaction of any personal data).
87. In respect of the information withheld under regulation 10(5)(d) at review stage which, the Authority confirmed during the investigation, it was no longer seeking to withhold under that exception, in the absence of any submissions persuading him otherwise, the Commissioner must find that the Authority was not entitled to withhold that particular information under regulation 10(5)(d). As the Authority has already disclosed this information to the Applicant, he does not require the Authority to take any further action in that respect.

Case Handling

88. The Commissioner is concerned that this case has been greatly over-complicated by the Authority's continual changes of position and records management failures. He has recorded these as non-compliance issues and will consider these in his regular review of the Authority performance and practice.

Decision

The Commissioner finds that the Authority partially complied with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by the Applicant.

The Commissioner finds that the Authority was entitled to rely on regulation 10(4)(e) to withhold some information.

However, the Commissioner also finds that the Authority was not entitled to withhold the remainder of the information requested under (variously) the exceptions in regulations 10(4)(e) and 10(5)(d) of the EIRs and that, in doing so, it failed to comply with regulation 5(1) of the EIRs.

The Commissioner therefore requires the Authority to disclose to the Applicant the information found to have been wrongly withheld, subject to the redaction of any personal data, by

7 June 2024.

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.

Enforcement

If the Authority fails to comply with this decision, the Commissioner has the right to certify to the Court of Session that the Authority has failed to comply. The Court has the right to inquire into the matter and may deal with the Authority as if it had committed a contempt of court.

David Hamilton
Scottish Information Commissioner

23 April 2024

Appendix 1: Relevant statutory provisions

Freedom of Information (Scotland) Act 2002

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

-

- (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.

- (5) A Scottish public authority may refuse to make environmental information available to the extent that its disclosure would, or would be likely to, prejudice substantially-

...

- (d) the confidentiality of the proceedings of any public authority where such confidentiality is provided for by law;

...

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
 - ...