

# Decision Notice 108/2020

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## Information relating to two planning applications

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**Applicant: The Applicant**

**Public authority: Perth and Kinross Council**

**Case Ref: 201902213**



Scottish Information  
Commissioner

## Summary

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The Council was asked for information relating to two planning applications.

The Council disclosed some information. It withheld other information, on the basis that disclosure would prejudice the confidentiality of proceedings (regulation 10(5)(d) of the EIRs).

While the Commissioner accepted that the Council carried out thorough and adequate searches prior to responding to the information request and request for review, and was entitled to withhold information contained within legal advice in one document, he found that the Council was not entitled to apply this same exception to other information it subsequently disclosed during the investigation.

## Relevant statutory provisions

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The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (Interpretation) (definitions (a), (b) and (c) of “environmental information”), 5(1) and (2)(b) (Duty to make available environmental information on request); 10(1), (2) and (5)(d) (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 27 February 2020, the Applicant made a request for information to Perth and Kinross Council (the Council). The information requested was:
  - a) *Copies of all correspondence and contacts to include, emails, letters, memos, notes of phone calls, records of meetings etc between Perth and Kinross Council Officers and the applicants or their agents in relation to planning applications 19/00090/FLL and 17/01260/FLL not otherwise on the Public Access portal.*

*Please note the information requested includes all items detailed above from 4 May 2018 onward and including post-determination discussion and advice relating to 17/01260/FLL and include any pre and post contact in relation to the DPEA Appeal and decision.*
  - b) *In regard to 19/00090/FLL the information requested includes all pre-application discussion and advice on the suitability of the proposal in the context of the previous dismissed appeal and should include everything else from initial contact until now.*

*In this regard the information requested also includes all internal and external consultations.*
2. The Council responded on 28 March 2019. It applied the exemption in section 39(2) of the Freedom of Information (Scotland) Act 2002 (FOISA), on the basis that the information was environmental information and should be considered under the EIRs. The Council responded under the EIRs and provided the Applicant with information, subject to the redaction personal data (for which it relied on the exception in regulation 11 of the EIRs). The Council also withheld some information in line with regulation 10(5)(d) of the EIRs,

submitting that this comprised communications from legal advisers and would be considered to have legal privilege by a court. The Council informed the Applicant that it was also relying on regulation 6(1)(b) (Form and format of information) of the EIRs as certain information was publicly available on its website: it provided links to this.

3. On 2 May 2019, the Applicant wrote to the Council, requesting a review of its decision on the basis that it had not identified and provided all the documentation he was entitled to. The Applicant also stated that he believed that the information withheld under regulation 10(5)(d) should be disclosed to him in full, as was reasonable and necessary in the public interest.
4. The Council notified the Applicant of the outcome of its review on 7 June 2019, fully upholding its decision that the Applicant had received all information held by the Council to which he was entitled. The Council also upheld its application of the exception in regulation 10(5)(d) of the EIRs.
5. On 4 December 2019, 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 Council's review because he considered he was entitled to have full access to the information requested, particularly the information withheld under regulation 10(5)(d), and argued that it was in the public interest for the requested information to be made available.

## Investigation

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6. The application was accepted as valid. The Commissioner confirmed that the Applicant made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to him for a decision.
7. On 5 December 2019, the Council was notified in writing that the Applicant had made a valid application. The Council was asked to send the Commissioner the information withheld from the Applicant. 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 to answer specific questions. These related to the searches carried out by the Council to establish whether it had identified all relevant information held, together with its justification for withholding information under the exception in regulation 10(5)(d) (including consideration of the public interest test).
9. During the investigation, on 4 March 2020, the Council informed the Commissioner that it had changed its position. It withdrew reliance on regulation 10(5)(d) of the EIRs for information in four documents previously withheld from the Applicant and confirmed that it was willing to release the information subject to the redaction of personal data. The information was disclosed. In the absence of submissions from the Council as to why this information was, prior to the investigation, excepted from disclosure under regulation 10(5)(d), the Commissioner must find that the Council breached the EIRs in failing to disclose this information in response to the Applicant's request.
10. The Applicant subsequently informed the Commissioner that the disclosure by the Council did not satisfy his application as it only confirmed that "most" information had been disclosed, also confirming that one document continued to be withheld on the basis that it was

considered to be legal advice. He had already provided the Commissioner with submissions as to why he considered it to be in the public interest for the withheld information to be disclosed.

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

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

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

12. The Council considered the Applicant's request under the EIRs, having concluded that the information requested was environmental as defined in regulation 2(1) of the EIRs.
13. 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 various restrictions and exceptions contained in the EIRs.
14. The Council submitted that it considered the substance of the Applicant's request to be covered by the definition of environmental information contained in the EIRs. The Applicant has not challenged the Council's decision to deal with the information as environmental information and the Commissioner will consider the handling of the request in what follows solely in terms of the EIRs.
15. Similarly, as the Applicant has not challenged the Council's redaction of personal data from the information that has been disclosed or withheld, this will not be considered.

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

16. 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. The obligation relates to information that is held by the authority when it receives a request.
17. On receipt of a request for environmental information, therefore, the authority must ascertain what information it holds falling within scope of the request. Having done so, regulation 5(1) requires the authority to provide that information to the requester unless a qualification in regulations 6 to 12 applies (regulation 5(2)(b)).
18. In order to ascertain whether all relevant information had been identified, the Council was asked to explain the steps it took to establish what information it held and which fell within the terms of the Applicant's request.
19. The Council explained that, in line with its obligations under the Town and Country Planning (Scotland) Act 1997, it is required to have a rigid and transparent filing system in place. All information on the applications in question was either published on its Public Access portal or held in a separate folder as "sensitive".
20. In his request, the Applicant explained that he was seeking information which was not otherwise on the Public Access portal.
21. The Council submitted that searches were carried out both on the Public Access portal and in the separate "sensitive" case file. The Council explained that the response to the Applicant covered the outcomes of both searches.

22. The standard of proof to determine whether a 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.
23. Having considered the submissions from the Council and the terms of the request, the Commissioner accepts that adequate, proportionate searches were carried out by the Council prior to responding to the Applicant's request. He also accepts that these searches would have been capable of identifying any recorded information held by the Council and falling within scope of the Applicant's request. The Commissioner is therefore satisfied that the Council complied with regulation 5(1) of the EIRs in identifying and locating any relevant information it held.

### **Regulation 10(5)(d) of the EIRs**

24. As mentioned, the Council is relying on the exception in regulation 10(5)(d) of the EIRs for withholding information in one document from the Applicant.
25. The exception in 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 proceedings of any public authority where such confidentiality is provided for by law.
26. As with all exceptions contained within regulation 10, a Scottish public authority applying this exception must interpret the exception in a restrictive way (regulation 10(2)(a)) and apply a presumption in favour of disclosure (regulation 10(2)(b)). 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)).
27. *The Aarhus Convention: an Implementation Guide*<sup>1</sup> (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.
28. The first matter to consider is whether the information relates to proceedings of the Council, the confidentiality of which is provided for 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.
29. In many cases where this exception applies, there is a specific 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 which legal advice is sought or provided.

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<sup>1</sup> [http://www.unece.org/fileadmin/DAM/env/pp/Publications/Aarhus\\_Implementation\\_Guide\\_interactive\\_eng.pdf](http://www.unece.org/fileadmin/DAM/env/pp/Publications/Aarhus_Implementation_Guide_interactive_eng.pdf)

30. The Council submitted that the proceedings which would be prejudiced substantially by disclosure of the information were the obtaining of legal advice from a Council solicitor in the course of that solicitor's professional duties. In this regard, the Council explained that the withheld information concerned a Council solicitor giving a planning officer legal advice in connection with a planning application, in the context of an appeal, thereby enabling the planning officer to deal with the case.
31. The Commissioner notes that "proceedings", in the context of this regulation, will cover a range of activities, but will usually be confined to internal deliberations in some form or another. The matter under consideration here is an issue raised in a planning appeal on which legal advice was required and obtained. Having considered the Council's submissions on this point, the Commissioner accepts that obtaining legal advice in this context falls within the intended meaning of "proceedings".
32. For information to be confidential under the common law, two main requirements must be met:
  - the information must have the necessary quality of confidence about it and so must not be generally accessible to the public already; and
  - the information must have been communicated in circumstances imparting an obligation of confidentiality.

*Does the information have the necessary quality of confidence?*

33. The Council informed the Commissioner that there was no evidence of the content of the withheld information being shared with anyone other than the author and recipient.
34. The Commissioner accepts the Council's submission that no other party, other than the solicitor and the planning officer, has seen or had access to the legal advice. In the circumstances, he is content to accept that the information has (and had, at the time the Council dealt with the request) the necessary quality of confidence.

*Was the information communicated in circumstances imparting an obligation of confidentiality?*

35. The law relating to legal professional privilege (including legal advice privilege) is one aspect of the common law of confidentiality. A communication to which legal advice privilege applies will have been communicated in circumstances imparting an obligation of confidentiality
36. The Council submitted that the information concerned a communication from a current practising Council solicitor to a planning officer within the Council, giving advice on a planning matter in the course of that solicitor's professional duties. In the circumstances, the Commissioner accepts that the document was (and remains) subject to legal advice privilege.

*Would disclosure prejudice substantially, or be likely to prejudice substantially, the confidentiality of proceedings?*

37. The Commissioner must also consider whether disclosure would prejudice substantially, or be likely to prejudice substantially, the confidentiality of the proceedings in question.
38. On the question of substantial prejudice, the Council submitted that, if information of this nature were to be released, it would make it difficult for the Council's solicitors to do their professional job effectively.

39. The Commissioner has made clear in previous decisions that the test of substantial prejudice is a high one, requiring a real risk of actual, significant harm. In this case, having considered the content of the information and its privileged status, the Commissioner accepts that its disclosure would, or would be likely to prejudice the confidentiality of the Council's proceedings substantially, as the Council has argued. Consequently, the Commissioner accepts that the exception in regulation 10(5)(d) was correctly applied to that information.

*Public interest test*

40. The Council acknowledged that the general issue of planning applications and appeals was a matter of some public debate within communities and so the disclosure of the information would be in the public interest.
41. Against this public interest in disclosure, the Council argued that there was also considerable public interest in maintaining the principle of legal advice privilege and it did not consider the general public interest in disclosure of the information outweighed that in withholding it.
42. The Applicant outlined his understanding of the history of the planning cases he was concerned about. He asserted that there were legitimate and reasonable grounds to expect release of this withheld information. He contended that withholding this information is not only to his disadvantage, but also disadvantageous to other interested parties. He also argued that, given the evidence of failings identified in the processing of these two planning applications, including those identified by the DPEA (the Planning and Environmental Appeals Division of the Scottish Government) Reporter, it was in the wider public interests of transparency and fairness that the withheld information should be made available. The Applicant believed granting access to the withheld information would ensure proper accountability and would serve the public interest together with upholding public trust and confidence in the proper functioning of the planning system in Scotland.
43. The Commissioner must consider any information which is the subject of legal professional privilege in light of the established, inherent public interest in maintaining the confidentiality of communications between legal adviser and client. The courts have long recognised the strong public interest in maintaining the right to confidentiality of communications between legal adviser and client on administration of justice grounds. Many of the arguments in favour of maintaining confidentiality of communications were discussed in a House of Lords case, *Three Rivers District Council and others v Governor and Company of the Bank of England (2004) UKHL 48*<sup>2</sup> and in the case of *Department for Business, Enterprise and Regulatory Reform v Information Commissioner and O'Brien [2009] EWHC 164 (QB)*<sup>3</sup>. The Commissioner will apply the same reasoning to communication attracting legal professional privilege generally. More widely, he considers there to be a strong public interest, also recognised by the courts, in the maintenance of confidences.
44. The Commissioner acknowledges that disclosure would enhance public understanding of the matters considered and debated on by the Council in respect of these planning applications, particularly in relation to the appeal. This would, in turn, lead to increased transparency and accountability in relation to the Council's compliance with appropriate planning legislation when processing and responding to planning applications.
45. That said, the Commissioner also recognises the fact that the Council has, in line with its statutory duty, made a considerable amount of information about these planning applications

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<sup>2</sup> <http://www.bailii.org/uk/cases/UKHL/2004/48.html>

<sup>3</sup> <http://www.bailii.org/ew/cases/EWHC/QB/2009/164.html>

available on its Public Access portal. The Commissioner also notes that the Council has also disclosed other information, not publicly available, in response to this request. The information that has been disclosed goes some way towards fulfilling the public interest expressed by the Applicant: it might be further fulfilled by disclosing the withheld information, but not significantly.

46. The Commissioner also recognises the strong public interest in ensuring that the Council can receive legal advice in confidence, to facilitate it in discharging its functions as thoroughly and effectively as possible.
47. The Commissioner accepts that disclosure of this information could discourage a public authority from seeking legal advice, or would deter frankness and openness by parties involved when seeking advice, if it were expected that the advice would then be disclosed. If, for this reason, the Council was unable to obtain impartial and objective legal advice in support of its actions, this would not be in the public interest.
48. On balance, having considered the withheld information, the Commissioner is not satisfied that the public interest arguments in favour of making the information available are so strong as to outweigh the public interest arguments in maintaining the exception. Consequently, he finds that the public interest in maintaining the exception outweighs the public interest in making the information available, and so accepts that the information was properly withheld under regulation 10(5)(d) of the EIRs.

## Decision

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The Commissioner finds that Perth and Kinross Council (the Council) partially complied with Part 1 of the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by the Applicant.

The Commissioner finds that by carrying out adequate, proportionate searches in responding to the Applicant's request and requirement for review, the Council complied with regulation 5(1) of the EIRs.

The Commissioner also finds that the Council was entitled to apply the exception in regulation 10(5)(d) of the EIRs for withholding information in one document from the Applicant.

However, he finds that the Council was not entitled to rely on the exception in regulation 10(5)(d) of the EIRs in withholding information it subsequently disclosed during the investigation. The Commissioner therefore found that the Council failed to comply with regulation 5(1) of the EIRs.

Given that the Council disclosed the information it does not consider to be exempt to the Applicant during the course of the investigation, the Commissioner does not require the Council to take any action in respect of this failure in response to the Applicant's application.

## **Appeal**

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Should either the Applicant or Perth and Kinross 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 September 2020**

### 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

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- (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
- (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in paragraph (a);
- (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in paragraphs (a) and (b) as well as measures or activities designed to protect those elements;

...

#### 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.
- (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;
  - ...

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