

Decision Notice



Decision 174/2013 Mr Gavin Hunter and Angus Council

Information relating to pothole damage claims

Reference No: 201202492

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www.itspublicknowledge.info

Rosemary Agnew

Scottish Information Commissioner

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Summary

On 18 April 2012, Mr Hunter asked Angus Council (the Council) for a range of information concerning pothole compensation, damage claims and appeals. The Council initially claimed that Mr Hunter's request was not valid but then wrote to him again disclosing some information. Mr Hunter requested the Council review this decision, which it did subsequently maintaining its position that the request was invalid. Mr Hunter remained dissatisfied and applied to the Commissioner for a decision.

During the investigation, the Council accepted that the request was valid, but argued that the information was excepted from disclosure under regulations 10(4)(e), 10(5)(e) and 11(2) of the EIRs. The Commissioner found that the Council was entitled to withhold some of the information under regulation 11(2), but required the Council to disclose the remainder. She also expressed serious concern about the Council's handling of the request.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 8(1)(c) (Requesting information); 39(2) (Health, safety and the environment)

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (definitions (a) and (c) of "environmental information"); 5(1) and (2)(b) (Duty to make environmental information available on request); 10(1), (2), (4)(e) and (5)(e) (Exceptions from duty to make environmental information available); 11(2), (3)(a)(i) and (b) (Personal data)

Data Protection Act 1998 (the DPA) sections 1(1) (Basic interpretative provisions) (definition of "personal data"); Schedules 1 (The data protection principles: Part I – the principles) (the first principle) and 2 (Conditions relevant for purposes of the first principle: processing of any personal data) (Condition 6)

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



Background

1. On 18 April 2012, Mr Hunter emailed the Council requesting information relating to pothole compensation, damage claims and appeals covering vehicle damage caused on roads which are the responsibility of the Council. Mr Hunter asked for information on these subjects concerning Council policy, instructions and guidelines (whether official or unofficial), discussions and correspondence. Mr Hunter stated that he wished specifically to see information held by five named Council employees.
2. The Council responded on 3 May 2012. The Council informed Mr Hunter that it did not consider the request to be a valid one in terms of section 8(1) of FOISA. The Council stated that it would have to carry out an analysis of documents covered by litigation privilege and to apply judgement in compiling information. In the Council's view, this did not amount to the retrieval of information and was not covered by freedom of information legislation. Additionally, the Council informed Mr Hunter that, even if his request had been valid, the information would have been exempt from disclosure in terms of section 36(1) of FOISA.
3. On 10 May 2012, the Council provided a second response to Mr Hunter. The Council informed Mr Hunter that it had interpreted his request as referring to the devising of the Council's roads maintenance policy. The Council provided Mr Hunter with copies of three committee reports containing information on roads inspections and the managing of defects. The Council also informed Mr Hunter that it did not devise its own policy with regard to roads maintenance but was guided by the Well Maintained Highways Code of Practice. The Council provided Mr Hunter with a weblink to this Code.
4. On 24 May 2012, Mr Hunter emailed the Council requesting a review of its decision. Mr Hunter disagreed with the Council's view that his request for information was invalid. Mr Hunter also disagreed with the interpretation of his request which the Council had outlined in its second response of 10 May 2012.
5. The Council notified Mr Hunter of the outcome of its review on 3 July 2012. The Council informed Mr Hunter that it had identified some information falling within the scope of his request. However, the Council considered his request was invalid for the same reasons set out in its letter of 3 May 2012.
6. On 29 November 2012, Mr Hunter wrote to the Commissioner, stating that he was dissatisfied with the outcome of the Council's review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA. By virtue of regulation 17 of the EIRs, Part 4 of FOISA applies to the enforcement of the EIRs as it applies to the enforcement of FOISA, subject to certain specified modifications.
7. The application was validated by establishing that Mr Hunter had made a request for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its response to that request.



Investigation

8. On 14 December 2012, the Council was notified in writing that an application had been received from Mr Hunter and was asked to provide the Commissioner with any information withheld from him.
9. In response, the Council provided a range of information that it had previously disclosed to Mr Hunter in response to previous information requests. The Council did not provide the Commissioner with the information that it was withholding in relation to the request under consideration in this application. Additionally, the Council stated that it now considered it should have dealt with Mr Hunter's request under the EIRs. The case was then allocated to an investigating officer.
10. The investigating officer subsequently contacted the Council, giving it an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking it to respond to specific questions. The Council was asked to justify its reliance on any provisions of FOISA or the EIRs it considered applicable to the information requested and to explain the searches it had undertaken in order to locate and retrieve any relevant information falling within the scope of Mr Hunter's request.
11. The investigating officer also asked the Council to provide the Commissioner with the information it was withholding from Mr Hunter. Additionally, the Council was asked to explain why it considered the requested information to be excepted from disclosure under the EIRs, to provide submissions on any exception(s) it considered applicable to the withheld information and to confirm whether it wished to apply the exemption in section 39(2) of FOISA to the withheld information.
12. In response, the Council stated that specified officers had been asked to check electronic data to establish whether any relevant information was held. The Council again submitted that Mr Hunter's request was not valid for the purposes of FOISA and did not provide the Commissioner with the withheld information. The Council did not indicate whether or not it considered the request was valid for the purposes of the EIRs. Nonetheless, the Council confirmed that it wished to apply the exemption in section 39(2) of FOISA to the withheld information on the basis that it comprised environmental information.
13. The investigating officer subsequently contacted the Council again, disagreeing with its assertion that Mr Hunter's request was invalid and asking again that it provide the Commissioner with the withheld information. The investigating officer again asked the Council to explain which exception(s) in the EIRs it considered applicable to the withheld information and to provide submissions on the application of those exceptions. The investigating officer also asked the Council to provide fuller details of the searches that had been undertaken in order to locate and retrieve any information falling within the scope of the request.



14. In response, the Council stated that it now accepted that Mr Hunter's application was valid and provided the Commissioner with the information withheld from him, comprising twelve separate documents. The Council provided further details of the searches that had been undertaken in order to locate and retrieve relevant information. The withheld information comprised internal communications regarding specific claims against the Council or information relating to the level and volume of claims received by the Council.
15. The Council stated that it considered the information to be excepted from disclosure in terms of regulations 10(4)(e), 10(5)(b), 10(5)(d) and 10(5)(e) of the EIRs. Despite having been asked to do so, the Council provided no submissions whatsoever explaining why it considered these exceptions to be applicable to the withheld information.
16. The investigating officer then contacted the Council again querying why it had provided no submissions explaining its application of the exceptions in the EIRs that it had cited and giving it a final opportunity to do so. Additionally, the investigating officer pointed out that some of the withheld information supplied by the Council was not held by it at the time it received Mr Hunter's request and was therefore outwith the scope of the request and investigation.
17. The Council responded, explaining that it now wished to apply only the exceptions in regulation 10(4)(e) and 10(5)(e) to the withheld information. The Council provided submissions explaining its application of these exceptions. In further discussions, the investigating officer and the Council agreed that documents 1, 2, 3, 4 and 11 did not fall within the scope of Mr Hunter's request on the basis that they post-dated the Council's receipt of his request. These documents have therefore been discounted from consideration in what follows.
18. In further correspondence with the investigating officer, Mr Hunter indicated that he did not require any documents containing the details of specific claims. Consequently, the Commissioner has discounted documents 6, 9 and 12 from consideration in this decision.
19. This decision, therefore, only considers documents 5, 7, 8 and 10.

Commissioner's analysis and findings

20. In coming to a decision on this matter, the Commissioner has considered all of the withheld information and the relevant submissions, or parts of submissions, made to her by both Mr Hunter and the Council. She is satisfied that no matter of relevance has been overlooked.

FOISA or EIRs?

21. In this case, the Council has considered Mr Hunter's request as one seeking environmental information in terms of the EIRs. Environmental information is defined in regulation 2(1) of the EIRs (the relevant parts of the definition are reproduced in the Appendix to this decision). Where information falls within the scope of this definition, a person has a right to access it under the EIRs, subject to various restrictions and exceptions contained in the EIRs.



22. Having considered the nature of the withheld information, the Commissioner is satisfied that it comprises environmental information as defined within regulation 2(1) of the EIRs. As the requested information concerns the condition of roads (including responsibility for their repair and maintenance), it relates to measures (the Council's policy in relation to how it handles compensation claims) and activities (the Council's responsibilities in terms of the Roads (Scotland) Act 1984) affecting or likely to affect the elements referred to in part (a) of the definition of environmental information, in particular land and landscape. As such, the Commissioner is satisfied that the information withheld by the Council is environmental information as defined in part (c) of the definition.

Section 39(2) of FOISA – environmental information

23. The exemption in section 39(2) of FOISA provides that environmental information as defined by regulation 2(1) of the EIRs is exempt from disclosure under FOISA, thereby allowing any such information to be considered solely in terms of the EIRs. This exemption is subject to the public interest test required by section 2(1)(b) of FOISA. In this case the Commissioner finds that the Council was entitled to apply the exemption to the withheld information, given her conclusion that it is properly considered to be environmental information.
24. As there is a separate statutory right of access to environmental information available to the applicant in this case, the Commissioner also 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. The Commissioner has consequently proceeded to consider this case in what follows solely in terms of the EIRs.

Regulation 10(4)(e)

25. Under regulation 10(4)(e) of the EIRs, a Scottish public authority may refuse to make environmental information available to the extent that the request involves making available internal communications.
26. As with all the exceptions under regulation 10, a Scottish public authority applying this exception must interpret it 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 released unless, in all the circumstances of the case, the public interest in making the information available is outweighed by that in maintaining the exception (regulation 10(1)(b)).
27. The withheld information in this case concerns general correspondence regarding the level of claims submitted to the Council. The Council applied this exception to documents 5, 7, 8 and 10.
28. For information to fall within the scope of the exception in regulation 10(4)(e), it need only be established that the information is an internal communication. In this case, the Commissioner is satisfied that all of the information to which the exception has been applied does comprise internal communications within the Council for the purposes of the EIRs.



29. The application of the exception is subject to the public interest test in regulation 10(1)(b), so the Commissioner must now go on to consider this.

The public interest test

30. The public interest test in regulation 10(1)(b) specifies that a Scottish public authority may only withhold information to which an exception applies where, in all the circumstances, the public interest in making the information available is outweighed by the public interest in maintaining the exception.
31. The Council submitted that the information in question comprised internal communications either in respect of specific claims, or for the purpose of informing press releases. (As Mr Hunter has stated that he does not wish to receive documents containing details of specific claims, the Commissioner has not considered those parts of the Council's submissions which relate to details of specific claims.) The Council argued that the release of the information required to be handled by the Council in the correct context. In the Council's view, the disclosure of the information would not improve the accountability of the Council or increase public scrutiny of its performance regarding potholes.
32. In Mr Hunter's view, the public interest favoured the disclosure of the withheld information. Mr Hunter submitted that the Council provided little information on its website concerning the subject of his request. In his view, the information should be disclosed so that Council Tax payers could know more about the Council's policies in relation to such matters and in the interest of openness and accountability.
33. In considering the public interest test, the Commissioner accepts that there is a general public interest in making information available to the public, especially where this helps to ensure a transparent and accountable decision-making process in Scottish public authorities, but this benefit must be balanced against any detriment to the public interest as a consequence of disclosure.
34. The Commissioner notes that the withheld information under consideration comprises generic information relating to the number and level of claims received by the Council. The Commissioner is unable to see how there could be any detriment to the public interest in the disclosure of such information. The Commissioner is not persuaded by the Council's submission that the disclosure of such information would not improve the accountability of the Council or increase scrutiny of its performance. Indeed, she considers disclosure would have the opposite effect. She also notes that the Council has disclosed similar information to Mr Hunter in response to a previous information request.
35. Accordingly, the Commissioner considers, in relation to documents 5, 7, 8 and 10, that the public interest in making the information available is not outweighed by that in maintaining the exception. Therefore, the Commissioner concludes that the Council was not entitled to withhold these documents under the exception in regulation 10(4)(e) of the EIRs.



Regulation 10(5)(e)

36. The Council also withheld information in documents 7 and 8 under this exception.
37. Regulation 10(5)(e) of the EIRs 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 commercial or industrial information where such confidentiality is provided for by law to protect a legitimate economic interest.
38. In its submissions, the Council stated that all claims of this nature are dealt with by its insurers. The Council submitted that disclosure of the information could substantially prejudice its commercial interests in dealing with such claims. The Council argued that it has a legitimate interest in being allowed to deal with negligence claims in confidence and without admission of liability.
39. The Commissioner has considered the Council's submissions; however, she is unable to conclude that the exception is engaged. The Council has provided no submissions to show why the disclosure of the information would, or would be likely to, result in substantial prejudice to its commercial interests. Additionally, the Commissioner is unable to see how the disclosure of the information would affect the Council's ability to deal with such claims in confidence and without the admission of liability as it has claimed.
40. The Commissioner finds that the Council's submissions are totally inadequate and that it has failed to demonstrate that the exception is engaged. Consequently, the Commissioner is not required to consider the public interest test in relation to this information.

Regulation 11(2) – Personal data

41. Documents 5, 7, 8 and 10 each contain the personal data of third parties. Documents 5, 7 and 10 contain the names of Council staff involved in the administration and processing of claims and document 8 contains the names of individual claimants. Document 10 also contains the name of a Council officer in its Public Relations Team and an external correspondent with the Council.
42. During the investigation, in the interests of the data subjects, the investigating officer pointed out to the Council that the withheld information contained the personal data of Council staff, claimants and a correspondent to the Council. The investigating officer asked the Council to provide additional submissions explaining whether it considered the personal data of those individuals could be disclosed and, if not, why not.
43. In response, the Council provided some submissions but these were only in relation to members of staff. Despite having been asked to do so, it provided no submissions in relation to the personal data of claimants and the external correspondent. The following deliberations, therefore, have been separated to differentiate between the personal data of the Council employees, and that of the claimants and correspondent.



Personal data of the Council employees

44. Regulation 11(2) of the EIRs excepts personal data of which the applicant is not the data subject, where either "the first condition" (set out in regulation 11(3)) or "the second condition" (set out in regulation 11(4)) applies. The Council's arguments relate to those parts of the first condition which apply where making the information available would contravene the data protection principles. In order for a Scottish public authority to rely on this exception, it must show
- (i) that the information is personal data for the purposes of the DPA and
 - (ii) that making it available would contravene at least one of the data protection principles laid down in the DPA.
45. In this case, the Council argued that the first data protection principle would be contravened.
46. "Personal data" are defined in section 1(1) of the DPA as:
- data which relate to a living individual who can be identified (a) from those data, or (b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller, and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual.*
47. The information under consideration comprises the names of Council officers. The Commissioner is satisfied that the information under consideration (i.e. the names of individuals) is the personal data of those individuals who could, in line with definition (a) of "personal data", be identified from the information. In the context in which the information appears, the Commissioner is satisfied that it relates to those individuals, being biographical in relation to – and focusing on - them.

Would disclosure of the personal data contravene the first data protection principle?

48. The Council argued that disclosure of the personal data would breach the first data protection principle. This requires that personal data be processed fairly and lawfully and, in particular, that it shall not be processed unless at least one of the conditions in Schedule 2 to the DPA is met. The processing under consideration in this case is disclosure of the personal data into the public domain in response to Mr Hunter's information request.
49. There are three separate aspects to the first data protection principle:
- (i) fairness
 - (ii) lawfulness and
 - (iii) the conditions in the schedules.
50. However, these three aspects are interlinked. For example, if there is a specific condition in the schedules which permits the personal data to be disclosed, it is likely that the disclosure will also be fair and lawful.



51. The Commissioner will now go on to consider the Council's arguments and whether there are any conditions in Schedule 2 to the DPA which would permit the personal data of the Council employees to be disclosed, given there is no presumption in favour of making personal data available under the general obligation laid down in the EIRs.

Can any of the conditions in Schedule 2 to the DPA be met?

52. When considering the conditions in Schedule 2, the Commissioner notes Lord Hope's comment in *Common Services Agency v Scottish Information Commissioner* [2008] UKHL 47¹ that the conditions require careful treatment in the context of a request for information under FOISA, given that they were not designed to facilitate the release of information, but rather to protect personal data from being processed in a way that might prejudice the rights and freedoms or legitimate interests of the data subject.
53. Having considered all the conditions in Schedule 2, the Commissioner finds that only condition 6 might be applicable in the circumstances of this case.
54. Condition 6 allows personal data to be processed if the processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject(s) (i.e. the individual(s) to whom the data relate).
55. There are a number of different tests which must therefore be satisfied before condition 6 can be met. These are:
- (i) Is Mr Hunter pursuing a legitimate interest or interests?
 - (ii) If yes, is the processing necessary for the purposes of these interests? In other words, is the disclosure proportionate as a means and fairly balanced as to its ends, or could these legitimate interests be achieved by means which interfere less with the privacy of the data subject(s)?
 - (iii) Even if processing is necessary for Mr Hunter's legitimate interests, is the processing unwarranted in this case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject(s)?

Is Mr Hunter pursuing a legitimate interest or interests?

56. The Council submitted that Mr Hunter did not have a legitimate interest in obtaining the personal data of Council staff. In the Council's view, the withheld information contained details of members of staff who were carrying out their employment roles. The Council argued that each claim it received was assessed on its own merits and the disclosure of this information would not assist a member of the public in pursuing a claim or in establishing the number of pothole claims received or settled.

¹ <http://www.publications.parliament.uk/pa/ld200708/ldjudgmt/jd080709/comm-1.htm>



57. In this case, Mr Hunter pointed out that the Council had previously disclosed information to him which included a diary entry with the names of Council employees.
58. Having considered his submissions, the Commissioner has concluded that Mr Hunter is pursuing a legitimate interest in relation to the personal data of the Council staff under consideration. The Commissioner accepts that the withheld information would assist Mr Hunter in understanding the Council's internal procedures for dealing with compensation claims and the departments which are involved in the handling of such claims.
59. The Commissioner will now go on to consider whether disclosure of the personal data relating to Council employees is necessary for the purposes of Mr Hunter's legitimate interests.

Is the processing necessary for the purposes of those legitimate interests?

60. In all the circumstances of this case, the Commissioner can identify no viable means of meeting Mr Hunter's legitimate interests which would interfere less with the privacy of the relevant data subjects than the provision of the withheld personal data. In the circumstances, she is satisfied that making those personal data available is necessary to meet the legitimate interests in question.

Is the processing unwarranted in this case by reason of prejudice to the rights, freedoms or legitimate interests of the data subjects?

61. The Commissioner must next go on to consider whether the processing is unwarranted by reason of prejudice to the rights and freedoms or legitimate interests of the individuals whose personal data it is.
62. As noted above, this test involves a balancing exercise between the legitimate interests of Mr Hunter and the rights, freedoms and legitimate interests of the individuals in question. Only if the legitimate interests of Mr Hunter outweigh those of the data subjects can the information be made available without breaching the first data protection principle.
63. In the Commissioner's briefing on regulation 11 of the EIRs², she notes a number of factors which should be taken into account in carrying out the balancing exercise. These include:
 - whether the information relates to the individual's public life (i.e. their work as a public official or employee) or their private life (i.e. their home, family, social life or finances)
 - the potential harm or distress that may be caused by the disclosure
 - whether the individual objected to the disclosure
 - the reasonable expectations of the individuals as to whether the information should be disclose

² <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section38/Section38.aspx>



64. The Council submitted that the information comprised private communications within the Council relating to claims. In the Council's view, its employees should be able to conduct the business of the Council without these communications being made public.
65. Having considered the Council's submissions, the Commissioner is not satisfied that the Council has made a persuasive argument for the personal data of its employees to be withheld. The Council has merely stated that it considers its employees should be allowed to be allowed to communicate with each other privately. The Council has given no indication (as requested by the investigating officer) of the seniority of the employees (although it is clear from the job titles included in the correspondence that some of them are very senior) or whether they are employed in public facing roles.
66. In this case, the communications in question are routine in nature and it hard to see how the disclosure of the personal data under consideration would impinge on any way in the ability of the data subjects to carry out their duties. In its submissions, the Council made no suggestion that the disclosure of the information would cause any distress or damage to the data subjects. As already noted, the Council has previously disclosed the names of Council officers to Mr Hunter in response to another information request.
67. The Commissioner has balanced the rights, freedoms and legitimate interests of the data subjects against the legitimate interests of Mr Hunter. Having done so, the Commissioner finds that the legitimate interests served by making the personal data available to Mr Hunter (and the wider public) outweigh any unwarranted prejudice to the rights, freedoms or legitimate interests of the data subjects. The Commissioner is therefore satisfied that condition 6 of schedule 2 of the DPA can be met in this case.
68. Having reached this conclusion, the Commissioner has gone on to consider whether (as required by the first data protection principle) making the withheld personal data available would be fair and lawful.
69. The Commissioner considers that it would be fair to make the information available, for the reasons already outlined in relation to condition 6 above. Whilst the Council has not provided any separate submissions to argue that to do so would be unlawful, the Commissioner, in any case, is unable to identify (having concluded that condition 6 of schedule 2 to the DPA can be met) any specific law forbidding the information being made available.
70. Having found disclosure of the information sought by Mr Hunter (in relation to the personal data of Council employees) to be both fair and lawful, and in accordance with condition 6(1), the Commissioner therefore concludes that making this information available would not breach the first data protection principle.
71. As the Commissioner has found that making the withheld personal data available would not breach the first principle, she therefore concludes that the exception in regulation 11(2) of the EIRs has been wrongly applied by the Council to the withheld information in this case (insofar as it relates to Council employees) and so it acted in breach of regulation 5(1) by withholding it.



Personal data of other individuals

72. As already noted the Council did not provide any submissions relating to the personal data of individual claimants or to an external correspondent. Given the Council did not initially identify the information as personal data, and has since failed to provide any arguments as to why it should be withheld, the Commissioner finds that the Council failed to apply the exemption correctly and breached regulation 5(1) in doing so.
73. However, for the reasons explained in the following paragraphs, the Commissioner is aware that to direct the Council to disclose the information would result in a breach of the first data protection principle. Consequently, although the Commissioner finds against the Council, she will not, in the interests of the data subjects, direct it be disclosed.
74. The information contained in document 8 comprises a summary of claims which includes the claimants' names. The correspondence in document 10 comprises an email chain which includes a general information request made to the Council. The information clearly relates to those individuals, in the context in which it appears, being biographical in relation to – and focusing on – them. As it is their names and, in one case, direct contact details, the individuals can, in line with definition (a) of “personal data”, be identified from the information.
75. In relation to this information, the Commissioner is unable to conclude that, for the purposes of condition 6, Mr Hunter, or the wider public, is pursuing a legitimate interest in relation to this information. As the Commissioner considers that Mr Hunter does not have a legitimate interest in relation to the information withheld by the Council which relates to individual claimants or the external correspondent, she is satisfied that Condition 6 of Schedule 2 is not met in this case. Therefore, disclosure of the personal data would breach the first data protection principle and so would be excepted under regulation 11(2) of the EIRs.

Consideration of the cumulative public interest

76. The Commissioner notes that, in this case, the Council applied the exceptions in both regulation 10(4)(e) and 10(5)(e) to a number of the withheld documents. During the investigation, the investigating officer drew the Council's attention to the judgement of the European Court of Justice (ECJ) in the case of *OFCOM v the Information Commissioner*³.
77. In that judgement, the ECJ considered how the public interest test should be addressed under the EIRs, in cases where more than one exception has been found to apply to the same information.
78. The ECJ concluded that, in such cases, a two stage public interest test should be carried out. The first step (undertaken above) is to consider, in relation to each exception judged to apply, whether the public interest in disclosing that information is outweighed by the public interest in maintaining the exception.

³ <http://www.bailii.org/eu/cases/EUECJ/2011/C7110.html>



79. Where more than one exception is found to apply to the same piece of information, the second test is then to cumulatively weigh all grounds for refusing to disclose the information against all of the public interests served by disclosure, and to come to a decision as to whether the information should be disclosed.
80. Although the Council had, in this case, found two exceptions to apply, it declined to put forward any arguments on the cumulative public interest test.
81. As the Commissioner did not accept that the exception in regulation 10(5)(e) was engaged, she has not found it necessary to consider the cumulative public interest test on this occasion. However, she would suggest that the Council has regard to the judgement of the ECJ and includes a consideration of the cumulative public interest test should similar cases arise in future.

Conclusion

82. Having concluded that documents 5, 7, 8 and 10 are not excepted from disclosure under regulations 10(4)(e) and 10(5)(e) of the EIRs, the Commissioner now requires the Council to disclose them to Mr Hunter, subject to the redaction of the names of the claimants in document 8 and the personal data of the external correspondent mentioned in document 10.
83. With this decision, the Commissioner will provide the Council with a copy of the information in question indicating the identifying information that should be redacted.

The Council's handling of the request

84. Having reached her formal conclusions above, the Commissioner wishes to note her serious concerns regarding the Council's handling of Mr Hunter's information request and subsequent conduct during the investigation of the case.
85. As already noted, the Council initially informed Mr Hunter that it did not consider his request to be a valid one in terms of section 8(1)(c) of FOISA, and then disclosed some information. The Council persisted with this position that the request was invalid following a review, confusing the matter still further in its decision by saying the request was invalid but in any case the information held would be exempt. It maintained the view that the request was invalid in its initial dealings with the investigating officer.
86. It concerns the Commissioner that the Council's rationale for deciding that the request was not valid displayed a fundamental misunderstanding of the most basic aspects of FOISA and the EIRs. This was not only in the initial response but also in the Council's review and during the subsequent appeal to the Commissioner. It was not until the investigating officer pointed out that the Council did not appear to have had any difficulty in identifying the information requested by Mr Hunter, that it finally agreed that the request was valid.



87. The Commissioner notes that, as the investigation progressed, the Council eventually accepted that the request was indeed a valid one. However, by initially claiming that Mr Hunter's request for information was invalid, the Commissioner finds that the Council breached regulation 5(1) of the EIRs. The impact of this was avoidable delay in Mr Hunter receiving the information and unnecessary cost to the Council in having to deal with the review and to both the Commissioner and the Council in having to consider the appeal; an appeal that might have been avoided.
88. The Commissioner is also concerned that the Council, having finally accepted that the request was valid, failed to provide any submissions on its application of the exceptions that it eventually decided to apply to the withheld information. It was only after prompting from the investigating officer (in the interests of fairness), that the Council provided submissions: submissions which the Commissioner considered to be inadequate in many respects.
89. The Commissioner would stress that it is the responsibility of a public authority to justify its decision. Where submissions are not received, or are inadequate, the Commissioner is likely to issue a decision based on the information available to her, and will not normally pursue additional submissions.
90. The Commissioner has provided guidance for public authorities⁴ which makes clear what is expected of them during an investigation, including the standard of submissions required. In this case, the Council's submissions fell short of the standard required by the Commissioner. She would expect the Council to ensure that adequate submissions are provided to her in any future investigations.

⁴ <http://www.itspublicknowledge.info/uploadedfiles/InvestigationsGuideJan2011.pdf>



DECISION

The Commissioner finds that Angus Council (the Council) partially complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) and the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by Mr Hunter.

The Commissioner finds that the Council was entitled to withhold some information under regulation 11(2) of the EIRs.

The Commissioner also finds that:

- by failing to recognise initially, and deal with, Mr Hunter's request as one seeking environmental information, the Council failed to comply with regulation 5(1) of the EIRs.
- the Council breached regulation 5(1) by initially determining that Mr Hunter's request was not valid.
- the Council was wrong to rely on the exceptions in regulations 10(4)(e), 10(5)(e) and 11(2) of the EIRs for withholding the majority of the information from Mr Hunter. This was also a breach of regulation 5(1).

The Commissioner therefore requires the Council to disclose the information contained in documents 5, 7, 8 and 10 to Mr Hunter (subject to the redaction of the personal data of individual claimants and an external correspondent) by 30 September 2013.

Appeal

Should either Mr Hunter or Angus Council wish to appeal against this decision, there is an 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.

Rosemary Agnew
Scottish Information Commissioner
16 August 2013



Appendix

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002

1 General entitlement

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

...

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

2 Effect of exemptions

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

...

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

...

8 Requesting information

- (1) Any reference in this Act to "requesting" information is a reference to making a request which-

...

- (c) describes the information requested.

...

39 Health, safety and the environment

...

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

...



The Environmental Information (Scotland) Regulations 2004

2 Interpretation

(1) In these Regulations –

...

"environmental information" has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on –

(a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;

...

(c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in paragraphs (a) and (b) as well as measures or activities designed to protect those elements;

...

5 Duty to make available environmental information on request

(1) Subject to paragraph (2), a Scottish public authority that holds environmental information shall make it available when requested to do so by any applicant.

(2) The duty under paragraph (1)-

...

(b) is subject to regulations 6 to 12.

...

10 Exceptions from duty to make environmental information available–

(1) A Scottish public authority may refuse a request to make environmental information available if-

(a) there is an exception to disclosure under paragraphs (4) or (5); and

(b) in all the circumstances, the public interest in making the information available is outweighed by that in maintaining the exception.

(2) In considering the application of the exceptions referred to in paragraphs (4) and (5), a Scottish public authority shall-



- (a) interpret those paragraphs in a restrictive way; and
- (b) apply a presumption in favour of disclosure.

...

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

...

- (e) the request involves making available internal communications.

- (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-

...

- (e) the confidentiality of commercial or industrial information where such confidentiality is provided for by law to protect a legitimate economic interest;

11 Personal data

...

- (2) To the extent that environmental information requested includes personal data of which the applicant is not the data subject and in relation to which either the first or second condition set out in paragraphs (3) and (4) is satisfied, a Scottish public authority shall not make the personal data available.

- (3) The first condition is-

- (a) in a case where the information falls within paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998 that making the information available otherwise than under these Regulations would contravene-

- (i) any of the data protection principles;

...

- (b) in any other case, that making the information available otherwise than under these Regulations would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.

...



Data Protection Act 1998

1 Basic interpretative provisions

(1) In this Act, unless the context otherwise requires –

...

"personal data" means data which relate to a living individual who can be identified –

(a) from those data, or

(b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller, and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual;

...

Schedule 1 – The data protection principles

Part I – the principles

1. Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –

(a) at least one of the conditions in Schedule 2 is met, and

(b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.

...

Schedule 2 – Conditions relevant for purposes of the first principle: processing of any personal data

...

6. (1) The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.

...