

Decision Notice

Decision 147/2018: Company J and City of Edinburgh Council

AMC (applications for approval of matters specified in conditions) application fees

Reference No: 201702262

Decision Date: 1 October 2018



Scottish Information
Commissioner

Summary

The Council was asked for information regarding its decision to amend AMC (applications for approval of matters specified in conditions) planning fees.

The Council disclosed some information under the EIRs, but withheld other information it believed to be third party personal data, internal communications or external legal advice.

The Commissioner investigated and found that the Council had correctly withheld third party personal data and legal advice, but had incorrectly withheld some information from internal communications.

The Commissioner requires the Council to disclose the wrongly withheld information.

Relevant statutory provisions

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

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

Data Protection Act 2018 (the DPA 2018) Schedule 20 (Transitional provision etc - paragraph 61)

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 11 October 2017, Company J made a request for information to the City of Edinburgh Council (the Council). The information requested was all documents, notes, minutes and emails in connection with:
 - (i) The authorisation of [a named official], Majors Waterfront Team Manager, Planning and Transport, to advise Company J's professional advisors on 27 July 2017 that the Council were entitled to charge full fees for any AMC applications (applications for approval of matters specified in conditions) made after planning permission had been obtained on a site; and
 - (ii) The decision notified by [the named official] to Company J's professional advisors on 9 October 2017 that the Council were reverting to the "previous approach".
2. The Council responded on 8 November 2017. It notified Company J that it held information falling within the scope of its request but it was withholding it under regulations 10(4)(e) (internal communications), 10(5)(b) (the course of justice, etc.) and 11(2) (personal data) of the EIRs.

3. On 10 November 2017, Company J wrote to the Council requesting a review of its decision, in particular the decision to consider the request under the EIRs.
4. The Council notified Company J of the outcome of its review on 8 December 2017. It explained why it considered the requested information to be environmental information and it confirmed that it would be applying the exemption in section 39(2) (environmental information) of the Freedom of Information (Scotland) Act 2002 (FOISA) to the information request, so the request would be considered under the EIRs. The Council disclosed some information to Company J but continued to withhold other information under regulations 10(4)(e), 10(5)(b) and 11(2) of the EIRs.
5. On 15 December 2017, Company J applied to the Commissioner for a decision in terms of section 47(1) of FOISA. By virtue of regulation 17 of the EIRs, Part 4 of FOISA applies to the enforcement of the EIRs as it applies to the enforcement of FOISA, subject to specified modifications. Company J stated it was dissatisfied with the outcome of the Council's review because it considered that the public interest favoured disclosure of the information.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that Company J 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 16 January 2018, the Council was notified in writing that Company J had made a valid application. The Council was asked to send the Commissioner the information withheld from Company J. The Council provided the Commissioner with withheld information and a schedule of documents on 2 February 2018 and the case was allocated to an investigating officer.
8. On 19 February 2018, the investigating officer noted that the withheld information provided by the Council did not match up with the exceptions referred to in the schedule of documents. The investigating officer subsequently contacted the Council to seek clarification of the information being withheld. The Council agreed to review the information that had been sent to the Commissioner and, on 16 March 2018, it provided the Commissioner with an entirely new set of withheld information along with a revised schedule of documents.
9. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. On 23 March 2018, the Council was invited to comment on this application and answer specific questions including justifying its reliance on any provisions the EIRs it considered applicable to the information requested.
10. The Council responded on 10 April 2018. The investigating officer reviewed the Council's response, along with the schedule of documents and the withheld information it had provided on 16 March 2018. The investigating officer found that it was still not clear what information was being withheld by the Council, as the Council had not specified the information that it was withholding under regulation 11(2) of the EIRs.
11. On 20 April 2018, the investigating officer asked the Council to provide a further schedule of documents. The Council supplied this information on 4 May 2018 and the investigation was able to continue.

Commissioner's analysis and findings

12. 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 Company J and the Council. He is satisfied that no matter of relevance has been overlooked.

FOISA or EIRs?

13. The Council responded to Company J's request and requirement for review in terms of the EIRs. In its review outcome, it confirmed that it was applying the exemption in section 39(2) of FOISA.
14. In submissions to the Commissioner, Company J queried the Council's decision to respond to the request under the EIRs.
15. Having considered the withheld information, the Commissioner notes that it relates to the fees for planning developments, and in particular to financial contributions to be paid to the Council by the developer. The Commissioner is satisfied that the information concerns measures, policies and activities affecting or likely to affect the land and landscape. As such, the Commissioner is satisfied that it would fall within paragraphs (a) and (c) of the definition of environmental information in regulation 2(1) of the EIRs (reproduced in Appendix 1 to this decision) and that the Council was correct to respond to the request under the EIRs.

Section 39(2) of FOISA - environmental information

16. The exemption in section 39(2) of FOISA provides, in effect, that environmental information (as defined in 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. The Commissioner accepts that the Council was entitled to apply the exemption to the requested information, given his conclusion that it is properly classified as environmental information.
17. The exemption in section 39(2) is subject to the public interest test in section 2(1)(b) of FOISA. 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 in dealing with the request in line with the requirements of the EIRs outweighs any public interest in disclosing the information under FOISA.
18. As the withheld information in this case is all environmental information, the Commissioner will consider the Council's handling of the request in what follows solely in terms of the EIRs.

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

19. Regulation 5(1) of the EIRs (subject to the various qualifications contained in regulations 6 to 12) requires a Scottish public authority which holds environmental information to make it available when requested to do so by any applicant.
20. Under the EIRs, a public authority may refuse to make environmental information available if one or more of the exceptions in regulation 10 apply and, in all the circumstances of the case, the public interest in maintaining the exception(s) outweighs the public interest in making the information available.
21. During the investigation, the Council withdrew its reliance on regulation 10(5)(b) of FOISA. It argued instead that regulation 10(5)(d) (the confidentiality of the proceedings of a public authority) of the EIRs should apply to communications between itself and external legal

counsel, while regulation 10(4)(e) applied to all internal communications between Council officers, including with communications with its in-house legal advisers. The Council maintained its reliance on regulation 11(2) of the EIRs to withhold third party personal data.

Regulation 10(5)(d) of the EIRs – prejudice to confidentiality of proceedings

22. The Council is seeking to withhold two documents from Company J under the exception contained in regulation 10(5)(d) of the EIRs. In the schedule of documents provided by the Council, they are described as: Item 2; email 2 (attached legal opinion and associated email only) and Item 9 (email and letter).
23. During the investigation, Company J indicated to the Commissioner that it was not seeking to obtain external legal advice, but it did not absolutely exclude external legal advice from matters it wished the Commissioner to consider. In light of this, the Commissioner has gone on to consider whether the Council has correctly applied the exception in regulation 10(5)(d) of the EIRs to communications with an external legal adviser.
24. Regulation 10(1) of the EIRs provides that a public authority may refuse to make environmental information available if one or more of the exceptions in regulations 10(4) and (5) applies to that information and, in all the circumstances, the public interest in making the information available is outweighed by that in maintaining the exception or exceptions. It should be noted that, under regulation 10(2), authorities are required to interpret the exceptions in a restrictive way and to apply a presumption in favour of disclosure.
25. Under regulation 10(5)(d), 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. The Council submitted that information relating to external legal advice was covered by this exception.
26. In its publication "The Aarhus Convention: an implementation guide"¹ (which provides guidance on the Convention on which the EIRs are based) the Economic Commission for Europe notes (at page 86) that the Convention does not comprehensively define "proceedings of public authorities". However, 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 authority in its area of competence. The confidentiality under this exception must be provided for under national law.
27. The Council submitted that the information withheld under regulation 10(5)(d) related to its functions under the Town and Country Planning (Fees for Applications and Deemed Applications) (Scotland) Regulations 2004 and, in particular, the process of obtaining legal advice in connection with the exercise of those functions. The Council argued that the common law of confidence applied in this case.
28. One aspect of the common law of confidence is the law relating to confidentiality of communications, which embraces the rules and principles applying to legal professional privilege. This includes legal advice privilege.
29. The Commissioner has accepted in previous decisions that legal advice could fall within the terms of regulation 10(5)(d) of the EIRs (see paragraph 23 of *Decision 137/2010 Mrs Ann*

¹ http://www.unece.org/fileadmin/DAM/env/pp/Publications/Aarhus_Implementation_Guide_interactive_eng.pdf

Wilson and Aberdeenshire Council², and paragraph 22 of Decision 199/2016 Mr Francis Mordaunt and Scottish Borders Council³.

30. The Commissioner will now consider whether the legal advice withheld in this case is excepted from disclosure under regulation 10(5)(d) of the EIRs.
31. For information to be confidential under the common law of confidence, two main requirements must be met:
 - (i) the information must have the necessary quality of confidence about it and 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?

32. The Council told the Commissioner that no party other than its legal advisers and the Council itself had seen or had access to the legal advice. The advisers were acting in their professional capacity as legal advisers and therefore the information was confidential.
33. The Commissioner is satisfied that the information was shared only between the Council and its external legal adviser; it has not been disclosed to the wider public. In the circumstances, he accepts that the information has the necessary quality of confidence.

Was the information communicated in circumstances importing an obligation of confidentiality?

34. The Council submitted that the following conditions were fulfilled:
 - (i) the information related to communications with a professional legal adviser, such as a solicitor or an advocate;
 - (ii) the legal adviser was acting in their professional capacity; and
 - (iii) the information was confidential.
35. The Commissioner is satisfied that the information withheld under regulation 10(5)(d) consists of information related to communications with a particular legal adviser within the context of a professional relationship in circumstances in which legal professional privilege could apply. The legal adviser was clearly acting in their professional capacity by providing advice to the Council.
36. Having considered in full the submissions from the Council, the Commissioner takes the view that a claim to confidentiality of communications could be maintained in legal proceedings in respect of this information. The information is clearly legal advice and the associated request and is marked for the intended recipient only. The Council states that the substance of the legal advice received has not been disclosed, and the Commissioner has received no evidence to suggest the advice has been disclosed: he therefore accepts that the confidentiality of the advice has been maintained.
37. The Commissioner is therefore satisfied that, in this case, the confidentiality of the Council's proceedings is provided for by law. The Commissioner must now consider whether disclosure would, or would be likely to, prejudice substantially those proceedings.

² <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2010/200901753.aspx>

³ <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2016/201600866.aspx>

38. The Council commented that it was essential that it could obtain legal advice in confidence in relation to proposed changes in procedures to ensure compliance with legislation. It would be severely disadvantaged if the other party were able to obtain and view the Council's legal advice following its disclosure into the public domain.
39. The Commissioner is clear that the test of substantial prejudice requires a real risk of actual, significant harm. Given the content of the information and its inherently confidential nature, and having taken full account of the Council's arguments, the Commissioner accepts that making this information available would have caused, or would have been likely to cause, substantial prejudice to the confidentiality of the Council's proceedings. He therefore accepts that the exception in regulation 10(5)(d) is engaged.

Public interest test

40. As noted above, the exception in regulation 10(5)(d) of the EIRs is subject to the public interest test in regulation 10(1)(b).
41. The Council acknowledged that there is a general public interest in disclosing information in order to promote transparency and accountability in local government. However, it argued that it was essential that the Council can obtain legal advice in confidence in relation to proposed changes in procedures to ensure compliance with legislation. The Council submitted that it must be able to obtain this legal advice secure in the knowledge that any other parties in any future legal proceedings would not be able to obtain the Council's legal advice.
42. The Council argued that it would be severely disadvantaged if the other party were able to obtain and view the Council's legal advice following its disclosure into the public domain. It noted that the Commissioner has previously stated that there will always be a strong public interest in maintaining the right to confidentiality of communications between a legal adviser and their client and that while each case will be considered on an individual basis, the Commissioner is only likely to order the release of such communications in highly compelling cases.
43. The Council submitted that the public interest in this information is low, given that the Council has reverted to its previous policy on this matter.
44. The Council argued that, despite there being a clear public interest in promoting transparency and accountability, it is of greater concern and benefit to the public to ensure that the Council can obtain legal advice secure in the knowledge that this would not be available to the public in the event of a legal challenge.
45. As noted above, Company J indicated that it was not seeking to obtain any external legal advice, but its submissions on this point were not completely clear, so the Commissioner has gone on to consider the Council's application of regulation 10(5)(d) of the EIRs to such information. Company J has not made any specific arguments on the public interest test as it applies to the information withheld under this exception, but it has made general arguments about transparency and accountability.
46. The Commissioner must consider any information which is the subject of legal professional privilege in the light of the established, inherent public interest in maintaining the confidentiality of communications between legal adviser and client. As noted above, 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.

47. 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*⁴. The Commissioner will apply the same reasoning to communications attracting legal professional privilege generally. More generally, he considers there to be a strong public interest, also recognised by the courts, in the maintenance of confidences.
48. The Commissioner acknowledges that disclosure of this information would help fulfil a public interest in understanding the Council's consideration of its regulatory functions in relation to charging fees for AMC planning applications. The Commissioner considers that it is in the public interest to ensure effective oversight of the Council's actions and that disclosure of the information withheld by the Council would, to some extent, enable such oversight.
49. On the other hand, the Commissioner 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. This is particularly the case where the legal advice concerns an issue which may be subject to legal challenge (a point raised by Company J in previous correspondence with the Council).
50. The Commissioner considers that the disclosure of such information could discourage a public authority from seeking legal advice, or would deter frankness and openness by parties involved when seeking advice if there was knowledge that the advice may be then disclosed. If, for this reason, the Council was unable to obtain impartial and objective legal advice in respect of its actions, this would not be in the public interest.
51. On balance, having examined the withheld information, the Commissioner is not satisfied that the public interest arguments presented by Company J in favour of making the legal advice 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 disclosure, and accepts that the information was properly withheld under regulation 10(5)(d) of the EIRs.

Regulation 11(2) of the EIRs – personal data

52. Regulation 10(3) of the EIRs provides that a Scottish public authority can only make personal data in environmental information available in accordance with regulation 11. Regulation 11(2) provides that personal data shall not be made available where the applicant is not the data subject and other specified conditions apply. These include where disclosure would contravene any of the data protection principles in Schedule 1 to the DPA 1998 (regulation 11(3)(a)(i)/(b)). The Council argued that disclosure of certain information would breach the first data protection principle.
53. The Council withheld the following information under regulation 11 on the basis that disclosure would breach the first data protection principle:
 - (i) names, email addresses and telephone numbers of Council officers
 - (ii) names, email addresses and telephone numbers of members of the public
 - (iii) details of when a Council officer would not be working

⁴ <http://www.bailii.org/uk/cases/UKHL/2004/48.html>

Data Protection Act 2018 (Transitional provisions)

54. On 25 May 2018, the DPA 1998 was repealed by the DPA 2018. The DPA 2018 amended regulation 11 of the EIRs and also introduced a set of transitional provisions which set out what should happen where a public authority dealt with an information request before the EIRs were amended on 25 May 2018, but where the matter is being considered by the Commissioner after that date.
55. In line with paragraph 61 of Schedule 20 to the DPA 2018 (see Appendix 1), if an information request was dealt with before 25 May 2018 (as is the case here), the Commissioner must consider the law as it was before 25 May 2018 when determining whether the authority dealt with the request in accordance with the EIRs.
56. Paragraph 61 of Schedule 20 goes on to say that, if the Commissioner concludes that the request was not dealt with in accordance with the EIRs (as it stood before 25 May 2018), he cannot require the authority to take steps which it would not be required to take in order to comply with the EIRs on or after 25 May 2018.
57. The Commissioner will therefore consider whether the Council was entitled to apply the exception in regulation 11(2) of the EIRs under the old law. If he finds that the Council was not entitled to withhold the information under the old law, he will only order the Council to disclose the information if disclosure would not now be contrary to the new law.

Is the information under consideration personal data?

58. The definition of "personal data" under consideration here is that in section 1(1) of the DPA 1998 (see Appendix 1). Having considered the submissions received, the Commissioner is satisfied that all of the information withheld by the Council is personal data: living individuals can be identified from the information and, given the context in which the information appears, he is satisfied that the information relates to the individuals concerned.

The first data protection principle

59. The first data protection principle states that personal data shall be processed fairly and lawfully. The processing in this case would be making the information available in the public domain, in response to Company J's request. The first principle also states that personal data shall not be processed unless at least one of the conditions in Schedule 2 to the DPA 1998 is met (the full text of the principle is set out in Appendix 1). A condition in Schedule 3 to the DPA 1998 will also require to be met if the data is sensitive personal data, as defined in section 2 of the DPA 1998: the Commissioner is satisfied that this is not the case here.
60. There are three separate aspects to the first data protection principle:
 - (i) fairness
 - (ii) lawfulness and
 - (iii) the conditions in the schedules.

These three aspects are interlinked. For example, if there is a specific condition in Schedule 2 which permits the personal data to be disclosed, it is likely that the disclosure will also be fair and lawful.

61. The Commissioner will now consider whether there are any conditions in Schedule 2 to the DPA 1998 which would permit the withheld personal data to be made available. If any of these conditions can be met, he must then consider whether making the information available would be fair and lawful.

Can any of the conditions in Schedule 2 be met?

62. In the circumstances, it appears to the Commissioner that condition 6 in Schedule 2 is the only one which might permit making the information available to Company J. 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 (the individuals to whom the data relate).
63. There are, therefore, a number of different tests which must be satisfied before condition 6 can be met. These are:
- (i) Is Company J pursuing a legitimate interest or interests?
 - (ii) If yes, is the processing involved necessary for the purposes of those interests? In other words, is the processing proportionate as a means and fairly balanced as to ends, or could these interests be achieved by means which interfere less with the privacy of the data subjects?
 - (iii) Even if the processing is necessary for Company J's legitimate interests, is that processing nevertheless unwarranted in this case by reason of prejudice to the rights and freedoms or legitimate interests of the data subjects?
64. There is no presumption in favour of making personal data available under the general obligation laid down by regulation 5(1) of the EIRs. Accordingly, the legitimate interests of Company J must outweigh the rights and freedoms or legitimate interests of the data subjects before condition 6 will permit making the personal data available. If the two are evenly balanced, the Commissioner must find that the Council was correct to refuse to make the personal data available to Company J.

Is Company J pursuing a legitimate interest or interests?

65. There is no definition within the DPA 1998 of what constitutes a "legitimate interest", but the Commissioner takes the view that the term indicates that matters in which an individual properly has an interest should be distinguished from matters about which he or she is merely inquisitive. The Commissioner's guidance on personal data⁵ states:
- "In some cases, the legitimate interest might be personal to the requester - e.g. he or she might want the information in order to bring legal proceedings. With most requests, however, there are likely to be wider legitimate interests, such as the scrutiny of the actions of public bodies or public safety."*
66. The Council accepted that Company J has a legitimate interest in seeking the disclosure of the information. It recognised that Company J has concerns regarding the changing of planning application fees and disclosure of the names of the Council officers involved would help Company J to understand the Council's decision making. However, the Council maintained that this legitimate interest only extends to the personal data of Council officers and does not include the personal data of members of the public.
67. Company J submitted that it has a legitimate interest in knowing who authorised the Majors Waterfront Team Manager to change the Council's previous policy regarding the AMC

⁵ <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section38/Section38.aspx>

planning fees and who subsequently authorised the decision to revert to its previous charging policy. Company J considers that the Council may have acted in a discriminatory manner by changing its fees policy, and believes that disclosure of the withheld information will clarify this.

68. The Commissioner has considered all the relevant submissions he has received on this point, along with the withheld personal data.
69. The Commissioner notes that Company J is primarily interested in the decision making processes of the Council, and in understanding how the AMC planning fees were changed and who authorised them. The Commissioner does not consider that disclosing the personal data of the members of the public will reveal or add any information about the Council's decision making processes. The members of the public had no influence on the Council's decision making, nor did they authorise any actions by the Council. The Commissioner is satisfied that Company J does not have a legitimate interest in the personal data of members of the public, and he finds that this information was correctly withheld under regulation 11(2) of the EIRs.
70. However, the Commissioner accepts that Company J does have a legitimate interest in obtaining the personal data of Council officers. He considers that disclosure would increase transparency about the Council's decision making processes, in relation to responsibility for the decisions to increase the AMC planning fees and then have them revert to their previous level.
71. The Commissioner acknowledges that making the personal data available would enable Company J (and any other developers affected by the fee change) to understand more fully the reasons behind the Council's decision and actions on the AMC planning fees, and the decision making process followed within the Council. In all the circumstances, therefore, he accepts that Company J has a legitimate interest in obtaining the withheld personal data of Council officers.

Is disclosure necessary to achieve those legitimate interests?

72. The Commissioner must now go on to consider whether disclosure of the personal data of Council officers would be necessary to meet the legitimate interest he has identified above. As already indicated, this will include consideration of whether the legitimate interest might be met by alternative means which interfere less with the privacy of the data subjects.
73. The Council argued that the release of the Council officers' personal data would not provide significant insight into the AMC planning fee policy change as it would not, in isolation, aid members of the public in gaining further understanding of the change.
74. The Council noted that it had provided Company J with the job descriptions and departments of the officers involved, to provide an understanding of the roles of the Council officers engaged in the discussion.
75. The Council stated that the data subjects (the Council officers) had not consented to disclosure of their personal data (if they had, condition 1 in Schedule 2 to the DPA 1998 would have been fulfilled).
76. The Council noted that disclosure under freedom of information legislation is, in effect, release to the world. It explained that it publishes information that has been released under FOI on the disclosure log on its website. It submitted that it would not be fair for the names and contact details of the Council officers in question to be disclosed into the public domain

as a result of this information request, because they had no reasonable expectation that this would happen.

77. In its submissions, Company J argued that it is entirely reasonable, for the purposes of transparency, that the Council provides details of who authorised the change in Council policy regarding AMC planning fees and who authorised its reversion.
78. As noted above, the Commissioner is satisfied that Company J has a legitimate interest in discovering how and why the Council changed its AMC planning fees and he acknowledges that disclosure of the names of the officials involved in that decision would help to meet those legitimate interests. However, the Commissioner does not consider that disclosure of the personal data in this case is the only way that Company J's legitimate interests can be met.
79. In its review outcome, the Council disclosed some correspondence to Company J, withholding the names and contact details of staff members under regulation 11(2) of the EIRs. However, the Council did not redact the job titles of staff members from the email correspondence: this information was disclosed to Company J. In the Commissioner's view, disclosure of the job titles of the Council staff involved in the correspondence is sufficient to allow Company J to understand the decision-making process within the Council. The job titles provide information on the roles of the staff involved and clearly indicate the departments that were involved in the discussions and the seniority of staff who took or enacted decisions.
80. In the circumstances, the Commissioner is satisfied that disclosure of the names and direct contact details of Council staff members is not necessary to meet Company J's legitimate interests. As a result, he has concluded that there is no condition in Schedule 2 to the DPA 1998 which would permit the personal data consisting of the names and contact details to be disclosed. This also means that disclosure of the personal data would breach the first data protection principle and that the personal data has been correctly withheld under regulation 11(2) of the EIRs.

Transitional provisions

81. Given that the Commissioner has found that the Council's decision to withhold personal data under regulation 11(2) complied with the EIRs (as they stood before 25 May 2018), he is not required to go on to consider whether disclosure would breach the EIRs as they currently stand.

Regulation 10(4)(e) of the EIRs – internal communications

82. Under regulation 10(4)(e) of the EIRs, a Scottish public authority may refuse to make environmental information available to the extent that it involves making available internal communications. In order for information to fall within the scope of this exception, it need only be established that the information is an internal communication.
83. As noted above, if the Commissioner finds that a document is an internal communication, he will be required to go on to consider the public interest test.
84. The Council applied this exception to every document it withheld, apart from item 2, email 2 (attached legal advice) and item 9 (email and letter) which it withheld under regulation 10(5)(d) of the EIRs (as considered above). The majority of the information withheld under regulation 10(4)(e) is correspondence between the Council and an in-house solicitor.
85. The Council stated that the information withheld under regulation 10(4)(e) comprises internal email exchanges which have not been shared externally with any third party. It notes that

some of the emails contain drafts of responses which have not been sent to a third party. The Council also submitted that the withheld information includes internal correspondence with in-house legal advisers.

86. Having considered the information withheld by the Council under this exception, the Commissioner is satisfied that all of this information comprises internal communications and is therefore subject to the exception in regulation 10(4)(e). He 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.

Public interest test

87. The Council recognised that there is a general public interest in making information available to demonstrate that it is acting in the best interests of the citizens of Edinburgh. However, the Council argued that there is also a public interest in ensuring that there remains a space for Council officials to think in private, as recognised by the Aarhus Convention. It submitted that such a private space is fundamental to the formulation and development of good policy and decision making.
88. The Council expressed concern that disclosure of these internal communications would restrict the free and frank exchange of views required for good policy formulation. Furthermore, the Council argued that the publication of Council thinking before it has been finalised could lead to confusion and uncertainty within the relevant industries. The Council submitted that the public interest in releasing the communications is low, given that the Council has reverted to its original policy position on the matter.
89. Company J argued that this case involved questions about the public purse and an apparent discriminatory application of a fee charging policy which was contrary to long established policy, understanding and practice, without there being any change to the underlying regulation and guidance. Company J submitted that those involved in planning applications need to have certainty on costs; “such an enormous change to the costs involved surely has to be made known to the public, not delivered in a private meeting between Company J and Council officials and then dealt with through correspondence between Company J’s agents and the Council”.
90. Company J submitted that it must be in the public interest to know why the Council thought it could unilaterally change a policy “which had been determined by Government, was understood by everybody and of which no one knew about any proposed changes”. Company J argued that it was also in the public interest to know who promoted the change in policy; why the Council backtracked on its proposal following Company J’s objections; and who confirmed that the Council’s original proposal was flawed.

Commissioner’s conclusions

91. The Commissioner has considered all of these submissions carefully, alongside the withheld information (which he has accepted comprises internal discussions).
92. As noted above, the Council has argued that Council officials require space to “think in private”, and that such a private space is essential to the formulation and development of good policy and decision making. The Council has argued that publication of its thinking before it has been finalised could lead to confusion.
93. Much of the information withheld under regulation 10(4)(e) discusses the external legal advice that the Council obtained and which the Commissioner has already found to be excepted from disclosure under regulation 10(5)(d) of the EIRs. Other information comprises

communications between the Council and one of its in-house solicitors. The Commissioner is satisfied that this information is legal advice provided by a legal adviser within the context of a professional relationship in circumstances in which legal professional privilege could apply. The legal adviser (the Council's in-house solicitor) was clearly acting in a professional capacity by providing advice to the Council. The Commissioner considers that legal advice obtained from internal legal advisers is subject to the same protections as externally obtained legal advice.

94. With regard to these parts of the withheld information (the internal and external legal advice) the Commissioner considers that, on balance, the public interest arguments in favour of withholding the information outweigh the public interest arguments for disclosure. The Commissioner refers to his earlier consideration of the public interest test as it relates to the information withheld under regulation 10(5)(d) and his conclusion that, while there is a public interest in understanding the Council's decision making process, there is a stronger public interest in ensuring that the Council can receive legal advice in confidence so it can discharging its functions as thoroughly and effectively as possible.
95. In relation to the remaining parts of the withheld information, the Commissioner acknowledges that there is a public interest in ensuring that Council officials can communicate ideas and opinions regarding policy development freely and without fearing that their initial views will routinely be made public. However, the Commissioner does not accept the relevance of such arguments in this case. He disagrees with the Council's suggestion that the information being withheld in these documents relates to "private space thinking" or interim policy discussions. It is clear that the Council took a decision to change its AMC planning fees policy and notified Company J to that effect. The fact that the Council reverted back to its previous policy position four months later does not mean that its initial policy change was "interim" or a work in progress.
96. The Commissioner takes the view that the remaining parts of the information withheld in this case relate to decisions made and their practical application, not options under consideration. In any event, even if the Commissioner was persuaded that the information related to policy development and frank exchanges of views, he is not persuaded that the public interest lies in withholding this information. The information relates to a policy change that would have a financial impact on Company J and, potentially, other developers. The Commissioner considers that, on balance, the public interest in understanding why and through what process the Council decided to alter its existing policy on AMC planning fees outweighs the public interest in safeguarding officials' entitlement to a private space for thinking (while disagreeing that the process reflected in the withheld information should be described in those terms).
97. Finally, the Commissioner noted that the withheld information contains an accounting folio code in one e-mail. Although the Council has not provided any submission on this point, the Commissioner finds that the balance of public interest lies in withholding details of that accounting folio code.
98. In summary, the Commissioner finds that where the internal communications form, seek, or contain detail of internal or external legal advice, the public interest favours maintaining the exception. Where the withheld information simply records the views and discussions of Council staff, the public interest favours disclosure.

Actions to be taken

99. The Commissioner requires the Council to provide Company J with the information it withheld under regulation 10(4)(e) of the EIRs, after redacting third party personal data, details of a folio code, and information forming, seeking or containing detail of the legal advice or opinion it received from its internal or external legal advisers.
100. The Commissioner will provide the Council with a marked up copy of the information indicating what must be disclosed to Company J.

Decision

The Commissioner finds that the City of Edinburgh Council (the Council) partially complied with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by Company J.

The Commissioner is satisfied that the Council correctly withheld information under regulation 11(2) of the EIRs, and that it correctly applied the exception in regulation 10(5)(d) of the EIRs.

The Commissioner also finds that the Council was entitled to withhold some under regulation 10(4)(e). However, the Council wrongly withheld other information under that exception.

The Commissioner therefore requires the Council to disclose the wrongly withheld information to Company J by 15 November 2018.

Appeal

Should either Company J or the City of Edinburgh 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.

Enforcement

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

Daren Fitzhenry
Scottish Information Commissioner

1 October 2018

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.

- (3) Where the environmental information requested includes personal data, the authority shall not make those personal data available otherwise than in accordance with regulation 11.
- (4) A Scottish public authority may refuse to make environmental information available to the extent that
 - ...
 - (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;
 - ...

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[6] that making the information available otherwise than under these Regulations would contravene-
 - (i) any of the data protection principles; or
 - ...
 - (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.

Data Protection Act 2018

Schedule 2 – Transitional provision etc

61 Environmental Information (Scotland) Regulations 2004 (S.S.I. 2004/520)

- (1) This paragraph applies where a request for information was made to a Scottish public authority under the Environmental Information (Scotland) Regulations 2004 (“the 2004 Regulations”) before the relevant time.
- (2) To the extent that the request is dealt with after the relevant time, the amendments of the 2004 Regulations in Schedule 19 to this Act have effect for the purposes of determining whether the authority deals with the request in accordance with those Regulations.
- (3) To the extent that the request was dealt with before the relevant time –
 - (a) the amendments of the 2004 Regulations in Schedule 19 to this Act do not have effect for the purposes of determining whether the authority dealt with the request in accordance with those Regulations, but
 - (b) the powers of the Scottish Information Commissioner and the Court of Session, on an application or appeal under the 2002 Act (as applied by the 2004 Regulations), do not include power to require the authority to take steps which it would not be required to take in order to comply with those Regulations as amended by Schedule 19 to this Act.
- (4) In this paragraph -

“Scottish public authority” has the same meaning as in the 2004 Regulations;

“the relevant time” means the time when the amendments of the 2004 Regulations in Schedule 19 to this Act come into force.

Scottish Information Commissioner

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