

Decision Notice 086/2020

Planning obligation – Park of Keir

Applicant: The Applicant

Public authority: Stirling Council

Case Ref: 201900717



Scottish Information
Commissioner

Summary

The Council was asked about negotiations on a planning obligation in relation to a sports complex at Park of Keir. The Council withheld the information as excepted from disclosure under the EIRs.

The Commissioner investigated and found that the Council were not entitled to withhold the information under exceptions in the EIRs.

The Commissioner required the Council to disclose the withheld information.

Relevant statutory provisions

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (paragraphs (a) and (c) of definition of “environmental information”) (Interpretation); 5(1) and (2)(b) (Duty to make environmental information available on request); 10(1), (2), (4)(e) and 5(d), (e) and (f) (Exceptions from duty to make environmental information available)

The full text of each of the statutory provisions cited above is reproduced in Appendix 1 to this decision. Both Appendices form part of this decision.

Background

1. On 20 January 2019, the Applicant made a request for information to Stirling Council (the Council). The information requested was:
 - a) All emails, notes of telephone conversations and meetings and other communications between Stirling Council councillors and officers and their consultants and the applicants and their advisors, agents, supporters and consultants, in respect of the negotiations to achieve a "satisfactory conclusion of a planning obligation", as required by the Ministerial “Minded to Consent” decision on the Park of Keir appeal, published on Wednesday 30 August 2017.
 - b) All emails, notes of telephone conversations and meetings and other communications between Stirling Council councillors and officers and their consultants and advisors and Scottish Government politicians, officers and their consultants and advisors, in respect of the negotiations to achieve a "satisfactory conclusion of a planning obligation", as required by the Ministerial “Minded to Consent” decision on the Park of Keir appeal, published on Wednesday 30 August 2017.
 - c) All emails, notes of telephone conversations and meetings and other communications between Stirling Council councillors and officers and their consultants and advisors and SportsScotland, TennisScotland and Scottish Golf and their consultants and advisors, in respect of the negotiations to achieve a "satisfactory conclusion of a planning obligation", as required by the Ministerial “Minded to Consent” decision on the Park of Keir appeal, published on Wednesday 30 August 2017.
 - d) All emails, notes of telephone conversations and meetings and other communications between Stirling Council councillors and officers and their consultants and advisors and the Lawn Tennis Association, in respect to the provision of tennis facilities in the Stirling Council area and particularly in respect of the negotiations to achieve a "satisfactory

conclusion of a planning obligation", as required by the Ministerial "Minded to Consent" decision on the Park of Keir appeal, published on Wednesday 30 August 2017.

2. The Council wrote to the Applicant on 19 February 2019 and apologised for its failure to respond within the time allowed.
3. The Council responded on 8 March 2019. It apologised for the delay in responding to the Applicant's request and advised that it had applied section 39(2) of the Freedom of Information (Scotland) Act 2002 (FOISA) (as the request was for environmental information and fell to be considered under the EIRs). The Council also claimed that the information it held was excepted from disclosure under regulations 10(4)(e) and 10(5)(d), (e) and (f) of the EIRs, with some explanation as to why these exceptions applied. It also stated that it considered that any third party personal information was excepted from disclosure under regulation 11 of the EIRs.
4. On 11 March 2019, the Applicant wrote to the Council, requesting a review of its decision. He explained that he had made four requests and was concerned that they had not been answered separately. He did not believe all of the reasons provided applied in all four cases. He provided further reasons why he did not consider the exceptions claimed applied, and was also dissatisfied with the time taken to respond.
5. The Council notified the Applicant of the outcome of its review on 16 April 2019. The Council upheld its original decision, and explained which exceptions it considered applicable to which parts of the request and further explained why it considered they applied.
6. On 4 May 2019, the Applicant wrote to the Commissioner and applied for a decision in terms of section 47(1) of FOISA. By virtue of regulation 17 of the EIRs, Part 4 of FOISA applies to the enforcement of the EIRs as it applies to the enforcement of FOISA, subject to specified modifications. The Applicant stated that he was dissatisfied with the outcome of the Council's review because, while he accepted that some information might be subject to redaction, he could not accept that no information was suitable for disclosure.

Investigation

7. The application was accepted as valid. The Commissioner confirmed that the Applicant made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to him for a decision.
8. On 20 June 2019, the Council was notified in writing that the Applicant had made a valid application. The Council was asked to send the Commissioner the information withheld from the Applicant.
9. The Council initially provided the Commissioner with a schedule listing 68 documents withheld from the Applicant, advising that each document was considered to be excepted from disclosure under regulations 10(4)(e), 10(5)(d) and 10(5)(e) of the EIRs. It also applied regulation 11 (Personal data) to some of the documents. The case was allocated to an investigating officer.
10. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Council was invited to comment on this application and to answer specific questions. These related to the steps taken to identify information falling within the scope of each part of the Applicant's request and its application of the exceptions to withhold the information from the Applicant, as claimed in the review

outcome of 16 April 2019. The Council was asked to provide any and all submissions it wished the Commissioner to consider as to why the information requested was considered excepted from disclosure, with emphasis on the exceptions claimed within that review outcome.

11. There followed further communications with the Council regarding the information that fell within the scope of the Applicant's request and the fact that a number of the 68 documents provided could be considered as duplicates. The Commissioner also took the view that internal exchanges within the Council and between the Council and its legal agents did not fall within the scope of the request, unless these exchanges related to communications with any of the third parties named within the requests, as outlined above. Given that the request related to such exchanges with outside agencies/organisations, it was apparent that regulation 10(4)(e), which strictly relates to internal communications, could not apply.
12. Following further correspondence and discussions with the investigating officer, the Council provided submissions advising that only 19 documents actually contained information falling within the scope of the Applicant's request.
13. On the basis that it considered the request to be for environmental information, to be considered in terms of the EIRs, the Council adhered to its earlier application of section 39(2) of FOISA. However, it stated that it no longer wished to rely upon the exceptions under regulation 10(4)(e), 10(5)(d) or 10(5)(e) of the EIRs, now submitting that all of the information identified fell to be excepted in terms of regulation 10(5)(f).
14. The Council provided submissions as to why it considered the information to be excepted from disclosure under regulation 10(5)(f) of the EIRs.
15. There followed further exchanges between the Council and the investigating officer regarding what information within the documents actually fell within the scope of the Applicant's request. In these exchanges, the Council provided further submissions as to the application of regulation 10(5)(f) of the EIRs, specific to particular withheld information.
16. The Commissioner gave consideration to the content of the 68 documents identified initially and, having also considered duplication within that information, he is satisfied that any information from these documents falling within the scope of the Applicant's request is to be found in the email chains and documents listed in Part 1 of Appendix 2, which identifies the documents in question (as numbered in the original schedule) and the dates and times of the relevant emails.
17. In relation to the steps taken to identify any information held by the Council and falling within the scope of the request, the Council was asked to confirm whether it had identified all of the relevant information held by its legal advisers on its behalf. Should any further information be held, the Council was asked to provide that information to the Commissioner, along with any submissions it wished to make as to why that information should be considered excepted from disclosure under the EIRs.
18. The Council subsequently provided further information. Following consideration of this information, checking it against information previously considered, the Commissioner is satisfied that the further information, as listed in Part 2 of Appendix 2, falls within the scope of the Applicant's request. Part 2 of Appendix 2 lists the documents identified and the dates and times of the relevant emails.

19. The Council advised that it considered the information listed in Part 2 of Appendix 2 to be excepted from disclosure under regulation 10(5)(f) of the EIRs and provided further submissions to that effect.
20. The Commissioner is satisfied that the remaining information (i.e. information identified by the Council but not listed in either parts of Appendix 2) either does not fall within the scope of the Applicant's request or is duplicated within the documents listed.
21. The Applicant provided submissions as to why he believed disclosure of the information was in the public interest, confirming he did not expect to be provided with any personal information.

Commissioner's analysis and findings

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

Application of the EIRs

23. It is clear from the Council's correspondence with both the Applicant and the Commissioner, and from the information itself, that the information sought by the Applicant is properly considered to be environmental information, as defined in regulation 2(1) of the EIRs. It relates to the "satisfactory conclusion of a planning obligation", relating to the construction of a sports complex, and so the Commissioner is satisfied that it falls within either paragraph (a) or paragraph (c) of the definition in regulation 2(1) (the text of each paragraph is reproduced in Appendix 1). The Applicant has not disputed this and the Commissioner will consider the information in what follows solely in terms of the EIRs.

Regulation 5(1) of the EIRs

24. 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. This obligation relates to information held by the authority when it receives a request.
25. 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 or exceptions outweighs the public interest in making the information available.
26. In responding to the Applicant, both initially and on review, the Council withheld information under regulation 10(4)(e) of the EIRs (which relates to internal communications), regulation 10(5)(d) (which relates to the confidentiality of the proceedings of any public authority), and regulation 10(5)(e) (which relates to the confidentiality of commercial or industrial information). As mentioned above, during the investigation the Council withdrew its reliance on these exceptions. In the absence of submissions from the Council as to why they should have been considered applicable, the Commissioner has no option but to find that the Council was not entitled to withhold information under regulation 10(4)(e), 10(5)(d) and 10(5)(e). In doing so, it breached regulation 5(1) of the EIRs.
27. Following this change of position, the Council only provided submissions in support of the information being withheld under regulation 10(5)(f) of the EIRs. As such, this is the only

exception the Commissioner can give consideration to in deciding whether the Council was entitled to withhold the information.

Regulation 10(5)(f) of the EIRs (interests of the person who provided the information)

28. Regulation 10(5)(f) 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 interests of the person who provided that information, where that person -
- (i) was not under, and could not have been put under, any legal obligation to supply the information;
 - (ii) did not supply it in circumstances such that it could, apart from the EIRs, be made available; and
 - (iii) has not consented to its disclosure.

Does regulation 10(5)(f) apply in this case?

29. A number of factors should be addressed in considering whether this exception applies. These include:

- (i) Was the information provided by a third party?
- (ii) Was the provider, or could the provider be, required by law to provide it?
- (iii) Is the information otherwise publicly available?
- (iv) Has the provider consented to disclosure?
- (v) Would disclosure of the information cause, or be likely to cause, substantial harm to the interests of the provider?

30. The Council submitted that the withheld information related directly to the negotiation of a Section 75 agreement (under the Town and Country Planning (Scotland) Act 1997) between the Council and developers, which it was required to undertake as an integral part of its obligations in its role as the local Planning Authority.

31. The Commissioner has considered all of the submissions provided on this matter by the Council at various stages during the investigation and notes that the various submissions provided by the Council during the course of the investigation covers the five points listed above.

Was the information provided by a third party?

32. The Commissioner has first of all to consider whether the information being withheld was provided by a third party. Where information was not provided by a third party, regulation 10(5)(f) of the EIRs cannot be engaged and the Commissioner is not required to consider the remaining factors, as outlined at paragraph 29 above.

33. The Council submitted that it established that all of the information under consideration was, on each occasion, provided by third parties as defined in the Commissioner's Guidance on Regulation 10(5)(f) of the EIRs¹. It also submitted that emails (and the information contained

¹ [http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/EIRsexceptionbriefings/Regulation10\(5\)\(f\)/Regulation10\(5\)\(f\)Thirdpartyinterests.aspx](http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/EIRsexceptionbriefings/Regulation10(5)(f)/Regulation10(5)(f)Thirdpartyinterests.aspx)

within them) which were provided to the Council by its own legal advisers, constituted third party information in all such instances. It advised that all information within the emails could be identified as coming from third parties, by interrogating the relevant email addresses and names of organisations within the email address domain names as well as email signatures.

34. In this regard, the Commissioner notes that the email exchanges to which the Council has applied regulation 10(5)(f) of the EIRs fall into a number of categories. The Council has applied this exception to:
- (i) emails between Council staff and the Council's own legal agents, where the legal agents acting on behalf of the developers and/or the Scottish Government have been copied into that email;
 - (ii) emails sent by Council staff or the Council's legal agents to the developer's legal agents or the Scottish Government;
 - (iii) emails received from the developers, the developer's legal agents or the Scottish Government; and
 - (iv) an internal email which contained what the Commissioner considers to be a phone note (document 63 - accepted as such by the Council in correspondence with the investigating officer).
35. In considering whether the information was obtained from a third party, the Commissioner has to conclude – and be satisfied that this is evidenced by the Council's submissions – that the actual information contained in the emails has been provided by a third party. The Commissioner takes the view that this exception will not apply to information which has been created internally – and is unlikely to apply to information negotiated with the third party.
36. The Commissioner must also be satisfied that the emails contain information only known to the Council as a result of being provide by the third party. If the authority is already privy to information, then subsequent provision by a third party cannot make it information provided by a third party for the purposes of this exception.
37. The Commissioner is not satisfied that, in the context of this request, any exchanges between the Council and its own legal agents can be considered information provided by a third party, unless it contains information provided by a third party other than the legal agents. In the context of the relationship between the Council and its legal agents, where the agents are acting on behalf of the Council, the Commissioner considers this to be information created internally, or at the very least by the Council's agents on behalf of the Council, and so cannot be considered as having been provided by a third party.
38. In previous decisions, the Commissioner has found that exchanges between an authority and its own legal agents are considered to be internal communications (a recent decision being *Decision 172/2018: Mr H and Fife Council*). Even if the relevant exception were claimed in this case, however, the exchanges in question involve parties in addition to the Council and its agents and so could not be considered internal communications.
39. While document 63 was sent to the Council by its legal agents, it contains information provided by a third party, namely Tennis Scotland. As such, this information falls within the scope of part c) of the Applicant's request and can be considered as information received from a third party for the purposes of this exception.

40. The Commissioner also finds, however, that none of the other emails sent by the Council or its legal agents can be accepted as information received from a third party, with the result that they do not fall to be considered as excepted under regulation 10(5)(f) of the EIRs.
41. While the Commissioner does not accept that the emails sent by the Council's agents or by the Council itself (and copied or sent to others) comprise information provided by a third party, he accepts that information attached to emails sent by the Council's agents (in documents 7a, 20a, and 48a listed in Part 1 of Appendix 2 and documents 1a, 4a, 4b listed in Part 2 of Appendix 2) does comprise information provided by a third party (the relevant information in documents 7a and 48a in Part 1 of Appendix 2) being the information in the column headed "Developer position", although this was not fully explained by the Council).
42. Other than document 63, the information listed in paragraph 41 and the information listed in Parts 1 and 2 of Appendix 2 as having been "Sent by" the "Developer", the "Developer's agent" or the "Scottish Government", the Commissioner cannot accept that the withheld information can be considered to have been provided by a third party for the purposes of regulation 10(5)(f) of the EIRs.
43. The Commissioner therefore finds that, other than the information accepted above, the Council was not entitled to withhold the information in terms of regulation 10(5)(f) of the EIRs. He requires that the information be provided to the Applicant (see paragraph 84 below regarding the redaction of personal data).
44. The Commissioner will now consider the other tests that have to be met in order for regulation 10(5)(f) of the EIRs to apply in relation to the information listed at paragraphs 41 and 42 above.

Was the provider, or could the provider be, required by law to provide it?

45. The Council submitted that it was satisfied that the person providing the withheld information was not legally obliged (or could not be legally obliged) to supply it.
46. The Council also confirmed that, in its view, this information was not supplied in circumstances that it could be made available except by making a request for it under EIRs.
47. The Commissioner acknowledges that, in order to advance the Section 75 agreement, there must be exchanges of information between the Council and its agents, and the developer and its agents. In this case, there was a requirement to enter into a Section 75 agreement, as a condition stipulated by the Scottish Ministers in granting planning permission for the development. To that extent, the legal agents for the developer were required to enter into negotiation with the Council and to reach a satisfactory conclusion, to fulfil the planning condition.
48. It could be said, therefore, that there was a requirement to provide certain information to the Council, if a Section 75 agreement was to be concluded. Failure to complete an agreement might be detrimental to the developer, and the possibly others, in that the development could not proceed without it. It does not necessarily follow, however, that the third parties in question were required to provide the information.
49. In commenting on this, the Aarhus Convention Implementation Guide², at page 89 provides an example:

² http://www.unece.org/env/pp/implementation_guide.html

For example, in some countries the national Government may delegate competence to a public authority to require an enterprise to report certain information. The public authority may decide not to impose a formal obligation to report this information if it is already being reported in practice. Most countries have found this type of information not to be “voluntary”. This protects the public interest by ensuring that any information that the public authority is entitled under national law to require to be submitted is accessible to the public.

50. Here, however, we are at one further remove from any “requirement”. Where the developer, in particular, has provided information in this case, it has done so because of the benefits of concluding the agreement and obtaining planning permission, rather than by virtue of any true legal requirement (whether applied or not).
51. Having considered the information listed at paragraph 41 and 42 above, the Commissioner is not satisfied that it is information that the provider was required, or could have been required, to provide by law.

Is the information otherwise publicly available?

52. The Council submitted that the information subject to this investigation was not publicly available.
53. Having considered the information, the Commissioner is satisfied that the withheld information is not (and has not been) otherwise available to the public.

Has the provider consented to disclosure?

54. The Council submitted that the person(s) who provided the information had not consented to the information being disclosed. It stated that emails from each third party confirmed that it had done so in confidence.
55. The Council advised that, within all the information provided, confidentiality markers and statements were clearly provided, highlighting that information was held in strict confidence.
56. The Commissioner does not accept that the standard statement within a number of emails, advising that the content is or may be confidential, amounts to refusal of consent.
57. The issue regarding consent is also covered by the Aarhus Convention Implementation Guide, which (at page 89) states:

Not only must the information in question qualify as voluntarily supplied information, the person that provided it must have denied consent to have it released to the public.

The Commissioner has also found in previous decisions that specific refusal of consent is fundamental to the application of regulation 10(5)(f) and this is also covered in his guidance on the application of regulation 10(5)(f) of the EIRs, as referenced above.

58. During the investigation, the Council was asked to confirm whether the third parties had actually declined consent to disclose the information to which it had applied regulation 10(5)(f) of the EIRs.
59. In its submissions, the Council stated it confirmed that the third parties providing the information have not consented to the information being disclosed. It provided evidence to show that its own legal agents, the developer’s agents and Tennis Scotland had refused

consent. It advised that comments had been requested from the Scottish Government, but did not provide any evidence to show that the Scottish Government had denied consent.

60. As mentioned above, however, the information provided by the Council's agents was not information that could be considered as having been provided by a third party for the purposes of regulation 10(5)(f).
61. Emails from the Scottish Government are listed in the attached schedules, and in the absence of a specific refusal of consent the Commissioner finds that any information provided by the Scottish Government, as listed, was incorrectly withheld in terms of regulation 10(5)(f) of the EIRs.
62. The Commissioner therefore requires the Council to disclose the information provided by the Scottish Government (see paragraph 84 below regarding the redaction of personal data).

Substantial prejudice

63. The Commissioner will now consider whether the disclosure of the information provided by the developer, the developer's legal agents or Tennis Scotland would, or would be likely to, cause substantial prejudice to those who provided the information.
64. As regulation 10(5)(f) is focused on substantial prejudice to the interests of the person who provided the information, the Council was asked to explain fully how substantial prejudice would manifest itself should the information be disclosed.
65. It was also advised that, while there is no definition in FOISA or the EIRs of what is deemed to be "substantial prejudice", the Commissioner considers the authority would have to identify harm of real and demonstrable significance. The harm would also have to be at least likely, and therefore more than simply a remote possibility.
66. In its various submissions to the Commissioner, the Council submitted that it considered the third party interests of the developer, the developers' legal representatives, the Scottish Government, the Council's legal representatives, the Council itself, Tennis Scotland and the community would be significantly compromised by disclosure of the information.
67. During the investigation, the Council provided the Commissioner with a number of submissions as to why disclosure of the information would cause substantial prejudice.
68. While the Council made a number of submissions as to the substantial prejudice that would follow disclosure of the information, the Commissioner notes that the submissions generally amount to why it is considered to be in the public interest that such exchanges be treated as confidential, with a view to maintaining the effectiveness of negotiations of this kind and the wider planning process. Further, while some of the submissions provided by the Council could be relevant to the consideration of the public interest test, the Commissioner has to be satisfied, based on all of the submissions made by the Council, that substantial prejudice to those providing the information would follow disclosure.
69. As mentioned at paragraph 29(v) above, this exception can only be applied where disclosure would, or would be likely to, cause substantial prejudice to the interests of the person who provided the information. As such, the Commissioner has to consider whether the disclosure of information provided by the developer or the developer's agent would cause substantial prejudice to the developer or the developer's agent, and whether disclosure of the information provided by Tennis Scotland would cause the substantial prejudice to Tennis Scotland.

70. The Council submitted that if the information were disclosed, this would significantly damage the commercial and economic positions of the developer, their legal advisers as well as the legal advisers of the Council. It stated that disclosing the information would provide competitors with a real insight into the way in which these parties carried out their negotiations, the level of “give and take” between the developers/developers’ legal advisers and the Council/Council’s external legal advisers.
71. The Council submitted that, if the information was disclosed, competitors of the developers and their legal advisers would be in a position to take commercial advantage of the way they conducted negotiations by gaining a clear understanding of the way in which they conducted these negotiations. The Council stated this would create a realistic and significant commercial and economic risk to the third parties.
72. It stated that disclosure would have a significant impact on the legal advisers’ professional reputations, impacting negatively on their businesses, which are built on the consensus that such information will not be shared outwith the negotiations. Such reputational damage, the Council claimed, would have a significantly prejudicial impact financially on these businesses.
73. The Commissioner notes that, in this case, the information falling within the scope of the request relates to exchanges with the external agencies/organisations mentioned in parts a) to c) of the request. The information would not have the protection of legal professional privilege, having been shared outwith any client/solicitor relationship, and no specific claim to such privilege appears to be being made in this context.
74. The Council also claimed that disclosure would be likely to cause significant commercial harm to the developers and their representatives, by disclosing how third parties were building an agreement through consensus. To disclose this information would, in the Council’s view, irrevocably allow competitors and future developers to undermine and undercut those involved within these negotiations by being able to analyse the information held, and use it to their and others’ advantage.
75. The Council further submitted that disclosure would damage the reputation of the commercial external parties, resulting in a loss of business and revenue and commercial viability, should competitors become privy to the information exchanged in the negotiations, including gaining insight into how negotiations were carried out on their behalf.
76. The Council also provided submissions in relation to perceived prejudice to the Scottish Government. As the information received from the Scottish Government is no longer under consideration here, the Commissioner need not set out these arguments at length.
77. It is important that submissions relating to substantial prejudice are specific to the actual information in relation to which harm is claimed. Having considered all of the submissions he has received in relation to how substantial prejudice might be manifested following disclosure, the Commissioner finds the submissions received to be general in nature, mostly regarding confidentiality and not focused on the actual information being withheld or the harm which disclosure of that information would (or would be likely to) cause.
78. As stated above, the Commissioner has to be satisfied that disclosure would lead to substantial prejudice to the interests of those who provided the information. Based on all of the submissions received, he is not persuaded that disclosure of any the information he is called upon to consider would, or would be likely, to prejudice substantially any identifiable interest of either the developer or the developer’s agents. Neither is he satisfied that the

disclosure of the information provided by Tennis Scotland would, or would be likely to, cause any substantial prejudice to Tennis Scotland (arguments on this point being particularly lacking).

79. Taking account of the actual information withheld and the submissions provided by the Council, the Commissioner is unable to accept that disclosure would have prejudiced substantially, or would have been likely to prejudice substantially, the interests of those who provided the information to the Council, in the ways described by the Council. Consequently, he cannot accept that the Council can justify the application of the exception in regulation 10(5)(f) of the EIRs to the remaining withheld information.
80. The Commissioner finds that by withholding the information requested, the Council failed to comply with regulation 5(1) of the EIRs.
81. Having found that the exception in regulation 10(5)(f) of the EIRs, was incorrectly applied to the information withheld by the Council, the Commissioner is not required to, and has not gone on to, consider the public interest test required by regulation 10(1)(b) of the EIRs.
82. As the Commissioner does not accept that the exception in regulation 10(5)(f) of the EIRs can be applied to any of the information listed in either Parts 1 or 2 of Appendix 2, the Commissioner requires the Council to disclose the information that has been withheld to the Applicant (with the exception of the emails marked out of scope) (see paragraph 84 below regarding the redaction of personal data).
83. The Commissioner would emphasise that he can only consider the exceptions (or exemptions) actually claimed by an authority in relation to a given request. The exception in regulation 10(5)(f) is designed primarily to protect the voluntary flow of information to regulators and like bodies. It would not, in most cases, appear to be the most appropriate exception to apply to contractual negotiations.

Personal data

84. As noted in paragraph 21 above, during the investigation, the Applicant confirmed he did not expect to be provided with any personal information. The Commissioner is mindful that the withheld information contains personal data. The Council may redact personal data (i.e. names and contact details), bearing in mind previous decisions where the Commissioner has not accepted that email addresses following the “@” symbol would generally amount to personal data) before disclosing the information to the Applicant.

Observations about the handling of the request and review

85. The following observations are not part of the Commissioner’s findings on compliance with the EIRs, but cover practice issues the Commissioner has identified during this investigation and about which he has concerns. He hopes these comments are helpful to all Scottish public authorities and requesters.
86. The Commissioner is concerned that it appears to have taken the Council until an application was made to the Commissioner before it took adequate and appropriate steps to determine what information it actually held falling within the scope of the Applicant’s request. It is also apparent here that the Council issued a response which could not be justified, before fully considering what information was held and whether the tests could be met to justify the application of any exceptions.

87. The Commissioner also notes that having submitted his request on 20 January 2019, the Council, did not respond until 8 March 2019, beyond the twenty working days allowed by the EIRs. As the Applicant made the requirement for review on 11 March 2019, the Council should have responded by 8 April 2019 (but did not do so).
88. There was also a delay in providing the withheld information and in making initial submissions to the Commissioner, something which should be straightforward where an authority has given proper consideration in dealing with the request and requirement for review.
89. In this particular case, considering the content and context of the request, the information sought could only be interpreted as communications between those listed in the requests. The Commissioner considers this to be a straightforward interpretation and one that should have been recognised by the Council from the outset. The failure to determine accurately the information falling within scope created unnecessary work for both the Commissioner and Council staff during the investigation, adding both time and complexity to what should have been a straightforward case.
90. The Council's withdrawal of its initial claims that various exceptions under the EIRs were engaged would suggest the application of these exceptions was not properly considered at the time it dealt with the request, the time it dealt with the review or the time it provided the information to the Commissioner. It appears that matters were only fully considered once the investigation had commenced.
91. Overall, the Commissioner cannot stress enough that it is vital for proper consideration and interpretation to be given to a request before purporting to withhold information that does not actually fall within scope. It is vital that adequate steps are taken to identify, locate and provide any relevant information held, in order that unnecessary delay is avoided in securing the applicant's right to information.
92. Equally, before deciding that information is excepted from disclosure, full consideration has to be given as to the tests that have to be met for an exception (or exemptions, under FOISA) to apply, when dealing with requests under both FOISA and the EIRs. Any shortcomings in the initial response should have been rectified on review. In this case however, the Council again relied on the exceptions claimed in the original response, which raises the question as to the quality of the review.
93. While no useful purpose would be served by requiring the Council to take any specific action in this case (other than disclosing the information), the Commissioner would urge it to take steps to ensure that it meets these obligations fully in future.
94. The Commissioner understands that the Council has experienced staff turnover, which may have impacted on understanding of this case. He also recognises the efforts of Council staff in attempting to address earlier errors in the handling of the request.
95. Overall, the Commissioner cannot stress enough the importance of dealing with requests within the time allowed by the EIRs (or, as appropriate, FOISA), and in giving proper consideration to what information falls within the scope of a given request and which exceptions (or exemptions) may apply to the information held. Proper consideration and response, including advice where necessary, may avoid the need for applicants to seek the intervention of the Commissioner.

Decision

The Commissioner finds that Stirling Council (the Council) failed to comply with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by the Applicant. The Commissioner finds that the Council was not entitled to withhold information under any of the exceptions claimed and, by doing so, failed to comply with regulation 5(1) of the EIRs.

The Commissioner therefore requires the Council to provide the Applicant with the information withheld, by 28 August 2020.

Appeal

Should either the Applicant or the 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 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.

Margaret Keyse
Head of Enforcement

15 July 2020

The Environmental Information (Scotland) Regulations 2004

2 Interpretation

- (1) In these Regulations –
- "environmental information" has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on –
- (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;
 - (e) the confidentiality of commercial or industrial information where such confidentiality is provided for by law to protect a legitimate economic interest;
 - (f) the interests of the person who provided the information where that person-
 - (i) was not under, and could not have been put under, any legal obligation to supply the information;
 - (ii) did not supply it in circumstances such that it could, apart from these Regulations, be made available; and
 - (iii) has not consented to its disclosure; or
- ...

Appendix 2: Emails excepted under regulation 10(5)(f)

Part 1

Doc.	Email date and time	Sent by:	Decision
7	5 March 2018 15:27	Council	Out of scope
7 attachment	5 March 2018 14:53	Council's agent	Disclose
	2 March 2018 13:49 (7a attached)	Council's agent	Disclose
	14 February 2018 16:08	Developer's agent	Disclose
	14 February 2018 09:21	Council's agent	Disclose
	13 February 2018 13:42	Developer's agent	Disclose
7a	Table – Parties Positions	Council's agent	Disclose
20/49	30 October 2017 16:07	Council's agent	Out of scope but Refers to document 20a
20/49	26 October 2017 16:16	Council's agent	Out of scope but Refers to document 20a
20/49	20 September 2017 16:47	Council's agent	Disclose
	20 September 2017 11:05	Developer's agent	Disclose
	19 September 2017 10:13	Council	Disclose
20a	Minute of agreement	Developer's agent	Disclose
21	9 November 2018 15:24	Developer's agent	Disclose
	1 November 2018 12:38	Council	Disclose
	28 August 2018 12:52	Council	Disclose
	14 August 2018 15:55	Council	Disclose
32	14 September 2017 14:28	Council	Out of scope
	14 September 2017 14:14	Council	Out of scope
	14 September 2017 14:10	Developer's agent	Disclose
	14 September 2017 14:05	Council's agent	Disclose
	13 September 2017 16:34	Developer's agent	Disclose
	13 September 2017 16:30	Council	Disclose
	13 September 2017 15:46	Developer's agent	Disclose
	7 September 2017 11:37	Council	Disclose
	7 September 2017 11:32	Developer's agent	Disclose
	1 September 2017 14:22	Developer's agent	Disclose
48	23 May 2018 11:48	Council's agent	Out of scope
	23 May 2019 10:18	Developer's agent	Disclose
	16 May 2018 10:05	Developer's agent	Disclose
	8 May 2018 13:23	Developer's agent	Disclose
	3 May 2019 09:38	Council's agent	Disclose
	2 May 2019 13:56	Developer's agent	Disclose
	1 May 2018 17:40	Council's agent	Disclose
	26 April 2018 16:46	Council's agent	Disclose
	24 April 2018 16:58	Developer's agent	Disclose
	24 April 2018 15:35	Council's agent	Disclose
	4 April 2018 12:41	Council's agent	Disclose
	23 March 2018 12:48	Council's agent	Disclose
	20 March 2018 16:43	Developer's agent	Disclose
	15 March 2018 11:43	Council's agent	Disclose
	14 March 2018 17:43	Developer's agent	Disclose
	9 March 2018 12:08	Council's agent	Disclose
	27 February 2018 10:00	Developer's agent	Disclose
	20 February 2018 09:24	Scottish Government	Disclose

Doc.	Email date and time	Sent by:	Decision
	16 February 2018 16:50	Council's agent	Disclose
	16 February 2018 10:53	Developer's agent	Disclose
	16 February 2018 10:30	Council's agent	Disclose
	29 November 2017 17:42	Scottish Government	Disclose
	27 November 2017 11:48	Council's agent	Disclose
	27 November 2017 11:42	Developer's agent	Disclose
48a	Revised table	Council's agent	Disclose
56	17 December 2018 16:56	Council's agent	Disclose
	18 September 2018 12:47	Scottish Government	Disclose
	11 September 2018 17:19	Council's agent	Disclose
	11 September 2018 15:53	Developer's agent	Disclose
	13 June 2018 11:22	Scottish Government	Disclose
	4 June 2018 14:40	Developer's agent	Disclose
	23 May 2019 15:06	Developer's agent	Disclose
	14 March 2018 10:54	Scottish Government	Disclose
	9 March 2018 12:08	Council's agent	Disclose
	27 February 2018 10:00	Developer's agent	Disclose
	20 February 2018 09:24	Scottish Government	Disclose
	16 February 2018 16:50	Council's agent	Disclose
	16 February 2018 10:53	Developer's agent	Disclose
	16 February 2018 10:30	Council's agent	Disclose
	29 November 2017 17:42	Scottish Government	Disclose
	27 November 2017 11:48	Council's agent	Disclose
	27 November 2017 11:42	Developer's agent	Disclose
Doc 60	10 January 2019 16:22	Council	Disclose
	10 January 2019 16:16	Council's agent	Out of scope
	8 January 2019 11:26	Council	Out of scope
Doc 62a	9 January 2019 09:05	Council	Disclose
	1 November 2018 12:38	Council	Disclose
	28 August 2018 12:52	Council	Disclose
	14 August 2018 15:55	Council	Disclose
Doc 63	9 January 2019 14:45	Council (Tennis Scotland)	Disclose

Part 2

Doc.	Email date and time	Sent by:	Decision
1	25 January 2018 12:45 with attachments 1a and 1b	Council's agent	Disclose
	15 January 2018 12:41	Developer	Disclose
	5 January 2018 11:57	Council's agent	Disclose
	19 December 2017 09:49	Council's agent	Disclose
	15 December 2017 09:51	Developer	Disclose
1a	Letter 30 March 2017	Developer	Disclose
1b	Certificate of Title October 2016	Council's agent	Disclose
4	6 July 2018 16:48 with attachments 4a and 4b	Council's agent	Disclose
4a	Minute of agreement v12		Disclose
4b	Minute of agreement v12		Disclose
6	23 May 2018 12:40	Developer's agent	Disclose
	23 May 2018 11:58	Council's agent	Disclose
	23 May 2018 10:18 to end in Doc 48 Sch. 1		As per doc 48 in Sch. 1
8	29 January 2018 13:38	Developer's agent	Disclose
	22 January 2018 17:16 with attachment 8a	Developer's agent	Disclose
	12 January 2018 10:42	Council's agent	Disclose
	9 January 2018 10:07	Developer's agent	Disclose
	29 December 2017 12:43	Council's agent	Disclose
	20 December 2017 10:30	Council's agent	Disclose
	14 December 2017 10:30	Developer's agent	Disclose
	5 December 2017 12:05	Council's agent	Disclose
28 November 2017 10:55	Developer's agent	Disclose	
8a	Minute of agreement	Developer's agent	Disclose
10	16 February 2018 10:29	Council's agent	Disclose
	29 November 2017 17:42 to end in Doc 48 Sch. 1		As per doc 48 in Sch. 1
11	18 December 2018 09:28	Scottish Government	Disclose
	18 December 2018 09:26	Developer's agent	Disclose
	17 December 2018 16:56 to end in Doc 56 Sch. 1	Council's agent	As per doc 56 in Sch. 1
15	11 January 2019 16:55	Developer's agent	Disclose
	17 December 2018 16:08	Council's agent	Disclose
	14 December 2018 17:09	Developer's agent	Disclose
	12 December 2018 15:22	Council's agent	Disclose
	6 December 2018 12:43	Council's agent	Disclose
	3 December 2018 15:15	Developer's agent	Disclose
	26 November 2018 15:19	Council's agent	Disclose
	16 November 2018 12:47	Developer's agent	Disclose

Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews, Fife
KY16 9DS

t 01334 464610

f 01334 464611

enquiries@itspublicknowledge.info

www.itspublicknowledge.info