

Decision Notice 150/2020

Information relating to two planning applications

Applicant: The Applicant

Public authority: Perth and Kinross Council

Case Ref: 202000636



Scottish Information
Commissioner

Summary

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

The Council made some information available. It redacted other information it considered to be personal data.

While the Commissioner accepted that, by the time it provided a response to the Applicant's request for review, the Council had carried out adequate searches for any relevant information held, he also found that the Council had not been entitled to withhold personal data it subsequently made available during the investigation.

Relevant statutory provisions

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (paragraphs (a), (b) and (c) of definition of "environmental information"); 5(1) and (2)(b) (Duty to make available environmental information on request)

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 September 2019, the Applicant made a request for information to Perth and Kinross Council (the Council). The information requested was:
Copies of all correspondence and contacts, to include, emails, letters, memos, notes of phone calls, records of meetings, reports, etc., between Perth & Kinross Council officers and the applicants or their agents in relation to planning applications 19/00090/FLL and 17/01260/FLL not otherwise available on the Public Access portal.
2. The Applicant noted that the request included all items detailed above from 6 August 2019 onward, including post-determination discussion and advice relating to 17/01260/FLL and any contact in relation to the DPEA Appeal and decision. He specified that it should also include all internal and external consultations and legal advice sought/provided by and/or obtained by Perth and Kinross Council officers, from any source, in relation to both planning applications.
3. Specifically in regard to 19/00090/FLL, the Applicant noted that the request included all discussion and advice on the suitability or otherwise of the proposal and all correspondence and contacts, to include, emails, letters, memos, notes of phone calls, records of meetings, reports etc., between Perth & Kinross Council officers and the applicants or their agents from 6 August 2019 to date.
4. The Council responded on 25 September 2019. The Council provided information to the Applicant that was not otherwise available on the Public Access portal. This information was provided subject to the redaction of information the Council considered to be personal data and so excepted from disclosure under regulation 11(2) of the EIRs.
5. On 25 September 2019, the Applicant wrote to the Council, requesting a review of its decision.

6. The Council wrote to the Applicant on 26 September 2019, asking that he confirm the matter or matters which caused him to be dissatisfied with its response to his request.
7. In a response dated 2 October 2019, the Applicant referred to the formal record identifying an email contact between a named case officer and the applicant's agent on 23 August 2019, which he considered fell within the scope of his request but had been omitted from the response. The Applicant was of the view that further internal and external consultations/contacts must have also been undertaken, but these had not been provided to him.
8. The Council acknowledged the Applicant's request for review on 3 October 2019.
9. The Council notified the Applicant of the outcome of its review on 25 October 2019. In its response, the Council acknowledged its response to the Applicant's request to have been incorrect: the email referred to by the Applicant existed, fell within the scope of the request and should have been provided (which it was at this point, along with another email the Council believed, although not within the timeframe of the request, might be of interest). Again, personal data were redacted under regulation 11(2).
10. On 23 April 2020, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of the Freedom of Information (Scotland) Act 2002 (FOISA). By virtue of regulation 17 of the EIRs, Part 4 of FOISA applies to the enforcement of the EIRs as it applies to the enforcement of FOISA, subject to specified modifications. The Applicant stated he was dissatisfied with the outcome of the Council's review because:
 - He considered he was entitled to have full access to the information requested, despite it being withheld from him
 - He remained unconvinced that he had been given access to all documents that should be on file and on record and to which he believed he was entitled, and
 - He believed it was in his interests and those of the wider public that the requested documentation be made available, in order that proper scrutiny and accountability could be exercised in the interests of best practice, openness and fairness, as well as upholding public trust in the planning system and democracy.

Investigation

11. 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.
12. On 31 July 2020, the Council was notified in writing that the Applicant had made a valid application. The Council was asked to send the Commissioner the information withheld from the Applicant. The Council provided the information and the case was allocated to an investigating officer.
13. 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 actions and searches undertaken by the Council to determine what recorded information it held falling within the scope of the Applicant's request, together with its reasons for applying the exception in regulation 11 to information it deemed to be personal data.

14. During the investigation, the Council explained that it was willing to give the Applicant certain of the personal data that had previously been withheld. Given that the Council has now disclosed this information to the Applicant, and in the absence of submissions justifying the earlier decision to withhold, the Commissioner must find that it breached regulation 5(1) of the EIRs in failing to disclose this information in response to the Applicant's request.

Commissioner's analysis and findings

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

Handling in terms of the EIRs

16. The Council processed the Applicant's request and requirement for review in accordance with the EIRs.
17. Where information falls within the scope of the definition of "environmental" in regulation 2(1) of the EIRs a person has a right to access it (and the public authority a corresponding obligation to respond) under the EIRs, subject to various restrictions and exceptions contained in the EIRs.
18. The Applicant has not challenged the Council's decision to deal with the information as environmental information. The Commissioner is satisfied that the information does comprise environmental information and will consider the handling of the request in what follows solely in terms of the EIRs.

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

19. Regulation 5(1) of the EIRs requires a Scottish public authority which holds environmental information to make it available when requested to do so by an applicant. The obligation relates to information that is held by the authority when it receives a request.
20. On receipt of a request for environmental information, therefore, the authority must ascertain what information it holds falling within scope of the request. Having done so, regulation 5(1) requires the authority to provide that information to the requester, unless a qualification in regulations 6 to 12 applies (regulation 5(2)(b)).
21. In order to ascertain whether all relevant information has been identified, the Council was asked to explain the steps it took to establish what information it held which fell within the terms of the Applicant's request.
22. The Council explained that the request related to two particular planning applications and all information related to a planning application is methodically held in the planning system to ensure that legislative requirements for the planning register are met. The Council commented that most of the information is published on the public access portal. However, some is withheld because it falls outwith the definition of what should be publicly available. The Council also noted that each planning application has an assigned case officer, who deals with all correspondence sent and received relating to the case.
23. The Council stated that there should be no other information held by the Council related to a planning application.

24. As a consequence of the systems in place and the processes followed by the Council in respect of planning information, the Council asserted that obtaining information held which fell within scope of the request was simply a matter of asking for the information from the relevant electronic case file.
25. The standard of proof to determine whether a public authority holds information is the civil standard of the balance of probabilities. In determining where the balance of probabilities lies, the Commissioner considers the scope, quality, thoroughness and results of the searches carried out by the public authority. He also considers, where appropriate, any reason offered by the public authority to explain why it does not hold the information.
26. Having considered all of the submissions from the Council and the terms of the request, the Commissioner accepts that, by time of the Council's review, it had carried out adequate, proportionate searches, which would have been likely to identify and locate any relevant information held by the Council. The Commissioner is therefore satisfied that the Council complied with regulation 5(1) of the EIRs in identifying and locating any relevant information it held.

Regulation 11(2) of the EIRs – Personal data

27. The Council relied on regulation 11(2) of the EIRs for withholding certain information from documents disclosed in response to the Applicant's request for review. As mentioned above, during the course of the investigation, the Council disclosed certain of the information it had previously redacted, leaving only information relating to one individual being withheld.
28. The withheld information is contained within the document which was provided to the Applicant (at review stage) because it might be of interest to him, and not because it fell within the scope of his request. Having considered the date of this document, the Commissioner must agree with the Council on this point – the document does not fall within the scope of the request of 11 September 2019. Consequently, the Commissioner has no right to determine whether the Council was entitled to rely on the exception in regulation 11(2) of the EIRs for redacting this information, and so this information will not be considered any further.

Decision

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

The Commissioner finds that by carrying out thorough and adequate searches by the time it responded to the Applicant's request for review, the Council complied with regulation 5(1) of the EIRs.

However, he finds that the Council was not entitled to rely on regulation 11(2) of the EIRs for withholding information it subsequently made available during the investigation. The Commissioner therefore finds that the Council failed to comply with regulation 5(1) of the EIRs in this respect.

Given that the Council made available the information it did not consider to be excepted from disclosure during the course of this investigation, the Commissioner does not require the Council to take any action in respect of this failure, in response to the Applicant's request.

Appeal

Should either the Applicant or Perth and Kinross Council wish to appeal against this decision, they have the right to appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days after the date of intimation of this decision.

Margaret Keyse
Head of Enforcement

27 November 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;
- (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in paragraph (a);
- (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in paragraphs (a) and (b) as well as measures or activities designed to protect those elements;

...

5 Duty to make available environmental information on request

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

(2) The duty under paragraph (1)-

...

(b) is subject to regulations 6 to 12.

...

Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews, Fife
KY16 9DS

t 01334 464610

f 01334 464611

enquiries@itspublicknowledge.info

www.itspublicknowledge.info