

Decision Notice 155/2020

Complaints about Graham's Dairy

Applicant: The Applicant

Public authority: Fife Council

Case Ref: 202000002



Scottish Information
Commissioner

Summary

The Council was asked for details of complaints about Graham's Dairy. The Council disclosed information in response, but withheld some information on the basis that it was either the personal information of the Applicant or of third parties.

Following an investigation, the Commissioner was satisfied that the Council had complied with the request in line with the EIRs.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 2(1) (Effect of exemptions) and 39(2) (Health, Safety and the Environment)

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (definitions of "the data protection principles", "data subject", "the GDPR" and "personal data" and paragraphs (a), (b) and (c) of "environmental information") and (3A) (Interpretation); 5(1) and (2)(b) (Duty to make available environmental information on request); 6(1) (Form and format of information); 10(3) (Exceptions from duty to make environmental information available); 11(1)(Personal data)

Data Protection Act 2018 (the DPA 2018) sections 3(2) and (3) (Terms relating to the processing of personal data)

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 15 March 2019, the Applicant made a request for information to Fife Council (the Council). The Applicant requested information related to complaints, comments or enquiries made to the Council about Graham's Dairy and the actions arising from the complaints, together with a copy of the Council's procedures for handling complaints. The request is set out in full in Appendix 2.
2. On 8 April 2019, the Council notified the Applicant, under regulation 7(1) (Extension of time) of the EIRs, that it was extending the response time for up to an additional 20 working days.
3. On 21 May 2019, the Applicant emailed the Council requesting a review on the basis that it had failed to respond.
4. Following the issue of *Decision Notice 138/2019*¹, the Council notified the Applicant of the outcome of its review on 5 September 2019. The Council stated that some of the information held (the Applicant's personal data and some third party personal data) was exempt from disclosure. The Council disclosed the remaining information (redacting duplicate information). The Council told the Applicant it would treat his request for his own personal data as a Subject Access Request (SAR) and disclose it to him.
5. On 5 January 2020, the Applicant applied for a decision in terms of section 47(1) of the FOISA. By virtue of regulation 17 of the EIRs, Part 4 of FOISA applies to the enforcement of

¹ <https://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2019/201901154.aspx>

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:

- (i) it had not provided him with all of the information falling within scope of his request
- (ii) he had expected to receive the information in a format similar to a table he had received in relation to an earlier request made in 2018
- (iii) his own personal data had been withheld under the EIRs
- (iv) he had received a large number of documents which he was unable to align with his requests.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that the Applicant made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to him for a decision.
7. On 8 January 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.
8. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Council was invited to comment on this application and to answer specific questions. The Council confirmed it was relying upon section 39(2) of FOISA (see below). The Council also responded to the questions raised regarding the searches it had conducted, how the information requested by the Applicant was held and about the information disclosed to the Applicant.
9. During the investigation, the Applicant confirmed that he did not require the Commissioner to reach a decision on the withholding of personal data of third parties.
10. The Council was asked to provide further submissions, including whether it had complied with all parts of the Applicant's request and had complied with its duty to give advice and assistance.

Commissioner's analysis and findings

11. In coming to a decision on this matter, the Commissioner considered all of the withheld information and the relevant submissions, or parts of submissions, made to him by both the Applicant and the Council. He is satisfied that no matter of relevance has been overlooked.
12. In its submissions the Council confirmed that it wished to rely on section 39(2) of FOISA. The exemption in section 39(2) of FOISA provides, in effect, that environmental information (as defined by regulation 2(1) of the EIRs) is exempt from disclosure under FOISA, thereby allowing any such information to be considered solely in terms of the EIRs.
13. The Commissioner is satisfied that the information requested in this case, relating to noise complaints at a dairy, falls within the definition of environmental information in regulation 2(1) of the EIRs, particularly paragraphs (a), (b) or (c) (see Appendix 1).

14. In this case, the Commissioner accepts that the Council was entitled to apply the exemption to the information withheld in this case, given his conclusion that it is properly classified as environmental information.
15. The exemption in section 39(2) is subject to the public interest test in section 2(1)(b) of FOISA. As there is a statutory right of access to environmental information available to the Applicant in this case, the Commissioner accepts, in all the circumstance, that the public interest in maintaining the exemption (and responding to the request under the EIRs) outweighs any public interest in disclosing the information under FOISA. Both regimes are intended to promote public access to information and there would appear to be no reason why (in this particular case) disclosure of the information should be more likely under FOISA than under the EIRs.
16. The Commissioner therefore concludes that the Council was correct to apply section 39(2) of FOISA and consider the Applicant's information request wholly under the EIRs. In what follows, the Commissioner will consider this case solely in terms of the EIRs.

Information held

17. The Applicant argued that he had not been provided with all of the information falling within scope of his request.
18. Regulation 5(1) of the EIRs (subject to the various qualification 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.
19. The standard proof to determine whether a Scottish public authority holds information is the civil standard of the balance of probabilities. In determining this, 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 a public authority to explain why it does not hold the information, and any reason offered by an applicant to explain why an authority is likely to hold information. While it may be relevant as part of this exercise to explore what information should be held, ultimately the Commissioner's role is to determine what relevant information is (or was, at the time the request was received) held by the public authority.

Searches

20. The Council explained that the information provided in response to the request was collated from different areas of the organisation.
21. The Council provided details of the four services responsible for following up all complaints, comments or enquiries about the Dairy and confirmed they had conducted searches. The Council also provided details of those tasked with conducting the searches and why they would have been likely to hold information:
 - Protective Services – team responsible for complaints / service requests relating to the site the request relates to;
 - Food & Workplace Safety;
 - Development Management – team responsible for planning enforcement for the area the site is located; and

- Escalation & Resolution – team which is responsible for information held on the complaints database and ensuring complaints are dealt with effectively.
22. The Council provided an extract of its record retention schedule for complaints, enquiries and requests for service, which states that, except for Environmental Health (Food and Workplace Safety), records are kept for the current year plus one extra year. (Environmental Health (Food and Workplace Safety) records are kept for four years.)

Information held

23. At the outset, the Council explained the terminology that it uses internally. In general terms, a complaint is logged when a member of the public makes a complaint about the Council. However, when the complaint is about anyone outside the Council, the Council is required to respond as part of its statutory duties and this is deemed a service request. The Council submitted that it had explained this distinction to the Applicant.
24. During the investigation, the Applicant insisted that every time he contacted the Council to complain about the Dairy, this complaint should be logged and responded to formally by the Council.
25. The Council explained that communications of the nature described by the Applicant are viewed as a service requests for the Environmental Health Team to look into. The information held is not structured (e.g. it is not the case that each request is held with a note of what investigation was carried out, conclusion). Each notification of noise, etc. will be dealt with by the officer visiting the site, or discussing the matter with the individual raising the concern and/or others (including the business concerned), but each communication is not necessarily dealt with as a separate matter. For instance, if an officer receives the same communication from the same person multiple times, each communication is unlikely to be treated as a new, separate concern.
26. The Council also explained that individuals are provided with a contact to assist with the matters they are unhappy with. However, communications between the officers and the business in question are not always confirmed in writing.
27. The Council recognised that the Applicant's request was wider than the concerns submitted by him. It confirmed that the searches it had conducted reflected that and related to all complaints/recorded service requests received during the timescale given.

The Commissioner's findings

28. As detailed above, the Commissioner cannot comment on what information an Applicant considers should be held an authority, or how it responds to or deals with issues raised with it as part of its wider statutory functions. He can only consider what recorded information is actually held by the Council.
29. The Council provided the Commissioner with unredacted copies of the information disclosed to the Applicant in response to this request and with the information it disclosed to him in response to his SAR (i.e. in line with the Applicant's rights under the General Data Protection Regulation (the GDPR) or, as appropriate, under the DPA 2018).
30. The Commissioner notes that the information disclosed in total to the Applicant by the Council comprises of over 300 pages, the majority being disclosed to the Applicant in response to his SAR. The Commissioner cannot comment on the information disclosed to the Applicant under the SAR, but has taken note of the extent of this disclosure to inform his findings.

31. Given the format in which the information was provided to the Applicant, the Council was asked for, and provided, confirmation that the information it had disclosed to the Applicant addressed each of the eight parts of the request, either in response to the request or in response to his SAR. The Council stated that it is satisfied that its searches have identified all the information falling in scope of the request and that all parts of the request had been addressed.
32. Having considered the disclosed information, the Commissioner is also satisfied that the relevant information has been disclosed. He notes that the Applicant expected the requested information to be provided in a table format, or at least in a sequential order, with, for example, each of his emails next to information showing how the email was processed and resolved. However, the Commissioner is satisfied that the Council is not required to record, and has not recorded, information in this way.
33. Having considered the explanations provided by the Council, alongside details of the searches conducted, the Commissioner is satisfied that the Council conducted adequate and proportionate searches to identify all of the information falling within the scope of this request and has provided this to the Applicant. In reaching this conclusion, the Commissioner has considered the extensive correspondence provided to the Applicant either as a result of this request or as a consequence of his SAR and the explanations provided by the Council as to how this type of information is stored and handled.

Regulation 11(1) - Personal information

34. The Council refused to disclose the Applicant's personal data in response to his EIRs request on the basis that it was excepted from disclosure under regulation 11(1). It was, however, disclosed to the Applicant in response to his SAR. The Applicant was unhappy that the exception in regulation 11(1) had been applied.
35. Regulation 10(3) of the EIRs makes it clear that a Scottish public authority can only make personal data in environmental information available in accordance with regulation 11. Regulation 11(1) prohibits public authorities from making an applicant's personal data available in response to an EIRs request. This is because individuals have a separate right to make a request for their own personal data under the GDPR (or, as appropriate, under the DPA 2018). This route is more appropriate for individuals accessing their personal data: while data disclosed in response to a SAR is made available to the data subject, any data disclosed under the EIRs is placed into the public domain.
36. Personal data are defined in section 3(2) of the DPA 2018 which, read with section 3(3), incorporates the definition of personal data in Article 4(1) of the GDPR:

“... any information relating to an identified or identifiable natural person ('data subject'); an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person”
37. The definition of personal data is set out in full in Appendix 1.
38. The Commissioner has considered the information withheld by the Council under regulation 11(1) of the EIRs and is satisfied that it is the Applicant's personal data: the Applicant can be identified from the information and the information focusses on – and is biographical in relation to – him. Consequently, it relates to the Applicant. The Commissioner is therefore satisfied that the information is excepted from disclosure under regulation 11(1) of the EIRs.

39. The Commissioner notes that the Applicant has no objection to his own personal data being disclosed under the EIRs. However, the Commissioner cannot order an authority to disclose information under the EIRs which it would, in effect, be unlawful for it to disclose.

Regulation 6(1)(b) - Form and format of information

40. During the investigation, it became clear that the Applicant expected the Council to provide him with a summary table of the noise complaints made.
41. Regulation 6(1) of the EIRs states that, where an applicant asks for information to be made available in a particular form or format, the authority shall comply with that request unless it is reasonable for it to make the information available in another format or the information is already publicly available and easily accessible in another form or format.
42. In 2018, the Council provided the Applicant with a table which summarised each comment, complaint or enquiry made about the Dairy. The Applicant expected the information provided in response to this request to be provided in the same structure.
43. The Council told the Commissioner that the requested information is not held in a summarised tabular format. It explained that, previously, one of the Council's officers spent time producing the table. The Council considered the creation of this table to be new information.
44. Having considered the terms of the Applicant's request, the Commissioner is unable to accept that his request should be interpreted as requiring the Council to prepare a table of complaints, comments or enquiries about the Dairy and the Council's actions in response.
45. The request simply asks for the information. The Commissioner is satisfied that the Council has provided the information requested, albeit in a different format to that expected.
46. In the circumstances, the Commissioner does not consider that the Council was obliged, in terms of regulation 6(1)(a) of the EIRs, to make the information requested by the Applicant available in any particular structure or format.
47. However, the Commissioner is of the view that, given the volume of information provided to the Applicant by the Council, it would have been helpful, in line with regulation 9 of the EIRs (Duty to provide advice and assistance), to have provided the Applicant with some explanation as to how the information provided satisfied each element of the Applicant's request in response to his requirement for review.
48. The Commissioner notes that the Council provided further explanation to the Applicant on 20 December 2019.

Decision

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

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.

Margaret Keyse
Head of Enforcement

3 December 2020

Appendix 1: Relevant statutory provisions

Freedom of Information (Scotland) Act 2002

2 Effect of exemptions

- (1) To information which is exempt information by virtue of any provision of Part 2, section 1 applies only to the extent that –
- (a) the provision does not confer absolute exemption; and
 - (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

...

39 Health, safety and the environment

...

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

...

The Environmental Information (Scotland) Regulations 2004

2 Interpretation

- (1) In these Regulations –

...

“the data protection principles” means the principles set out in –

- (a) Article 5(1) of the GDPR, and
- (b) section 34(1) of the Data Protection Act 2018;

“data subject” has the same meaning as in the Data Protection Act 2018 (see section 3 of that Act):

...

“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;

...

“the GDPR” and references to a provision of Chapter 2 of Part 2 of the Data Protection Act 2018 have the same meaning as in Parts 5 to 7 of the Act (see section 3(10), (11) and (14) of that Act);

“personal data” has the same meaning as in Parts 5 to 7 of the Data Protection Act 2018 (see section 3(2) and (14) of that Act);

...

- (3A) In these Regulations, references to the Data Protection Act 2018 have effect as if in Chapter 3 of Part 2 of that Act (other general processing) -
 - (a) the references to an FOI public authority were references to a Scottish public authority as defined in these Regulations;
 - (b) the references to personal data held by such an authority were to be interpreted in accordance with paragraph (2) of this regulation.

...

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.

...

6 Form and format of information

- (1) Where an applicant requests that environmental information be made available in a particular form or format, a Scottish public authority shall comply with that request unless-
 - (a) it is reasonable for it to make the information available in another form or format; or
 - (b) the information is already publicly available and easily accessible to the applicant in another form or format.

...

10 Exceptions from duty to make environmental information available–

...

- (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.

”

11 Personal data

- (1) To the extent that environmental information requested includes personal data of which the applicant is the data subject then the duty under regulation 5(1) to make it available shall not apply to those personal data.

...

Data Protection Act 2018

3 Terms relating to the processing of personal data

...

- (2) “Personal data” means any information relating to an identified or identifiable living individual (subject to subsection (14)(c)).
- (3) “Identifiable living individual” means a living individual who can be identified, directly or indirectly, in particular by reference to –
 - (a) an identifier such as a name, an identification number, location data or an online identifier, or
 - (b) one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.

...

Appendix 2: The request

Please provide details of all complaints, comments or enquiries made to Fife Council in relation to Graham's Dairy or previously First Milk at Glenfield industrial estate Cowdenbeath from 4th January 2016 to date.

Complaints, comments, enquiries can be from any option that is available to raise such issues, e.g. online contact via each of whichever service online contact eform or via the main Fife Council comments, enquiries eform, also any other online method, telephone phone calls, or emails.

Graham's Dairy, First Milk, Glenfield industrial Estate, cheese factory, Glenfield Estate are the names in my opinion that should be searched as these are a few of the names used for this area.

Please provide details as listed below for each complaint, comment or enquiry made during the stated period - 04/01/2016 to date.

1. Date complaint, comment, enquiry etc was raised;
2. Which Council service was responsible for dealing with;
3. Full Details of the actual complaint, comment or enquiry raised; (not FC version but the actual words used by person raising)
4. The FC reference number appointed to each complaint, comment, enquiry.
5. What actions/investigations were then undertaken by any Fife Council Officers to follow up on the complaints raised for each complaint, comment, enquiry, (e.g. Visit/s to site, monitoring, visits to properties, direct contact with business, email to business, phone calls to business and so on)

Also if no action was taken for any of the above then please provide a full explanation to why no action was taken for each.

6. Date/s these actions in point 5 were undertaken by Fife Council officers occurred;
7. Full Details of the actual response by Fife Council to the complainer; e.g. Exact words used by Fife Council on replying by email, letters, or reports following phone calls if applicable.
8. Date of the response to complainer;

Please also provide a copy/copies of the Fife Council policy/policies and procedural guides for dealing with each type of complaints received. E.g. If it's a noise complaint a copy of that policy and procedural guide for acting on such complaints.

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