

Decision Notice



Decision 108/2009 Mr X and West Dunbartonshire Council

Request for information concerning a complaint

Reference No: 200900149

Decision Date: 11 September 2009

www.itspublicknowledge.info

Kevin Dunion

Scottish Information Commissioner

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Summary

Mr X requested from West Dunbartonshire Council (the Council) information relating to a complaint which he and his wife had made about a nuisance odour from a specified address. The Council withheld the information under various exemptions in the Freedom of Information (Scotland) Act 2002 (FOISA). Following a review, Mr X remained dissatisfied and applied to the Commissioner for a decision.

During the investigation, the Commissioner took the view that the information comprised environmental information and asked for the Council's comments as to whether the request should have been dealt with under the Environmental Information (Scotland) Regulations 2004 (the EIRs). The Council did not wholly agree that the information was environmental. However, it indicated that should the Commissioner continue to consider the case under the EIRs, it would wish to rely on section 39(2) of FOISA and regulations 11 (Personal data) of the EIRs for withholding the information.

Following an investigation, the Commissioner found that the Council had been correct to withhold the information requested by Mr X under the exceptions in regulation 11 of the EIRs, on the basis that some of the information was Mr X's own personal data and that the other information was the personal data of third parties, the disclosure of which would breach at least one of the data protection principles set out in the Data Protection Act 1998 (the DPA).

However, he found that the Council had failed to respond to Mr X's request for review within the timescale specified in regulation 16(4) of the EIRs. He did not require the Council to take any action in relation to this breach in response to this decision.

Relevant statutory provisions and other sources

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

Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (Interpretation – definition of “environmental information”); 5(1) and (2)(b) (Duty to make available environmental information on request); 10(3) (Exceptions from duty to make environmental information available); 11(1), (2) and (3)(a)(i) and (b) (Personal data) and 16(4) (Review by Scottish public authority)

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



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

Decision 218/2007 Professor A D Hawkins and Transport Scotland (the Hawkins Decision), 19 November 2007.

<http://www.itspublicknowledge.info/applicationsanddecisions/Decisions/2007/200600654.asp>

Background

1. On 2 October 2008, Mr X emailed the Council requesting all information held by the Council in relation to communications with a named individual in relation to a complaint made about a nuisance smell. Mr X specified that the request included internal communications within the Council and communications with outside agencies about the matter.
2. The Council responded on 3 October 2008 and informed Mr X that it considered the information to be exempt from disclosure in terms of sections 36(2) and 38(1)(b) of FOISA on the basis that the information was, respectively, confidential and that it comprised personal data, the disclosure of which would breach one or more of the data protection principles of the DPA.
3. On 5 November 2008, Mr X emailed the Council requesting a review of its decision. Mr X drew the Council's attention to the fact that he did not believe the information to be confidential and stated that he required the information to be able to satisfy himself that the Council had investigated his complaint completely and without prejudice.
4. The Council notified Mr X of the outcome of its review on 21 January 2009. The Council advised Mr X that it no longer wished to rely on the exemption in section 36(2). However, it considered the withheld information to be exempt from disclosure under section 38(1)(a) and 38(1)(b) of FOISA on the basis that it comprised Mr X's own personal data as well as that of third parties.
5. On 22 January 2009, Mr X wrote to the Commissioner, stating that he was dissatisfied with the outcome of the Council's review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA. By virtue of regulation 17 of the EIRs, Part 4 of FOISA applies for the purposes of the EIRs as it applies for the purposes of FOISA, subject to certain specified modifications. Mr X also noted his dissatisfaction with the length of time taken by the Council to respond to his review request.
6. The application was validated by establishing that Mr X had made a request for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its response to that request.



Investigation

7. On 5 February 2009, the Council was notified in writing that an application had been received from Mr X and was asked to provide the Commissioner with any information withheld from Mr X. The Council responded with the information requested and the case was then allocated to an investigating officer.
8. The investigating officer subsequently contacted the Council, giving it an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA which, in line with regulation 17 of the EIRs, applies for the purposes of the EIRs as it applies for the purposes of FOISA) and asking it to respond to specific questions. The Council was advised that the Commissioner may take the view that at least some of the withheld information fell under the definition of environmental information as defined in regulation 2(1) of the EIRs. The Council was asked to comment on this point and to provide submissions on whether it considered the withheld information to be excepted from disclosure under the provisions of regulation 11 of the EIRs. The Council was also asked if it wished to rely on section 39(2) of FOISA, which allows Scottish public authorities to exempt information from disclosure under FOISA if it is environmental information which the authority is obliged to make available to the public in accordance with the EIRs.
9. In its response, the Council submitted that while it did not believe that the data held by it in this matter fell readily into any of the categories found in the definition of environmental information, if the Commissioner held to the view that the information did fall under this definition, then it would wish to rely on the exemption contained in section 39(2) of FOISA. The Council stated that it wished to rely on the exceptions contained in regulation 11(1) and 11(2) and (3) of the EIRs to the withheld information, and provided detailed submissions in support of its application of these exceptions.
10. The investigating officer subsequently contacted Mr X and invited him to provide submissions on his legitimate interest, in terms of condition 6 of schedule 2 of the DPA (see the discussion on condition 6 below) in the withheld information. Although Mr X did not subsequently provide any specific submissions, in prior correspondence with the Commissioner and the Council, he provided reasons why he feels he is entitled to receive the withheld information. These are summarised in the Commissioner's analysis and findings section below.
11. During the course of the investigation, the Council wrote to Mr X offering to release some of his own personal information to him under the DPA and also offering to release some of his wife's personal information to him if she provided her written consent for the Council to do so. At the time of the writing, Mr X has not as yet taken up the Council's offer on this point.



Commissioner's analysis and findings

12. In coming to a decision on this matter, the Commissioner has considered all of the withheld information and the submissions made to him by both Mr X and the Council and is satisfied that no matter of relevance has been overlooked.

The scope of the investigation

13. The Commissioner notes that the information request made by Mr X clearly asks for information relating to a specific complaint made by him and his wife to the Council about a nuisance odour. He also notes that several of the documents provided by the Council in the course of the investigation do not relate to the complaint about the nuisance odour, but rather to separate matters and therefore fall outwith the remit of this investigation. Additionally, some documents identified by the Council did not exist at the time Mr X submitted his original information request. Therefore, these are also outwith the scope of the investigation, given that the information was not held by the Council and could not have been available to Mr X at the time he made his request. .
14. The Commissioner has not therefore considered any documents outwith the scope of Mr X's request in what follows.

FOISA or EIRs?

15. In the Commissioner's *Decision 218/2007 Professor A D Hawkins and Transport Scotland*, he considered the relationship between FOISA and the EIRs at some length and set out his understanding of the situation. Broadly, the Commissioner's general position on the interaction between the two regimes is as follows:
- The definition of what constitutes environmental information should not be viewed narrowly
 - There are two separate statutory frameworks for access to environmental information and an authority is required to consider any request for environmental information under both FOISA and the EIRs
 - Any request for environmental information therefore must be dealt with under the EIRs
 - In responding to a request for environmental information under FOISA, an authority may claim the exemption in section 39(2)
 - If the authority does not choose to claim the section 39(2) exemption it must deal with the request fully under FOISA, by providing the information, withholding it under another exemption in Part 2, or claiming that it is not obliged to comply with the request by virtue of another provision in Part 1 (or a combination of these)



- The Commissioner is entitled (and indeed obliged) where he considers a request for environmental information has not been dealt with under the EIRs to consider how it should have been dealt with under that regime.
16. Environmental information is defined in regulation 2(1) of the EIRs, and this definition is reproduced in full in the Appendix to this decision. Where information falls within the scope of this definition, a person has a right to access it under the EIRs, subject to the exceptions contained within regulation 10 and the provisions of regulation 11, and certain other restrictions set out in the EIRs.
17. As noted above, the Council was unconvinced that the information in question was environmental but did not offer any separate arguments to substantiate its view.
18. Given that the requested information relates substantially to odour emissions, factors which will affect the elements of the environment and which, as such, fall within the definition of environmental information contained in regulation 2(1)(b) of the EIRs, the Commissioner is satisfied that the requested information all falls within the definition of environmental information set out in regulation 2(1)(a), (b) and (c) of the EIRs (see the text of regulation 2(1)(a) to (c) in the Appendix).

Section 39(2) of FOISA

19. As noted above, the Council has stated that it would claim the exemption in section 39(2) of FOISA should the Commissioner find the information to be environmental information as defined in regulation 2(1) of the EIRs.
20. As the Commissioner considers that the information requested by Mr X is environmental information, he also therefore considers that the Council was correct in its application of section 39(2) of FOISA.
21. This exemption is subject to the public interest test in section 2(1)(b) of FOISA. The Commissioner's view is that, in this case, as there is a separate statutory right of access to environmental information available to Mr X, the public interest in maintaining this exemption and dealing with the requests in line with the requirements of the EIRs outweighs any public interest in disclosure of information under FOISA. In what follows, the Commissioner has therefore made his decision solely in terms of the EIRs.

Regulation 11(1) of the EIRs – personal information of the applicant

22. The Council stated that it could not provide some of the information requested by Mr X as it was excepted under regulation 11(1) of the EIRs. Regulation 11(1) contains an absolute exception in relation to personal data of which the applicant is the data subject. "Personal data" is defined in section 1(1) of the DPA, which is reproduced in the Appendix.



23. This exception exists under the EIRs because individuals have a separate right to make a request for their own personal data (commonly known as a subject access request) under section 7 of the DPA. The DPA will therefore usually determine whether a person has a right to information about themselves. Therefore, the effect of the exception in regulation 11(1) of the EIRs is not to deny individuals a right of access to information about themselves, but to ensure that the right is exercised under the DPA and not under the EIRs.
24. Having reviewed the withheld documents, the Commissioner is satisfied that certain parts of two of the withheld documents comprise the personal data of Mr X. The data within these documents focuses on Mr X and is biographical of him in a significant sense, and consequently it relates to him. Therefore, it is the Commissioner's view that this information is absolutely excepted from disclosure under the EIRs as it is the personal data of Mr X.
25. The Commissioner notes that, as mentioned above, the Council offered to release some of this information to Mr X under the DPA. The Commissioner has not been provided with evidence as to whether Mr X has pursued this option, but he is satisfied that the Council took steps to advise Mr X on how to access his personal data under the DPA.
26. Given that he has concluded that only part of the withheld information should be considered Mr X's own personal data, the Commissioner will now go on to consider the remainder of the withheld information to which the Council is applying the exception in regulation 11(2) of the EIRs.

Regulation 11(2) of the EIRs – third party personal information

27. The Council stated that it could not provide some of the information requested by Mr X as it was excepted under regulation 11(2) of the EIRs. Regulation 11(2) excepts third party personal data from release if either "the first condition" (set out in regulation 11(3)) or "the second condition" (set out in regulation 11(4)) applies to the information.
28. As the Council's arguments relate to "the first condition" and, in particular, the parts of the first condition which consider whether disclosure of the information would breach the data protection principles (regulation 11(2) read in conjunction with either regulation 11(3)(a)(i) or (b)), this is what the Commissioner will focus on in this decision.
29. In order for a public authority to rely on this exception, it must show firstly that the information which has been requested is personal data for the purposes of the DPA and secondly that disclosure of the information would contravene at least one of the data protection principles laid down in the DPA.

Is the information under consideration personal data?

30. Personal data is defined in section 1(1) of the DPA as data which relate to a living individual who can be identified from those data, or from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller (the definition is set out in full in the Appendix).



31. The Council has submitted that the specific nature of Mr X's request is such that, by definition, the focus of the request is a specific individual and the circumstances that individual is in.
32. The Commissioner considers that the withheld information clearly relates to and identifies the individual concerned. The Commissioner is therefore satisfied that the information contained in the documents being withheld is the personal data of the named individual.
33. The Commissioner also considers that some of the information contained in the withheld documents is the personal data of Mr X's wife, given that it relates to her and her household in a personal sense and identifies her.
34. The Council has argued that the release of the information would breach the first and the sixth data protection principles. The Commissioner will begin by consideration of the first data protection principle.

Would disclosure of the information breach the first data protection principle?

35. The first data protection principle states that the processing of personal data (here, processing being the disclosure of the data in response to a request made under the EIRs) must be fair and lawful and, in particular, that personal data shall not be processed unless at least one of the conditions in Schedule 2 (to the DPA) is met and, in the case of sensitive personal data, at least one of the conditions in Schedule 3 to the DPA is also met.
36. The Commissioner has considered the definition of sensitive personal data set out in section 2 of the DPA, and while he considers some of the data to be sensitive personal data, he will consider the conditions in Schedule 2 in the first instance.
37. There are three separate aspects to the first data protection principle: (i) fairness, (ii) lawfulness and (iii) the conditions in the schedules. However, these three aspects are interlinked. For example, if there is a specific condition which permits the personal data to be disclosed, it is likely that the disclosure will also be fair and lawful.
38. The Commissioner will now go on to consider whether there are any conditions in Schedule 2 to the DPA which would permit the personal data to be disclosed. If any of these conditions can be met, he must then consider whether the disclosure of this personal data would be fair and lawful.

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

39. In its submissions, the Council considered that only condition 6 of Schedule 2 of the DPA could potentially be applicable in this instance.
40. The Commissioner has considered all of the conditions in Schedule 2 of the DPA, and is also of the view that condition 6(1) of Schedule 2 of the DPA is the only condition which might be considered potentially to apply in this case.



41. Condition 6(1) allows personal data to be processed if the processing is necessary for the purposes of legitimate interests pursued 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.
42. There are, therefore, a number of different tests which must be satisfied before condition 6 can be met. These are:
 - a. Does the applicant (Mr X) have a legitimate interest in obtaining this personal data?
 - b. If yes, is the disclosure necessary to achieve these legitimate aims? In other words, is the disclosure proportionate as a means and fairly balanced as to ends, or could these legitimate aims be achieved by means which interfere less with the privacy of the data subject(s)?
 - c. Even if the disclosure is necessary for the legitimate purposes of the applicant, would the disclosure nevertheless cause unwarranted prejudice to the rights and freedoms or legitimate interests of the data subjects? This will involve a balancing exercise between the legitimate interests of the applicant and those of the data subjects. Only if (or to the extent that) the legitimate interests of the applicant outweigh those of the data subjects can the personal data be disclosed.

Does the applicant have a legitimate interest?

43. In correspondence with the Commissioner, Mr. X submitted that the information should be made available as it refers to a public health issue. In his representations to the Council, he has previously argued that he has a clear interest in obtaining the information on the basis that the complaint involves him and he should have access to the information in order to make informed judgements about the complaint and to satisfy himself that the Council has investigated the complaint appropriately.
44. The Council has stated that it accepts that Mr X has an interest in the information in order to inform him as to how his complaint was progressed.
45. Having considered the submissions made by both Mr X and the Council, the Commissioner accepts that Mr X has a legitimate interest in gaining an insight into how his complaint was dealt with. The disclosure of the information would shed light on how the Council dealt with a matter, which was clearly of considerable concern to Mr X and would allow him to form a view on the effectiveness of the process.

Is disclosure of the information necessary to achieve those legitimate interests?

46. The Commissioner must now consider whether disclosure is necessary for Mr X's legitimate interests and in doing so he must consider whether these interests might reasonably be met by any alternative means.



47. The Commissioner has concluded that disclosure is necessary as there is no other way in which Mr X could obtain this information while interfering less with the privacy of the data subjects concerned.

Would disclosure cause unwarranted prejudice to the legitimate interests of the data subjects?

48. The Commissioner must now consider whether disclosure would nevertheless cause unwarranted prejudice to the rights, freedoms and legitimate interests of the data subjects concerned. As noted above, this will involve a balancing exercise between the legitimate interests of Mr X and those of the data subjects. Only if the legitimate interests of Mr X outweigh those of the data subjects can the information be disclosed without breaching the first data protection principle.

49. The Commissioner has recently issued updated guidance on the interpretation of the exceptions in section 11¹, and notes a number of factors which should be taken into account in carrying out this balancing exercise. These include:

- a. whether the information relates to the individual's public life (i.e. their work as a public official or employee) or their private life (i.e. their home, family, social life or finances).
- b. the potential harm or distress that may be caused by the disclosure.
- c. whether the individual has objected to the disclosure
- d. the reasonable expectations of the individuals as to whether the information would be disclosed.

50. When invited to present its submissions as to why it felt disclosure would cause unwarranted prejudice to the legitimate interests of the data subjects, the Council stated that the occupant of the property which was the locus of the complaint and the occupant's family should have the right to assume that personal data pertaining their lives within their own house would not be disclosed to the general public or indeed to Mr X.

51. The Council went on to argue that the relationship between it and the occupant of the property in question should be based on confidentiality and trust and stated that it did not have the permission of the occupant in question to disclose the information.

52. The Council also contended that the disclosure of the personal information under consideration would be excessive, unfair and unjustified when compared to any benefit Mr X would derive.

¹ "Personal information"- <http://www.itspubliknowledge.info/nmsruntime/saveasdialog.asp?IID=3085&SID=1333>



53. The Council was asked by the Commissioner for its submissions on the personal data of Mrs X. It submitted that, in the absence of express consent, it cannot be assumed that in all cases a wife or husband would be happy to have all information sought by their spouse disclosed to them. The Council also submitted that, bearing in mind that release of the spouse's personal data under the EIRs would effectively be a disclosure of that personal data into the public domain, and given that it could not determine that the circumstances narrated in section 7(6) of the DPA were such that disclosure under section 7(4)(b) of the DPA would be appropriate, the release of Mrs X's personal data by the Council would be in breach of the DPA. (Sections 7(4)(b) and 7(6) are set out in the Appendix.)
54. In relation to the occupant of the property which was the subject of the complaint, the Commissioner considers that, as the information relates to the occupant's home and family circumstances, the information being withheld relates to the private life of that individual and their family.
55. The Commissioner takes the view that part of the information also relates to the home and family circumstances, and hence private life, of Mrs X.
56. No evidence has been provided to the Commissioner to show that either the occupant concerned, their family, or Mrs X have consented to the disclosure of their personal information into the public domain. The Council has stated that it did not think it appropriate to seek the consent of the occupant and their family based on the appropriateness of the data sought. However, the Commissioner accepts that persons engaged in communications of a highly personal and sensitive nature would enter into such communications with the Council in the expectation that the fact and content of such communications would remain private.
57. The Commissioner must also take into account the fact that even though she is the spouse of the applicant, Mrs X's personal data must also be treated as that of any other third party, and, as such, the Commissioner is of the view that, while it is possible she may have no objection to her husband obtaining her personal data, she would have no expectation of it being released into the public domain.
58. The issue of any potential harm or distress that may be caused to the data subjects by the disclosure of the information has also been considered by the Commissioner. He is of the opinion that, while the release of the information would not necessarily cause the data subjects any actual harm, it could cause a degree of distress to them to have the personal details of their households and daily living disclosed into the public domain.
59. On balance, while the Commissioner accepts that disclosure of the withheld information would be necessary to fulfill Mr X's legitimate interests, he does not agree that this outweighs the unwarranted prejudice that would be caused to the data subjects' rights, freedoms and legitimate interests. The Commissioner is therefore satisfied that Condition 6 of Schedule 2 is not met in this case.



60. Having concluded that disclosure of the withheld information would lead to unwarranted prejudice, as described above, to the rights, freedoms and legitimate interests of the data subjects, the Commissioner must also conclude that disclosure would be unfair. As condition 6 cannot be met, he would also regard disclosure as unlawful. In all the circumstances, therefore, he finds that disclosure would breach the first data protection principle and that the information was therefore properly withheld under regulation 11(2) of the EIRs.

Sensitive personal data

61. As the Commissioner has found that none of the conditions in Schedule 2 (to the DPA) have been met he is not therefore required to go on to consider whether one of the conditions in Schedule 3 to the DPA can also be met.

Would disclosure of the information breach the sixth data protection principle?

62. As the Commissioner has found that disclosure of the withheld information would breach the first data protection principle he is not therefore required to go on to consider whether it would also breach the sixth data protection principle.

Failure to respond within timescales laid down in the EIRs

63. In his application to the Commissioner, Mr X expressed his concern about the length of time taken by the Council to respond to his request for review.
64. Regulation 16(4) of the EIRs gives authorities a maximum of 20 working days from receipt of an applicant's representations to notify the applicant of its decision on a review.
65. Mr X requested a review on 5 November 2008, which was responded to by the Council on 21 January 2009. In the review letter the Council explained and apologised to Mr X for its delay in responding to him and also sent a letter explaining the circumstances to the Commissioner.
66. While the Commissioner accepts that there may have been mitigating circumstances, he finds that the Council failed to notify Mr X of its decision on review within the 20 working days allowed for under regulation 16(4). In failing to comply with this timescale, the Council failed to comply with regulation 16(4) of the EIRs.



DECISION

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

The Commissioner finds that the Council was entitled to withhold the information from Mr X in terms of section 39(2) of FOISA and regulations 11(1) and 11(2) of the EIRs.

However, the Commissioner finds that the Council failed to comply with the EIRs by failing to respond to Mr X's requirement for review within the timescale laid down by regulation 16(4) of the EIRs.

Given that the Council subsequently responded to Mr X's requirement for review, the Commissioner does not require the Council to take any action in response to this failure.

Appeal

Should either Mr X or the Council wish to appeal against this decision, there is an appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days after the date of intimation of this decision notice.

Margaret Keyse
Head of Enforcement
xx September 2009



Appendix

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002

1 General entitlement

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

...

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

2 Effect of exemptions

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

...

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

39 Health, safety and the environment

...

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



The Environmental Information (Scotland) Regulations 2004

2 Interpretation

(1) In these Regulations –

...

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

- (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
- (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;
- (d) reports on the implementation of environmental legislation;
- (e) costs benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in paragraph (c); and
- (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in paragraph (a) or, through those elements, by any of the matters referred to in paragraphs (b) and (c);

...

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

...

- (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.
- (2) To the extent that environmental information requested includes personal data of which the applicant is not the data subject and in relation to which either the first or second condition set out in paragraphs (3) and (4) is satisfied, a Scottish public authority shall not make the personal data available.
- (3) The first condition is-
 - (a) in a case where the information falls within paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998 that making the information available otherwise than under these Regulations would contravene-
 - (i) any of the data protection principles;
...
 - (b) in any other case, that making the information available otherwise than under these Regulations would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.

16 Review by Scottish public authority

...

- (4) The Scottish public authority shall as soon as possible and no later than 20 working days after the date of receipt of the representations notify the applicant of its decision.

...



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;

...

7 Right of access to personal data

...

(4) Where a data controller cannot comply with the request without disclosing information relating to another individual who can be identified from that information, he is not obliged to comply with the request unless—

- (a) the other individual has consented to the disclosure of the information to the person making the request, or
- (b) it is reasonable in all the circumstances to comply with the request without the consent of the other individual.

...

(6) In determining for the purposes of subsection (4)(b) whether it is reasonable in all the circumstances to comply with the request without the consent of the other individual concerned, regard shall be had, in particular, to—

- (a) any duty of confidentiality owed to the other individual
- (b) any steps taken by the data controller with a view to seeking the consent of the other individual,
- (c) whether the other individual is capable of giving consent, and



- (d) any express refusal of consent by the other 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.

...