

Decision Notice



Decision 024/2010 Mr N and the Scottish Ministers

Application for grant

Reference No: 200900461

Decision Date: 16 February 2010

www.itspublicknowledge.info

Kevin Dunion

Scottish Information Commissioner

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Summary

Mr N requested from the Scottish Ministers (the Ministers) information relating to an application for a grant from the Scottish Rural Development Project (SRDP). The Ministers considered the information requested to be environmental information and dealt with it under the EIRs, withholding information under regulations 10(4)(b) (as they considered the request to be manifestly unreasonable) and 11(2) (in relation to some information they considered to be personal data). Following a review, Mr N remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner did not agree that the applicant's request was manifestly unreasonable and required that the withheld information be made available, subject to the redaction of personal data.

Relevant statutory provisions and other sources

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

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

Data Protection Act 1998 (the DPA) section 1(1) (Basic interpretative provisions) (definition of personal data); 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)

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.

Background

1. On 22 January 2009, Mr N wrote to the Ministers requesting the following information:



- (a) Whether SRDP (Scottish Rural Development Project) has received an application for funding for the second development at Torran Farm (which he had described in greater detail)
 - (b) If so, whether the application has been granted and in what sum (Mr N commented that he assumed that as these are public funds the public have a right to know)
 - (c) What claims have [named individuals] made for community support for their developments and community involvement in them.
2. The Ministers responded on 6 February 2009 by providing responses to requests (a) and (b).
 3. In relation to request (c), the Ministers explained that an exemption under section 39(2) of FOISA applied as the information sought was environmental information and therefore subject to the EIRs. They applied the exception in regulation 10(4)(b) of the EIRs, submitting that they considered the request to be manifestly unreasonable.
 4. On 13 February 2009, Mr N wrote to the Ministers, requesting a review of their decision in relation to request (c). In particular, he drew the Minister's attention to the need for "the widest possible consultation" on matters such as this, especially when public funds were at stake.
 5. The Ministers notified Mr N of the outcome of their review on 25 February 2009, upholding their original decision to withhold the information on the basis of regulation 10(4)(b).
 6. On 8 March 2009, Mr N wrote to the Commissioner, stating that he was dissatisfied with the outcome of the Minister'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 to the enforcement of the EIRs as it applies to the enforcement of FOISA, subject to certain specified modifications.
 7. The application was validated by establishing that Mr N 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

8. On 12 March 2009, the Ministers were notified in writing that an application had been received from Mr N and were asked to provide the Commissioner with any information withheld from him. The Ministers responded with the information requested and the case was then allocated to an investigating officer.



9. The investigating officer subsequently contacted the Ministers, giving them an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking them to respond to specific questions. In particular, the Ministers were asked to justify their reliance on any provisions of the EIRs they considered applicable to the information requested (with particular reference to regulation 10(4)(b)). In their response, the Ministers stated that they were also withholding the names and addresses of the signatories of a petition under regulation 10(3), read with regulation 11(2).
10. During the investigation, the Ministers indicated their intention to release further information and on 14 December 2009 released some information falling within the scope of request (c).
11. Following further discussion with the investigating officer, Mr N confirmed that he still required a decision from the Commissioner. He provided the investigating officer with more detailed comments on why he remained dissatisfied with the amount of information released and with the handling of his request by the Ministers. The submissions of both Mr N and the Ministers, insofar as relevant, will be considered by the Commissioner in his analysis and findings below.

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 N and the Ministers and is satisfied that no matter of relevance has been overlooked.
13. It may be helpful to provide an outline of the Rural Priorities (RP) application process to which this request relates. There are a number of stages in the approval process, with the case officer assessing proposals at increasing levels of detail. Finally, a committed application (which cannot be amended) will be presented, evaluated by the case officer and presented to the Regional Proposal Assessment Committee for consideration. If approval is given at this stage, public funds are then offered to the applicant (who may or may not decide to proceed).
14. The Ministers confirmed to Mr N that an application had been received in the case he was interested in and was still being processed.
15. During the course of the investigation, the Ministers gave further consideration to the information held and the terms of the request and changed their view on what fell within the scope of request (c). The Ministers indicated that they would release certain information while withholding certain personal data in accordance with regulation 10(3) as read with regulation 11(2) of the EIRs. In the circumstances, the Commissioner does not find it necessary to consider the information released in the course of the investigation further in this decision.



16. The Commissioner has set out his thinking on the relationship between FOISA and the EIRs in some detail in *Decision 218/2007 Professor A D Hawkins and Transport Scotland* and need not repeat it in full here. In this case, as mentioned above, the Ministers advised Mr N that they would rely on the exemption in section 39(2) of FOISA in relation to all of the information requested. For this exemption to apply, any information requested would require to be environmental information as defined in regulation 2(1) of the EIRs.
17. Given the subject matter of the information requested by Mr N (grant funding for a substantial development on a rural property), the Commissioner has no difficulty in agreeing with the position arrived at by the Ministers, that any information caught by this request would be environmental information for the purposes of the EIRs. The request relates to measures affecting or likely to affect the elements of the environment (in particular landscape) referred to in paragraph (a) of the definition of environmental information in regulation 1(1), and therefore falls within paragraph (c) of that definition.
18. The Commissioner is therefore satisfied that the information requested is exempt under section 39(2) of FOISA. 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 N, the public interest in maintaining this exemption and dealing with Mr N's request in line with the requirements of the EIRs outweighs any public interest in disclosure of information under FOISA. Consequently, the Commissioner is of the view that the Ministers were correct in this case to apply section 39(2) and thereafter deal with the request under the EIRs.
19. Under the EIRs, a Scottish public authority may refuse a request to make environmental information available to the extent that the request for information is manifestly unreasonable (regulation 10(4)(b)).

Regulation 10(4)(b) of the EIRs

20. In request (c), Mr N asked what claims the applicants for funding had made for community support for their proposed developments and community involvement in them.
21. In this case, the Ministers applied the exception in regulation 10(4)(b) in relation to the information it had withheld from seven letters of support, which, it advised, were sent by local businesses. Prior to their release of information during the investigation, the Ministers also withheld information from the completed application form under this exception: as a consequence of that release, however, the Commissioner is satisfied that Mr N now has all of the information from the application form which falls within the scope of his request (and therefore that the seven letters of support comprise the only information remaining to be considered under regulation 10(4)(b)).
22. Whilst the Commissioner has not yet published any decisions as to whether a request for environmental information is manifestly unreasonable (and there is no definition of the term in either the EIRs or in Directive 2003/4/EC, from which they are derived), he is likely to take into account the same kinds of considerations in considering this question as he would in reaching a decision as to whether a request is vexatious in terms of section 14(1) of FOISA.



23. In the briefing on both section 14(1) and regulation 10(4)(b)¹, the Commissioner explains there is no definition of “vexatious” in FOISA. The Scottish Parliament acknowledged that the term “vexatious” was well-established in law and opted to give the Commissioner latitude to interpret that term in accordance with this background, in order that the interpretation might evolve over time in light of experience and precedent.
24. The Commissioner’s general approach is that a request (which may be the latest in a series of requests) is vexatious where it would impose a significant burden on the public authority *and*:
- it does not have a serious purpose or value; and/or
 - it is designed to cause disruption or annoyance to the public authority; and/or
 - it has the effect of harassing the public authority; and/or
 - it would otherwise, in the opinion of a reasonable person, be considered to be manifestly unreasonable or disproportionate.

Although there may be circumstances where the burden of responding alone justifies deeming a request to be manifestly unreasonable, ordinarily the Commissioner will expect one or more of these listed criteria to be present in addition.

25. The Ministers submitted that they considered it to be manifestly unreasonable to request the withheld information while the grant application was still in the early stages of consideration (as they further described). They argued, with reference to the process and a range of potential actions, that making public details of the local businesses supporting the application would enable others, who might oppose the application or wish to submit their own, to seek to influence or otherwise interfere in the process of assessing and developing the applicants’ proposals or that of considering their application.
26. Thus, the arguments put forward by the Ministers appear to fall under the fourth option in paragraph 24 above. As indicated in that paragraph, generally the Commissioner would expect to be satisfied in addition that the request would impose a significant burden on the Ministers. Given the amount of information under consideration here, even prior to the disclosure in the course of the investigation – and given that the information was all readily accessible to the Ministers when the request was received – there would appear to be no question of the Ministers being presented with a significant burden in dealing with Mr N’s request. In no sense could the request be considered disproportionate in its impact on the authority. The Commissioner will now go on to consider whether, on the basis of the Ministers’ submissions, there could be any other basis on which a reasonable person would conclude that Mr N’s request was manifestly unreasonable.

¹ <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/Section14/Section14Overview.asp>



27. Mr N's own arguments appear to arise from a concern that public funds, specifically those allocated as part of the RP funding programme, should be spent on "those schemes best able to take advantage of them and provide a real return on the investment made". With this in mind, and noting that there were two broadly similar projects (including the one for which RP funding had been sought) in the course of development in the same area, he wished to verify the claims of community support being made in connection with the funding application. He believed it important that this be done before any funding application was determined and, in support of his request for review, cited the principles of openness set out in the preamble to the Aarhus Convention.
28. On the face of it, the Commissioner finds it difficult to characterise a request with these purposes, in the terms of Mr N's request (c), as inherently unreasonable. He has, however, considered the arguments put forward by the Ministers as to why it should be so regarded.
29. The Commissioner must be careful to consider the actual information being sought and the exact circumstances of this particular case. While he recognises that the timing of the request may be relevant, it cannot be the sole determining factor. The information under consideration here comprises seven letters of support for the proposed development in respect of which funding was sought. The Ministers considered a request for this information to be manifestly unreasonable while the grant application was in the early stages of consideration, as they argued it remained while they dealt with Mr N's information request and request for review. This was the case, they argued, because of the potential for undue interference with the process should the information be released.
30. The Commissioner recognises the possibility that disclosure of the withheld information might lead to the statements of support being challenged, through contact with either the Ministers or those responsible for the statements. He finds it difficult to accept, however, that the Ministers' systems are insufficiently robust to deal with such challenge without compromising the process of assessing applications for funding. In any event, he considers the test of what is manifestly unreasonable to be a high one and cannot accept that it follows from the risks identified by the Ministers that any reasonable person would have considered it manifestly unreasonable to submit a request for the withheld information at the time Mr N made his request. It is possible that in certain circumstances it might be legitimate to withhold the information under other exceptions in the EIRs, but that is not what the Commissioner has been asked to consider here: he is satisfied in this case that the Ministers have been given adequate opportunity to cite other exceptions in relation to this information, which they have chosen not to do.
31. Having considered the relevant arguments, therefore, the Commissioner is not satisfied that the exception in regulation 10(4)(b) of the EIRs applies to the information in the seven withheld letters. Having reached this conclusion, he is not required to consider the public interest test in regulation 10(1)(b) of the EIRs. Consequently, the Commissioner requires the Ministers to release the seven letters of support, subject to his conclusions below on the disclosure of any personal data withheld.



32. Regulation 10(3) of the EIRs requires that any personal data included in environmental information shall not be made available otherwise than in accordance with regulation 11. Regulation 11(2) prohibits disclosure of personal data of which the applicant is not the data subject, where either "the first condition" (set out in regulation 11(3)) or "the second condition" (set out in regulation 11(4)) applies to the information.
33. As the Ministers' 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(3)(a)(i) or, where appropriate, regulation 11(3)(b)), this is what the Commissioner will now focus on in this decision.
34. 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?

35. Personal data is defined in section 1(1) of the DPA, which is reproduced in the Appendix to this decision.
36. The Ministers submitted that the information withheld under this exception (details of the individual signatories of the petition, together with the signatures, names and designations of the seven letters of support) was clearly the personal data of certain individuals. The Commissioner accepts that the information is sufficient to enable identification of the individuals concerned, and that given its nature it relates to those individuals. Consequently, he is satisfied that it constitutes personal data as defined by section 1(1) of the DPA. Having considered the letters of support, he is also satisfied (for the same reasons) that the addresses on two of them are private rather than business and are therefore also the personal data of the individuals concerned.
37. The Ministers indicated that disclosure of this personal data would be unfair, thereby breaching the first data protection principle.

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

38. 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.
39. The Commissioner has considered the definition of sensitive personal data set out in section 2 of the DPA and is satisfied that none of the data under consideration here are sensitive personal data.



40. 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.
41. 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 otherwise fair and lawful.

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

42. The Commissioner first considered the conditions listed in Schedule 2 of the DPA and concluded that only condition 6 might be considered to apply in this case. Condition 6 allows personal data to be processed if the processing is necessary for the purposes of legitimate interests pursued by the data controller or 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.
43. There are, therefore, a number of different tests which must be satisfied before condition 6 can be met. These are:
- Does Mr N have a legitimate interest in obtaining this personal data?
 - If yes, is the disclosure necessary to achieve these legitimate interests? In other words, is the disclosure proportionate as a means and fairly balanced as to ends, or could these legitimate interests be achieved by means which interfere less with the privacy of the signatories?
 - Even if the processing is necessary for the legitimate purposes of Mr N, would the disclosure nevertheless cause unwarranted prejudice to the rights and freedoms or legitimate interests of the data subjects (i.e. those to whom the personal data relates)? This will involve a balancing exercise between the legitimate interests of Mr N and those of the data subjects. Only if (or to the extent that) the legitimate interests of Mr N outweigh those of the data subjects can the personal data be disclosed.

Does the applicant have a legitimate interest?

44. In his submissions to the Commissioner, Mr N explained the situation regarding the application for funding within the context of other community based projects. He also explained that one of the issues he wished to resolve was how much community support was given to this particular application for public funds.
45. The Commissioner is satisfied in the circumstances of this case that Mr N has a legitimate interest in being able to assess the claims of support submitted as part of this application for funding, to ascertain for himself the nature of the claims and in particular whether they are truly representative of the local community. The Commissioner also considers there is a general legitimate interest in ensuring transparency in such a process.



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

46. The Commissioner must now consider whether disclosure is necessary for those legitimate interests. Having accepted Mr N's legitimate interest in receiving the redacted information (as regards the claims of community support and public funding), the Commissioner is satisfied that disclosure is proportionate and that Mr N's aims could not be achieved by any other means which would interfere less with the privacy of the individuals in question.

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

47. The Commissioner must now consider whether disclosure would nevertheless cause unwarranted prejudice to the rights, freedoms and legitimate interests of the individuals identified in the redacted information. As noted above, this involves a balancing exercise between the legitimate interests of Mr N and the individuals in question. Only if the legitimate interests of Mr N outweigh those of the individuals in question can the information be disclosed without breaching the first data protection principle.

48. The Commissioner's briefing on personal data² sets out 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.

49. The Commissioner has taken into account the circumstances in which the data subjects provided their details.

50. The Ministers argued that this personal data would not have been provided in any expectation of release into the public domain. The Commissioner notes that the petition is signed by individuals in a private capacity rather than, say, employees acting in work-related capacity or officials on behalf of an organisation. The Commissioner also notes that the Ministers have not sought consent from the signatories for their personal data to be released (in the circumstances, he would not expect them to do so) and that the petition forms themselves do not contain any explicit statements as to how the information would be held or used, other than the general reference to support for the project. The Ministers have been asked whether there is any further evidence of the signatories' expectations, but have been unable to provide any. The Commissioner must also bear in mind that the EIRs contain no presumption in favour of the disclosure of personal data.

² <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section38/Section38.asp>



51. In all the circumstances, therefore, the Commissioner has concluded on balance that disclosure of the withheld personal data would be unwarranted in this case by reason of prejudice to rights and freedoms or legitimate interests of the data subjects. Consequently, condition 6 in Schedule 2 to the DPA is not met. For the same reasons, the Commissioner considers that disclosure would be unlawful and, in the absence of a Schedule 2 condition, unlawful. He therefore concludes that disclosure would breach the first data protection principle and that the Ministers were correct to withhold the personal data described in paragraph 36 above in accordance with regulation 11(2) of the EIRs.

DECISION

The Commissioner finds that the Scottish Ministers (the Ministers) complied with Part 1 of the Freedom of Information (Scotland) Act 2002 by correctly applying the exemption in section 39(2). He also finds that the Ministers complied with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in withholding personal data under regulation 11(2).

However, the Commissioner also finds that the Ministers failed to comply with the EIRs (and in particular regulation 5(1)) by withholding the remainder of the withheld information under regulation 10(4)(b).

The Commissioner therefore requires the Ministers to release the seven letters (other than the personal data therein as described in paragraph 36 above) by 2 April 2010.

Appeal

Should either Mr N or the Scottish Ministers 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
16 February 2010



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 –

- (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.

- (2) For the purposes of paragraph (a) of subsection 1, the following provisions of Part 2 (and no others) are to be regarded as conferring absolute exemption –

...

- (e) in subsection (1) of section 38 –

...

- (ii) paragraph (b) where the first condition referred to in that paragraph is satisfied by virtue of subsection (2)(a)(i) or (b) of that section.

...



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;

...

- (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;

...

- (3) The following expressions have the same meaning in these Regulations as they have in the Data Protection Act 1998], namely-

- (a) "data", except that for the purposes of regulation 10(3) and 11, a public authority referred to in paragraph (e) of the definition of data in section 1(1) of that Act means a Scottish public authority within the meaning of these Regulations;



- (b) "the data protection principles";
- (c) "data subject"; and
- (d) "personal data".

...

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
 - ...
 - (b) the request for information is manifestly unreasonable;
 - ...

11 Personal data

...



- (2) To the extent that environmental information requested includes personal data of which the applicant is not the data subject and in relation to which either the first or second condition set out in paragraphs (3) and (4) is satisfied, a Scottish public authority shall not make the personal data available.
- (3) The first condition is-
- (a) in a case where the information falls within paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998^[6] that making the information available otherwise than under these Regulations would contravene-
 - (i) any of the data protection principles; or
 - ...
 - (b) in any other case, that making the information available otherwise than under these Regulations would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.

...

Data Protection Act 1998

1 Basic interpretative provisions

- (1) In this Act, unless the context otherwise requires –
- ...
- “personal data” means data which relate to a living individual who can be identified –
- (a) from those data, or
 - (b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,
- and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual;

...

Schedule 1 – The data protection principles

Part I – The principles



1. Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –
 - (a) at least one of the conditions in Schedule 2 is met, and
 - (b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.

Schedule 2 – Conditions relevant for purposes of the first principle: processing of any personal data

...

6. (1) The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.

...