

Decision Notice



Decision 070/2014 ABW Consultants and West Lothian Council

Planning and related matters at Whitrigg, East Whitburn

Reference No: 201301487
Decision Date: 21 March 2014

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Summary

On 22 October 2013, ABW Consultants asked West Lothian Council (the Council) for information relating to planning and related matters at Whitrigg, East Whitburn. The Council responded by disclosing some information to ABW Consultants and notifying them that it did not hold other information. It withheld the remaining information under the exemptions in FOISA relating to legal professional privilege and the effective conduct of public affairs.

Following an investigation, the Commissioner found that the Council should have dealt with the request under the EIRs. She accepted the Council was entitled to withhold most of the information under the EIR exceptions it claimed during the investigation, but required it to disclose some information to ABW Consultants.

Relevant statutory provisions

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

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (paragraphs (a), (b) and (c) of definition of “environmental information”); 5(1) and (2) (Duty to make available environmental information on request); 6(1)(b) (Form and format of information); 10(1), (2), (3), (4)(a), (4)(e), (5)(b) and (5)(d) (Exceptions from duty to make environmental information available); 11(2), (3)(a)(i) and (3)(b) (Personal data); 16(4) (Review by Scottish public authority)

Data Protection Act 1998 (the DPA) sections 1(1) (Basic interpretative provisions) (definition of “personal data”); 2(h) (Sensitive personal data); Schedules 1 (The data protection principles, Part 1: the principles) (the first data protection 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 October 2012, ABW Consultants made three information requests to the Council. These were for details of all correspondence, meetings, briefings, notes and telephone calls:
 - a) between Council Officers and Robert Wiseman Dairies, their legal agents, agents or representatives since 2003, on all planning or related matters, whether or not involving Elected Members of the Council (including all correspondence where the Council or its agents had merely been copied);
 - b) between Council Officers and external consultants, legal advisers or agents involved in planning matters at Whitrigg since 2003 (with a breakdown of the costs by year and company, where applicable);
 - c) between any Councillor, MSP or MP with Council Officers in relation to planning applications or planning matters generally (including pre-planning discussions) at Whitrigg, East Whitburn from 2003 to the present date.
2. The Council responded on 20 November 2012, explaining that it held information covered by requests a), b) and c). It provided some of this information, stating that it was in the process of collating other relevant information, which it was not yet in a position to release.
3. ABW Consultants did not receive any further information and, on 8 January 2013, wrote to the Council requesting a review of its decision. They commented that elements of the requests did not appear to have been addressed in the Council's response. They also indicated that they had not received notice of any exemptions being applied to information covered by the requests, so they assumed none had been applied.
4. Having received no response to their requirement for review, ABW Consultants applied to the Commissioner in respect of this failure on 4 March 2013. During the investigation, the Council responded to ABW Consultants' requirement for review and, in doing so, provided a full copy of its response dated 20 November 2011: a page appears to have been missing from the version it was given in November 2012. The missing page stated that the Council did not hold elements of the information falling within the scope of parts of requests b) and c), and withheld other information under sections 30(b) and 36(1) of FOISA.
5. The Council's response to ABW Consultants' requirement for review upheld its original decision and explained (with reasons) that further relevant information was being withheld under section 36(1) of FOISA. The Council also informed ABW Consultants that some relevant information was otherwise accessible to them, providing a weblink to this information. Some further information was given to ABW Consultants.



6. ABW Consultants then withdrew their original application to the Commissioner. On 24 June 2013, ABW Consultants wrote to the Commissioner, stating that they were dissatisfied with the outcome of the Council's review and applying to the Commissioner for a decision (in respect of the review outcome) in terms of section 47(1) of FOISA. By virtue of regulation 17 of the EIRs, Part 4 of FOISA applies to the enforcement of the EIRs as it applies to the enforcement of FOISA, subject to specified modifications.
7. The application was validated by establishing that ABW Consultants made requests for information to a Scottish public authority and applied to the Commissioner for a decision only after asking the authority to review its response to those requests.

Investigation

8. On 4 July 2013, the Council was notified in writing that an application had been received from ABW Consultants and was asked to provide the Commissioner with the information withheld from them. The Council provided the information and the case was then allocated to an investigating officer.
9. 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. It was also asked to:
 - a. provide a detailed schedule of the withheld information (which it had failed to provide earlier, as requested on 4 July 2013)
 - b. describe the steps taken to identify and locate any relevant information it held
 - c. consider whether the information was environmental information and therefore subject to the EIRs
 - d. provide submissions justifying the withholding of information under FOISA and/or the EIRs.
10. Further correspondence followed, along with a meeting between the investigating officer and a representative of the Council. As a result of this process, a quantity of information was found to fall outwith the scope of the request (and therefore of the investigation). Additional information was disclosed to ABW Consultants during the investigation.
11. By the close of the investigation, the Council had provided the Commissioner with submissions on all the information it was still withholding (which included additional information identified during the investigation). It explained that it had concluded the information was environmental information (as defined in regulation 2(1) of the EIRs) and therefore applied section 39(2) of FOISA. It applied regulation 6(1)(b) of the EIRs to information it considered to be already accessible to ABW Consultants, withholding other information under regulations 10(4)(a), 10(4)(e), 10(5)(b), 10(5)(d) and 11(2). (These are considered in more detail below.)



12. During the investigation, the Council agreed to disclose some information it had previously withheld from ABW Consultants. This information is identified in the letter to the Council accompanying this decision. It had not been disclosed by the Council as at the date of this decision. As the Council has ceased to claim that this information should have been withheld under any provision of the EIRs, the Commissioner requires the Council to disclose it to ABW Consultants.
13. During the investigation, ABW Consultants confirmed that they did not require communications between them and the Council, which they had already. As a result, this information will not be considered further in this decision.

Commissioner's analysis and findings

14. 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 her by both ABW Consultants and the Council. She is satisfied that no matter of relevance has been overlooked.

Section 39(2) of FOISA – environmental information

15. The Commissioner's thinking on the relationship between FOISA and the EIRs is set out in some detail in *Decision 218/2007 Professor AD Hawkins and Transport Scotland*¹ and need not be repeated in full here. The central point is that when a person requests information which would fall within the definition of environmental information set out in regulation 2(1) of the EIRs, that request should be considered and responded to in line with the EIRs.
16. Where information falls within the definition of environmental information, it is exempt from disclosure under section 39(2) of FOISA, allowing its consideration solely in terms of the EIRs.
17. In this case, the Council initially handled ABW Consultants' requests for information in terms of FOISA. During the investigation, the Council submitted that, if the Commissioner determined that the withheld information was environmental information, it would seek to rely on the exemption in section 39(2).
18. Given the subject matter of all three requests (planning and related matters concerning a significant development site) and the content of the withheld information, the Commissioner is satisfied that the information requested by ABW Consultants meets the definition of environmental information within paragraph (c) of regulation 2(1) of the EIRs. The relevant provisions of regulation 2(1) are set out in the Appendix.

¹ <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2007/200600654.aspx>



19. Given the Commissioner's conclusion that the requested information is properly classified as environmental information, she accepts that the Council was entitled to apply the exemption in section 39(2) of FOISA to the withheld information. The exemption is a qualified one, so the Commissioner must also consider the public interest test in section 2(1)(b) of FOISA.
20. As there is a separate statutory right of access to environmental information available to ABW Consultants in this case, the Commissioner finds that the public interest in maintaining the exemption (and dealing with the request in line with the requirements of the EIRs) outweighs any public interest in disclosing the information under FOISA. The Commissioner will therefore consider the information in what follows solely in terms of the EIRs.
21. As the Council did not initially respond to the request as a request for environmental information, the Commissioner must find that it failed to respond in accordance with regulation 5(1) of the EIRs.

Regulation 6(1)(b) – information otherwise accessible

22. Regulation 6(1)(b) of the EIRs states that, where an applicant requests that information is made available in a particular form or format, a Scottish public authority shall comply with that request unless the information is already publicly available and easily accessible to the applicant in another form or format. It is apparent from ABW Consultants' correspondence that they expected the Council to provide them with copies of any relevant information they held: the Commissioner is therefore satisfied that ABW Consultants asked the Council to make the information available in a particular form or format.
23. The Council applied regulation 6(1)(b) to information in two documents. In one case, the Council submitted that the information, relating to a title to land, could be accessed by any member of the public on application and payment of a fee (£3.00) to the Registers of Scotland. Having considered the submissions provided by the Council on this point, the Commissioner accepts that this is (and was, when the Council responded to, ABW Consultants) the case.
24. Having considered regulation 6(1)(b) in the context of *The Aarhus Convention: an Implementation Guide*² (see pages 74 and 75), the Commissioner accepts that this provision can apply to information available from a public register, such as the Registers of Scotland, at a reasonable cost. In the circumstances, she accepts that the Council was entitled to apply regulation 6(1)(b) to the information. The covering email accompanying the information was not (and could not be) made the subject of regulation 6(1)(b) and the Commissioner must require its disclosure.
25. The Commissioner cannot accept that the Council was entitled to apply regulation 6(1)(b) to the remaining information. This was information created and supplied to the Council by ABW Consultants. Having considered the Council's submissions, the Commissioner can identify no basis on which this information could be considered publicly available. Therefore, regulation 6(1)(b) cannot apply. However, this is information ABW Consultants have stated they do not require (see paragraph 13 above), so the Commissioner will not require its disclosure.

² http://www.unece.org/fileadmin/DAM/env/pp/ppdm/Aarhus_Implementation_Guide_second_edition_text_only.pdf



Regulation 10 – exceptions under the EIRs

26. The Commissioner will now consider the exceptions applied by the Council to withhold information in this case. All of these are subject to the public interest test in regulation 10(1)(b). This means that excepted information must be disclosed unless the public interest in making it available is outweighed by that in maintaining the relevant exception. In addition, under regulation 10(2), authorities must interpret the exceptions in a restrictive way and apply a presumption in favour of disclosure.

Regulation 10(4)(a) – information not held

27. Regulation 10(4)(a) of the EIRs states that a Scottish public authority may refuse to make environmental information available to the extent that it does not hold the information when an applicant's request is received.
28. The Council responded to the last part of request b), which concerned “a breakdown of the costs by year and company, where applicable”, and that part of request c) concerning correspondence between MPs, MSPs and council officers, by stating that it did not hold any information.
29. In its submissions to the Commissioner, the Council described the steps it took to identify and locate any relevant information, both in responding to ABW Consultants and during the investigation. It also responded to comments made by ABW Consultants with regard to particular information they expected to be held.
30. Having considered all relevant submissions, the Commissioner is satisfied that the Council had carried out adequate, proportionate searches for the requested information by the conclusion of the investigation. On balance, she is satisfied that all relevant information had been identified and located at that point.
31. Given the location of further information during the investigation, the Commissioner cannot accept that the Council was entitled to respond to elements of ABW Consultants' requests on the basis that it held no information. This means it was not entitled to apply the exception in regulation 10(4)(a) of the EIRs (as such, the Commissioner is not required to consider the public interest).
32. To the extent that it has not disclosed it already, and has not sought to withhold it under any other exception, the Commissioner requires the Council to disclose to ABW Consultants all relevant information identified and located during the investigation. This is detailed in the letter to the Council accompanying this decision.



33. During the investigation, ABW Consultants brought information to the Commissioner's attention which suggested that the Council should hold other information which would fulfil the last part of request b), in relation to fees paid to legal counsel in or around 2009. The information brought to the attention of the Commissioner is sufficient to suggest that relevant information may be held by the Council. The Commissioner therefore considers it reasonable to require the Council to undertake further searches to determine if such information is held, and to provide a response to ABW Consultants following these searches.

Regulation 10(5)(d) – confidentiality of proceedings

34. Regulation 10(5)(d) of the EIRs states that a Scottish public authority may refuse to make environmental information available to the extent that its disclosure would, or would be likely to, prejudice substantially the confidentiality of the proceedings of any public authority where such confidentiality is provided for by law.
35. *The Aarhus Convention: An Implementation Guide* (see above) states, at page 81:
“the Convention does not define ‘proceedings of public authorities’ but one interpretation is that these may be proceedings concerning the internal operations of a public authority and not substantive proceedings conducted by the public authority in its area of competence. The confidentiality must be provided for under national law.”
36. The first matter to consider is whether the information relates to proceedings of the Council, the confidentiality of which is protected by law. The Commissioner must then consider whether disclosure of the information would, or would be likely to, prejudice substantially the confidentiality of those proceedings.
37. In many cases where this exception applies, there is a specific statutory provision prohibiting the release of the information. However, there will also be cases where the common law of confidence will protect the confidentiality of the proceedings. One aspect of this is the law relating to confidentiality of communications, which embraces the rules and principles applying to legal professional privilege. This includes legal advice privilege, which applies to communications in which legal advice is sought or provided.
38. The Council submitted that the information withheld under this exception was covered by legal advice privilege, as all the relevant communications either sought or provided legal advice, from its own solicitors or from Counsel. The Council explained that this advice was sought from or provided by the legal advisers concerned in their professional capacity, in the context of a professional relationship with clients. It identified the legal advisers, allowing the Commissioner to confirm that they were appropriately qualified.
39. Having considered the Council's submissions, the Commissioner accepts that elements of this information met all the requirements for legal advice privilege. She is satisfied that it remained confidential at the time the Council carried out its review.



40. The Commissioner does not, however, accept that other information to which the Council has applied regulation 10(5)(d) can be considered privileged. This is advice, or requests for advice, on the application of the Council's Standing Orders and related administrative matters, rather than the interpretation of the law. The communications involve a solicitor who is also the Council's Committee Services Manager. Having considered their content, the Commissioner has concluded that the officer is providing advice in the latter capacity, not applying his professional skills as a solicitor, and therefore legal advice privilege cannot apply.
41. The Commissioner considers her findings in paragraph 40 to apply to the information in documents 1, 2, 3, 4 and 14 (Index 5). Therefore, the Commissioner does not agree that the Council was entitled to withhold this information under regulation 10(5)(d) of the EIRs. The Council has also applied regulation 10(4)(e) to the information, and the Commissioner will consider the application of that exception below.
42. On the question of substantial prejudice, the Council submitted that if legal advisers were unable to be free and frank in the information and guidance they provided to (in particular) elected members, then the ability of those elected members to give full and thorough consideration to Council business would be substantially prejudiced. If it was thought that such guidance was to be released, the Council argued, then the legal advisers would be inhibited in the manner in which they presented or reviewed risk issues for Councillors. It went on to submit that disclosure might result in the Council effectively "showing its hand" and fettering its ability to present or develop robust agreements or policies to enable the delivery of priorities.
43. The question for the Commissioner is whether disclosure of the privileged information would have prejudiced substantially, or would have been likely to prejudice substantially, the confidentiality of the Council's proceedings. The Commissioner accepts, as she has in previous cases, that the process of obtaining legal advice can be accepted as relevant proceedings for the purposes of regulation 10(5)(d).
44. The Commissioner has made clear in previous decisions that the test of substantial prejudice is a high one, requiring a real risk of actual, significant harm. In this case, having considered the content of the information and its privileged status, the Commissioner accepts that its disclosure would, or would be likely to, prejudice the confidentiality of the Council's proceedings substantially, as the Council has argued. Consequently, the Commissioner accepts that the exception in regulation 10(5)(d) applies to that information.

Public interest test

45. The Council acknowledged that there was a public interest in understanding the processing of this planning application. Nonetheless, it considered this to be outweighed by the public interest in maintaining confidentiality of communications between legal adviser and client.
46. The Council argued that a client seeking legal advice would have an expectation that the contents of the resulting communications would be confidential. It continued that the courts recognise a strong public interest in maintaining confidentiality of communications between solicitor and client.



47. ABW Consultants argued that the Council had not been consistent in its application of this exception, contrary to the public interest.
48. As the Commissioner has noted in a number of previous decisions, the courts have long recognised the strong public interest in maintaining the right to confidentiality of communications between legal adviser and client on administration of justice grounds. Many of the arguments in favour of maintaining confidentiality of communications were discussed in a House of Lords case, *Three Rivers District Council and others v Governor and Company of the Bank of England (2004) UKHL 48*, and the Commissioner will apply the same reasoning to communications attracting legal professional privilege generally.
49. The Commissioner notes ABW Consultants' argument that the Council has not applied the exception in regulation 10(5)(d) consistently. It does not follow that there is not a strong public interest in withholding the particular privileged material under consideration here (which she is satisfied has not been made public in any form).
50. The Commissioner recognises that disclosure of the withheld information would assist the public interest in understanding how this particular planning application was processed, and how the Council discharged its regulatory functions in relation to this matter. She does not, however, find these general arguments to be sufficiently strong to outweigh the inherent public interest in maintaining confidentiality of communications.
51. On balance, the Commissioner is not satisfied that the public interest in maintaining this exception is outweighed by that in making the information available. Consequently, she accepts that the Council was entitled to withhold the remaining information to which it applied regulation 10(5)(d) of the EIRs.

Regulation 10(4)(e) – internal communications

52. Under regulation 10(4)(e), a Scottish public authority may refuse to make environmental information available to the extent that the request involves making available internal communications. For information to fall within the scope of the exception, it need only be established that the information is an internal communication.
53. The Commissioner is satisfied that the majority of the information to which the Council has applied this exception can be described as internal communications – the documents either originated from or were received by someone outwith the Council. She does not accept this for the information in the following documents, which (as no other exception has been applied) she must require the Council to disclose:
59, 115, 116 (other than some sensitive personal data considered under regulation 11(2)), 117, 118, 119 (other than some sensitive personal data considered under regulation 11(2)) and 121 (Index 1), and document 17 (Index 3).
54. Similarly, the information in documents 2, 3, 4 and 14 from Index 4 cannot be described as internal communications. Since the Council is also seeking to rely on the exception in regulation 10(5)(b) for this information, the Commissioner will go on to consider whether that exception applies.



55. The Commissioner has also identified information which has been provided to ABW Consultants already. Although the Commissioner does not require the Council to disclose this information again, she cannot accept that it can be withheld under this exception: authorities should check what they have disclosed before seeking to apply exceptions.

Public interest test

56. The Council considered that the public interest in maintaining effective internal consideration and deliberation on operational issues outweighed the public interest in disclosing these internal communications. It argued that members of the public would expect Council officers to deliberate on and review all issues, risks and options, to enable recommendations to be made which supported the Council's priorities and aimed to deliver these in the most cost-effective manner.
57. If these deliberations were to be disclosed, the Council submitted, it was likely that its officers would be inhibited from sharing their views on issues which might benefit the Council and residents of West Lothian.
58. The Council also submitted that officers were likely to be substantially inhibited from discussing all available options in planning enforcement matters, due to concerns that the discussions would be disclosed. As a planning authority, the Council considers the interests of the public to lie in ensuring planning regulation is conducted efficiently, effectively and within the terms of the appropriate legislation, and that this outweighs any interest in the disclosure of internal communications which may have been provided in the course of these proceedings.
59. ABW Consultants argued that the Council had withheld information selectively and had not adequately justified its decision to do so.
60. Having carefully considered the submissions from the Council and ABW Consultants, the Commissioner recognises that there is a public interest in ensuring that the Council is accountable and transparent in the actions taken and decisions it makes, particularly in dealing with a planning application for a major development.
61. On the other hand, the Commissioner can accept that there is strong public interest in the Council making the best possible decision for the residents of West Lothian. She accepts that this should be a fully informed decision, and one which may require free and frank deliberation on all its essential aspects.
62. In this case, Commissioner notes that the planning application had not been determined by the time the Council dealt with ABW Consultants' requirement for review. Although the Commissioner recognises that the issue of planning permission and associated matters in relation to this development had been ongoing for a number of years, she does not accept that the public interest in allowing full deliberation had diminished significantly at the time the Council dealt with ABW Consultants' requirement for review (which is the time at which the Commissioner must consider the public interest).



63. In all the circumstances, therefore, the Commissioner finds that (for the majority of the withheld information) the public interest in making the information available is outweighed by that in maintaining the exception in regulation 10(4)(e). The Council was therefore entitled to withhold the information under this exception.
64. However, having considered the information in document 39 attached to the unclassified document in Index 5, the Commissioner finds that this is factual in nature and not specific to the particular circumstances of the planning application for the development at Whitrigg. The Commissioner considers that disclosure of this information would assist the public's understanding of the options available to the Council when considering, and deciding upon, an application for planning permission. In the case of this document, she finds that the public interest in making the information available is not outweighed by that in maintaining the exception. She therefore requires the Council to make this information available to ABW Consultants.

Regulation 10(5)(b) – criminal inquiries etc.

65. Regulation 10(5)(b) of the EIRs provides that a Scottish public authority may refuse to make environmental information available to the extent that its disclosure would, or would be likely to, prejudice substantially the course of justice, the ability of an individual to receive a fair trial or the ability of any public authority to conduct an inquiry of a criminal or disciplinary nature.
66. The Council explained that information in documents 2, 3, 4 and 14 in Index 4 related to, or made reference to, the Police investigation in relation to the planning application at Whitrigg, which was ongoing at the time it responded to ABW Consultants request.
67. The Council submitted that its officers exchanged views or provided advice in relation to this matter on the understanding that their views and advice would be treated as confidential. The Council considered it essential that they could share views in relation to alleged criminal activity in a free and frank manner, to assist the process of the criminal investigation. It believed that, if officers were aware that their information could be shared, they might be fearful of reprisal or other negative reaction, and would be likely to be inhibited from sharing views or opinions openly. On this basis, the Council considered disclosure would have been likely to prejudice substantially the ability of the Police to conduct a full and thorough investigation.
68. Within the EIRs, there is no definition of what constitutes substantial prejudice. In the Commissioner's view, the word "substantial" is important here: the harm caused, or likely to be caused, by making the information available must be of real and demonstrable significance. The risk of harm must be real or very likely, not simply a remote or hypothetical possibility.



69. The Commissioner has considered the content of the withheld information. It involves communication between Council officers and the Police in relation to planning matters at Whittrigg. She also recognises that this information was provided to the Police as part of their investigation, which was ongoing at the time the Council carried out its review. Even so, the Commissioner does not accept that all of the withheld information is of such sensitivity that it would (or would be likely to), if made available, inhibit Council officers from assisting the Police with investigations in future. She does not agree that any of the information is of the nature that, if it were disclosed, Council officers would be fearful of reprisals or other negative reactions.
70. In relation to documents 3 and 4, therefore, the Commissioner is not satisfied that disclosure of the withheld information would prejudice substantially the course of justice or the ability of the Police to carry out criminal investigations, or that it would be likely to do so. Consequently, she finds that the information in documents 3 and 4 is not excepted under regulation 10(5)(b) of the EIRs.
71. The Commissioner does accept, however, that disclosure of the withheld information from documents 2 and 14 would be likely to prejudice substantially the course of justice and the ability of the Police to carry out criminal investigations, given the likely inhibiting effect of disclosure on the willingness of Council officers to share such information with the Police in future. She will therefore go on to consider the public interest test in relation to this information.
72. The Council has not relied on any other exception for withholding the information in documents 3 and 4 from ABW Consultants, so the Commissioner requires its disclosure.

Public interest test

73. The Council submitted that it considered the public interest in ensuring that criminal investigations were conducted thoroughly outweighed the public interest in the disclosure of the information.
74. ABW Consultants argued that the Council had withheld information selectively and had not adequately justified its decision to do so.
75. Having considered the arguments advanced by both the Council and ABW Consultants, the Commissioner recognises that there is a public interest in ensuring that the Council is accountable and transparent in the actions it takes and the decisions it makes.
76. That said, the Commissioner also accepts that there is a significant public interest in ensuring that the Police are fully informed when undertaking an investigation, to ensure that a thorough and comprehensive investigation is carried out in the interests of justice. For that reason, the Commissioner finds that the public interest in making the information available in this case is outweighed by that in maintaining the exception.



Regulation 11(2) – personal data

77. Regulation 10(3) of the EIRs provides that any personal data included in environmental information shall not be made available except in accordance with regulation 11. Regulation 11(2) prohibits the 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.
78. The Council redacted information under regulation 11(2), arguing that the first condition applied by virtue of regulation 11(3)(a)(i). This applies where making the information available (other than under the EIRs) would contravene any of the data protection principles. Here, the Council argued that the first data protection principle would be breached.

Is the information under consideration personal data?

79. “Personal data” are 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 full definition is set out in the Appendix).
80. The Commissioner is satisfied that the withheld information in this case is personal data, in line with the definition in part (a) of section 1(1) of the DPA. In other words, a living individual (the data subject) can be identified from the information. The Commissioner is also satisfied that the information relates to the data subject, given the context in which it is held.

Would disclosure of the personal data contravene the first data protection principle?

81. The first data protection principle states that personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless at least one of the conditions in Schedule 2 to the DPA is met. The processing in this case would be making the personal data available (to the public) in response to ABW Consultants’ request.
82. For sensitive personal data, the first principle also requires that at least one of the conditions in Schedule 3 to the DPA must be met. The Commissioner has considered the definition of sensitive personal data in section 2 of the DPA. She finds that certain limited information contained in documents 116 and 119 in Index 1 is sensitive personal data for the purpose of section 2(h) of the DPA (the definition is in the Schedule). As the Commissioner is satisfied that no condition in Schedule 3 would be fulfilled by disclosure of this information she will not consider it any further.
83. 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 disclosure would also be fair and lawful.



84. The Commissioner must now go on to consider whether there are any conditions in Schedule 2 to the DPA which would permit the personal data to be made available. Where a Schedule 2 condition can be met, she will then go on to consider whether disclosure of the personal data would be otherwise fair and lawful.
85. When considering the conditions in Schedule 2, the Commissioner has noted Lord Hope's comment in the case of *Common Services Agency v Scottish Information Commissioner* [2008] UKHL 47³ that these conditions require careful treatment in the context if a request for information under FOISA (and, by extension, the EIRs), given that they were not designed to facilitate the release of information, but rather to protect personal data from being processed in a way that might prejudice the rights, freedoms or legitimate interests of the data subject.

Can any schedule 2 conditions be met?

86. The Commissioner considers that the only condition in Schedule 2 to the DPA which might apply in this case is condition 6 (and neither party has suggested that any other condition might be relevant). Condition 6 allows personal data to be processed if that 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.
87. There are, therefore, a number of tests which must be met before condition 6(1) can apply. These are:
- i. Are ABW Consultants pursuing a legitimate interest?
 - ii. If yes, is the processing (i.e. making the personal data available to the public) necessary for the purposes of those interests? In other words, is the processing 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 data subject?
 - iii. Even if the processing is necessary for ABW Consultants' legitimate interests, is the processing unwarranted in this case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject? There is no presumption in favour of the disclosure of personal data under the EIRs: the presumption in favour of disclosure in regulation 10(2)(b) does not apply to personal data. Therefore, the legitimate interests of ABW Consultants must outweigh the rights, freedoms or legitimate interests of the data subject before condition 6 will permit making the information available. If the two are evenly balanced, the Commissioner must find that the Council was correct in refusing to make the information available.

³ <http://www.publications.parliament.uk/pa/ld200708/ldjudgmt/jd080709/comm-1.htm>



Are ABW Consultants pursuing a legitimate interest?

88. There is no definition within the DPA of what constitutes a “legitimate interest”. The Commissioner takes the view that the term indicates that matters in which an individual properly has an interest should be distinguished from matters about which he or she is simply inquisitive. The Commissioner’s published guidance on section 38 of FOISA⁴ states:
- In some cases, the legitimate interest might be personal to the applicant - e.g. he or she might want the information in order to bring legal proceedings. With most requests, however, there are likely to be wider legitimate interests, such as the scrutiny of the actions of public bodies or public safety.*
89. ABW Consultants explained that their only interest in personal data was to establish the truthfulness and legality of the Council’s behaviour towards them and their clients. They referred to alleged inappropriate conduct by Council officers, submitting that information on disciplinary matters (for example) should be made available. They believed it important that they should be aware of whether they had been prejudiced in anyway by the conduct of Council officers.
90. The Council submitted that it was unable to identify any legitimate interest which could be met by making these personal data available.
91. However, the Commissioner accepts that ABW Consultants have a legitimate interest in understanding the actions taken by the Council in dealing with the planning application which forms the subject matter of this case. More directly, they have a legitimate interest in understanding the actions of the Council affecting them.

Is the processing necessary for the purposes of those interests?

92. In addressing this question, the Commissioner must consider whether these interests might reasonably be met by any alternative means.
93. The Council submitted that ABW Consultants could assess the issues taken into account by the Council when determining the planning application, without the withheld personal data. Therefore, it did not consider it necessary for the personal data to be made available.
94. Having read the information that has been disclosed to ABW Consultants, the Commissioner agrees with the Council that it is possible for ABW Consultants to understand the matters considered by the Council without the need for the personal data to be disclosed. In all the circumstances of this case, therefore, the Commissioner has concluded that it is not necessary for the personal data to be made available to ABW Consultants.

⁴ <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section38/Section38.aspx>



95. As the Commissioner has concluded that it is not necessary for the personal data to be made available, she finds that condition 6 of Schedule 2 could not be met to allow those personal data to be made available. In the absence of a condition permitting processing, it would not be either fair or lawful to make the information available, with the result that doing so would breach the first data protection principle.
96. As the Commissioner has found that the first data protection principle would be breached by making the withheld personal data available, she accepts that the Council was entitled to withhold this information under regulation 11(2) of the EIRs.

Technical matters

97. In their application to the Commissioner, ABW Consultants expressed dissatisfaction with Council's failure to respond to their information requests, and their requirement for review, within the requisite statutory timescales.
98. Regulation 5(2)(a) of the EIRs gives Scottish public authorities a maximum of 20 working days following the date of receipt of the request to comply with a request for information, subject to exceptions which are not relevant in this case. The Council acknowledged that it did not respond to the request within this period.
99. Since the Council did not respond to ABW Consultants' request for information within 20 working days, the Commissioner finds that it failed to comply with regulation 5(2)(a) of the EIRs.
100. Regulation 16(4) of the EIRs gives Scottish public authorities a maximum of 20 working days following the receipt of the requirement to comply with a requirement for review, subject to exceptions which are not relevant in this case.
101. The Council initially argued that ABW Consultants had not made a requirement for review, although it later responded on the basis that a review had been requested. The Commissioner is satisfied that the email sent to the Council by ABW Consultants on 8 January 2013 (12:36) was a valid requirement for review.
102. Since the Council did not provide a response to ABW Consultants' requirement for review within 20 working days, the Commissioner finds that it failed to comply with regulation 16(4) of the EIRs.
103. Given that the Council has since responded to ABW Consultants' requirement for review, the Commissioner does not require it to take any further action in this case, in response to ABW Consultants' application.



DECISION

The Commissioner finds that West Lothian Council (the Council) partially complied with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information requests made by ABW Consultants.

The Commissioner finds that the Council was entitled to withhold information under regulations 6(1)(b), 10(4)(e), 10(5)(b), 10(5)(d) and 11(2) of the EIRs.

However, the Commissioner finds that the Council failed to comply with the EIRs in the following respects:

- a) in failing to identify the information requested as environmental information and deal with the requests accordingly under the EIRs (breaching regulation 5(1));
- b) in withholding all of the information to which it applied regulations 6(1)(b), 10(4)(a), 10(4)(e) and 10(5)(d) (breaching regulation 5(1));
- c) in failing to respond to ABW Consultants' requests for information and requirement for review within the required timescales (breaching regulations 5(2)(a) and 16(4)).

The Commissioner therefore requires the Council to;

- i) disclose information to ABW Consultants, as detailed in the letter accompanying this decision, and
- ii) carry out further searches for information falling within the scope of the last part of request b), and respond to ABW Consultants in relation to the outcome (in line with section 16(3) of the EIRs), by 5 May 2014.

Appeal

Should either ABW Consultants or West Lothian 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
21 March 2014



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;

...

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)-

- (a) shall be complied with as soon as possible and in any event no later than 20 working days after the date of receipt of the request; and
- (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-

...
 - (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

- (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
 - (a) it does not hold that information when an applicant's request is received;
 - ...
 - (e) the request involves making available internal communications.



- (5) A Scottish public authority may refuse to make environmental information available to the extent that its disclosure would, or would be likely to, prejudice substantially-
- (b) the course of justice, the ability of a person to receive a fair trial or the ability of any public authority to conduct an inquiry of a criminal or disciplinary nature;
 - ...
 - (d) the confidentiality of the proceedings of any public authority where such confidentiality is provided for by law;
 - ...

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.

...

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;

...

2 Sensitive personal data

In this Act “sensitive personal data” means personal data consisting of information as to –

...

(h) any proceedings for any offence committed or alleged to have been committed by [the data subject], the disposal of such proceedings or the sentence of any court in such proceedings.

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.

...