

Decision Notice

Decision 029/2016: Mrs X and Glasgow City Council

Complaint regarding removal of a tree

Reference No: 201501659

Decision Date: 8 February 2016



Scottish Information
Commissioner

Summary

On 13 September 2015, Mrs X asked the City of Glasgow Council (the Council) for information in a complaint about the removal of a tree.

The Council initially withheld the information, but disclosed most of it after a review. It continued to withhold some third party personal data under regulation 11(2) of the EIRs. Mrs X remained dissatisfied and applied to the Commissioner for a decision.

During the Commissioner's investigation, the Council disclosed more information to Mrs X. The Commissioner decided that this information should have been disclosed in response to Mrs X's request, but also found that the Council was entitled to withhold the remaining information under regulation 11(2).

Relevant statutory provisions

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (Interpretation) (paragraphs (a) and (c) of 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(2), (3)(a)(i) and (b) (Personal data)

Data Protection Act 1998 (the DPA) sections 1(1) (Basic interpretative provisions) (definition of "personal data"); Schedules 1 (The data protection principles, Part I - 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 Appendix 1 to this decision. The Appendix forms part of this decision.

Background

1. On 13 July 2015, Mrs X made a request for information to the Council. She asked for copies of all complaints made against her in relation to the removal of a tree in her garden.
2. The Council responded on 28 July 2015, citing section 39(2) of the Freedom of Information (Scotland) Act 2002 (FOISA), on the basis that it considered the request to be for environmental information and therefore any response should be under the EIRs. It confirmed it held information, which it was withholding under regulations 11 of the EIRs, on the grounds that the information comprised personal data relating to others and disclosure would breach the data protection principles.
3. On 31 July 2015, Mrs X wrote to the Council requesting a review of its decision. She submitted that the complainer had identified themselves publicly and therefore the provisions cited did not apply. She wanted the complaint in its entirety.
4. The Council notified Mrs X of the outcome of its review on 27 August 2015. It disclosed a redacted version of the complaint, adhering to its original reasons for continuing to withhold the redacted information.
5. On 9 September 2015, Mrs X wrote to the Commissioner. She applied 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 specified modifications. Mrs X stated she was dissatisfied with the outcome of the Council's review. She did not believe the Council was entitled to withhold any of the complaint from her, explaining that the personal data in question was already in the public domain in the context of a related planning enforcement appeal.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that Mrs X made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to her for a decision.
7. On 7 October 2015, the Council was notified in writing that Mrs X had made a valid application. The Council was asked to send the Commissioner the information withheld from her. The Council provided the information and the case was allocated to an investigating officer.
8. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Council was invited to comment on this application and answer specific questions, relating in particular its application of regulation 11 of the EIRs.
9. During the investigation, submissions were received from the Council and from Mrs X.

Commissioner's analysis and findings

10. 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 Mrs X and the Council. She is satisfied that no matter of relevance has been overlooked.

Application of the EIRs

11. It is apparent from the circumstances of Mrs X's request that any information falling within its scope would be environmental information, as defined in regulation 2(1) of the EIRs. This is borne out by the information withheld by the Council in this case. The relevant paragraphs of the definition are set out in Appendix 1.
12. The Council responded on the basis that the information was environmental information, applying section 39(2) of FOISA in conjunction with provisions of the EIRs. Mrs X has not disputed this and the Commissioner will consider the withheld information in what follows solely in terms of the EIRs.

Withheld information

13. Mrs X requested the complaint in its entirety. The Council released a redacted version following a review. The redacted information was withheld under regulation 11(2) of the EIRs.
14. During this investigation, the Council released further information, namely business details of a tree surgeon. It acknowledged that this information was not exempt under regulation 11(2). In the circumstances, the Commissioner finds that this information should have been disclosed in response to Mrs X's request and that, in failing to do this, the Council failed to

comply with regulation 5(1) of the EIRs. She need not consider this information further in this decision.

15. The Commissioner will now consider the remaining redacted information, still withheld by the Council under regulation 11(2).

Regulation 11(2) of the EIRs

16. Regulation 11(2) excepts 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.
17. The Council's arguments relate to those parts of the first condition which apply where making the information available would contravene any of the data protection principles. In order for a Scottish public authority to rely on this exception, it must show that:
 - (i) the information is personal data for the purposes of the DPA and
 - (ii) making it available would contravene at least one of the data protection principles laid down in the DPA. In this case, the Council argued that the first data protection principle would be contravened.

Is the withheld information personal data?

18. Personal data" are defined in section 1(1) of the DPA as:

"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 possessions 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."

19. The withheld information identifies the complainer and describes their actions and opinions. In the circumstances, the Commissioner is satisfied that the information relates to the complainer. It is their personal data, as defined in section 1(1) of the DPA.

The first data protection principle

20. The first data protection principle states that the processing of personal data (in this case, making those data publicly available 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. In the case of sensitive personal data, at least one of the conditions in Schedule 3 to the DPA must also be met.
21. The Commissioner has considered the definition of sensitive personal data set out in section 2 of the DPA. She does not consider any of the withheld information to be sensitive personal data.
22. There are three separate aspects to the first data protection principle:
 - (i) fairness
 - (ii) lawfulness and
 - (iii) the conditions in the schedules.

These three aspects are interlinked. For example, if there is a specific condition which permits the personal data to be made available, it is likely that disclosure will also be fair and lawful.

23. 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 made available. If any of these conditions can be met, she must then consider whether the disclosure of these personal data would also be fair and lawful.

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

24. The Council considered that only condition 6 in Schedule 2 could potentially apply in this instance. The Commissioner has considered all of the conditions in Schedule 2 and agrees that condition 6 is the only one which might be considered relevant in this case.

25. Condition 6 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 (i.e. the individuals to whom the data relate).

26. There are, therefore, a number of different tests which must be satisfied before condition 6 can be met. These are:

- (i) Is Mrs X pursuing a legitimate interest or interests?
- (ii) If yes, is the processing involved 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 interests be achieved by means which interfere less with the privacy of the data subjects?
- (iii) Even if the processing is necessary for Mrs X's legitimate interests, is that processing nevertheless unwarranted in this case by reason of prejudice to the rights and freedoms or legitimate interests of the data subjects?

Is Mrs X pursuing a legitimate interest or interests?

27. There is no definition within the DPA of what constitutes a "legitimate interest", but 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. In the Commissioner's published guidance on regulation 11(2)¹ of FOISA, it 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.

28. Mrs X contended that all complaints of this kind are made public and believed the public had a right to see all complaints. As this complaint was made against her, she believed she had a right to view its full contents. She submitted that the complainer's personal details had been made public, by being posted online in the context of the related planning enforcement appeal.

¹ <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section38/Section38.aspx>

29. Mrs X considered herself to have been disadvantaged in the pursuit of her planning enforcement appeal by not having the complaint. To present her case to the Scottish Ministers appropriately, she believed she should have had the opportunity to see the complaint, review it and respond to its contents.
30. The Commissioner is satisfied that Mrs X, as a party interested in the enforcement action and subsequent appeal in relation to the tree, was pursuing a legitimate interest in seeking the withheld information. She will now go on to consider whether access to the withheld information was necessary for the purposes of that interest.

Is the processing involved necessary for the purposes of those legitimate interests?

31. In reaching a decision on this, the Commissioner must consider whether these interests might reasonably be met by any alternative means.
32. As indicated above, Mrs X considers the withheld information to be significant in the context of her planning enforcement appeal, considered and determined by a reporter appointed by the Scottish Ministers.
33. The appeal relates to the enforcement action taken by the Council in relation to Mrs X's tree. That enforcement action may have been prompted by the complaint, but was a direct consequence of decisions of the Council. The reporter was asked to consider the Council's actions, not those of the complainer. As would be expected, the reporter's decision (which can be searched for under the planning reference [anonymised²]) focuses on the Council's actions by way of enforcement.
34. In challenging enforcement action of this kind, it might reasonably be considered useful to understand the enforcing authority's reasons for taking that action. This will not necessarily require access to any external communications, such as a complaint, which prompted the action. In this particular case, having considered the withheld information, the Commissioner can identify nothing in it which would cast particular light on the Council's reasons for taking enforcement action. It might have alerted the Council to the removal of the tree, but that is all.
35. In all the circumstances, therefore, the Commissioner is not satisfied that disclosure of the withheld information was necessary for the purposes of Mrs X's legitimate interests. These legitimate interests were capable of being met without the information being made available to her.
36. Having found that disclosure was not necessary, the Commissioner must conclude that condition 6 in Schedule 2 (to the DPA) could not be met in this case in relation to the withheld personal data. In the absence of a condition permitting disclosure, she must also conclude that disclosure would be unlawful.
37. The Commissioner therefore concludes that disclosure of the complainant's data would breach the first data protection principle, and so this information was properly withheld under the exception contained in regulation 11(2) of the EIRs.

Decision

² <https://www.dpea.scotland.gov.uk/>

The Commissioner finds that Glasgow City Council (the Council) partially complied with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by Mrs X.

The Commissioner finds that the Council was entitled to withhold the complainer's personal data under regulation 11(2) of the EIRs.

However, the Commissioner also finds that the Council was not entitled to withhold the information disclosed during the investigation under regulation 11(2). In doing so, it failed to comply with regulation 5(1) of the EIRs. Given that this information was disclosed during the investigation, the Commissioner does not require the Council to take any action in respect of this failure in response to Mrs X's application.

Appeal

Should either Mrs X or Glasgow City 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.

Enforcement

If the Council fails to comply with this decision, the Commissioner has the right to certify to the Court of Session that The Council has failed to comply. The Court has the right to inquire into the matter and may deal with The Council as if it had committed a contempt of court.

Margaret Keyse
Head of Enforcement

8 February 2016

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;

...

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

...

(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

...

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.

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