



Decision Notice 013/2024

Planning information

Applicant: The Applicant
Authority: Angus Council
Case Ref: 202100231

Summary

The Applicant asked the Authority for consultation responses, reports and advice about a specific planning application. The Authority provided some information but withheld the remaining information on the basis that it comprised internal communications which, in this case, were excepted from disclosure, and stated that it held no further information. The Commissioner investigated and found that Authority had complied with the EIRs in responding to the request.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 39(2) (Health, safety and the environment); 47(1) and (2) (Application for decision by Commissioner)

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (definition of "the Act", "the applicant" and "the Commissioner", (paragraphs (a), (b) and (c) of definition of "environmental information") (Interpretation); 5(1) (Duty to make environmental information available on request); 10(1), (2), and (4)(e) (Exceptions from duty to make environmental information available)

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 2 December 2020, the Applicant made a request for information to the Authority. The Applicant requested copies of all consultation responses, reports and advice given to the Authority's planning service or provided to another party in order to assist the planning

service in their decision-making, and any other relevant information produced by or sent from the Education and Learning Service (at the time of the application known as the Education Service), in relation to [Planning Application 13/01001/PPPM](https://planning.angus.gov.uk/online-applications/applicationDetails.do?activeTab=documents&keyVal=MVDQJTJCF6N000)¹ or any other planning application relevant to this site.

2. The Authority responded on 8 January 2021, in terms of the EIRs: it believed the information requested was environmental information, as it impacted on “the status, type or extent of use of land” in terms of regulation 2(1)(a) or (c) of the EIRs. The Authority explained that it had searched the files of its relevant services and had reviewed the application file for 13/01001/PPPM. The Authority supplied some information to the Applicant, but withheld the personal data of its officers below Chief Officer level, as disclosure of these would contravene the data protection principles.
3. The Authority also withheld two documents in terms of regulation 10(4)(e) of the EIRs, as they comprised internal communications. One document was an email between managers of the Authority’s Schools and Learning Service, dated 15 January 2015. The other document involved managers of the Schools and Learning Service and the Authority’s Chief Executive, dated 16 August 2015. The Authority concluded that there was a public interest in ensuring “that key professional advice in a planning context could be provided freely and frankly” and to release this kind of information would militate against the Authority being able to “think in private”, which would not serve the public interest.
4. On 19 January 2021, the Applicant wrote to the Authority requesting a review of its decision for the following reasons:
 - it believed that the withheld information should be provided with the names redacted, as had been done previously for other information disclosed
 - it believed that the Authority had not provided all of the information it held that fell within the scope of the request. (The Applicant gave examples of information that it believed must be held by the Authority, given the references in the supplied information.)
5. The Authority notified the Applicant of the outcome of its review on 16 February 2021. The Authority upheld its decision to withhold the requested information, for the same reasons as given in its initial refusal. The Authority also stated that it had obtained the results of a further search in its Planning and Schools & Learning services and its Project Team in relation to the specified Planning Application, but no additional information had been located.
6. The Authority further explained that committee reports had been published under its Publication Scheme or previously released to the Applicant (such as report 353/15, which had been made available to the Applicant when the planning application was determined), and would therefore be information already publicly available and easily accessible to the Applicant in terms of regulation 6(1)(b) of the EIRs.
7. The Authority also referred to the Applicant’s email, dated 26 November 2020, to the Authority’s Planning and Schools and Learning services, which expressly referred to report 353/15. The Authority commented that the EIRs do not apply where people are seeking a view from the Authority or an explanation of certain matters.
8. On 23 February 2021, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. By virtue of regulation 17 of the EIRs, Part 4 of FOISA

¹ <https://planning.angus.gov.uk/online-applications/applicationDetails.do?activeTab=documents&keyVal=MVDQJTJCF6N000>

applies to the enforcement of the EIRs as it applies to the enforcement of FOISA, subject to specified modifications. The Applicant was dissatisfied with the outcome of the Authority's review for the same reasons as in its request for review (for which it provided detailed arguments).

9. The Applicant did not express dissatisfaction at the information redacted in the Authority's initial response of 8 January 2021. Consequently, the Commissioner has not considered this matter further.

Investigation

10. The application was accepted as valid. The Commissioner confirmed that the Applicant made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to him for a decision.
11. On 9 March 2021, the Authority was notified in writing that the Applicant had made a valid application. The Authority was asked to send the Commissioner the information withheld from the Applicant. The Authority provided the information and the case was allocated to an investigating officer.
12. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Authority was invited to comment on this application and to answer specific questions. These related to why the information had been withheld and how the Authority had identified all the information falling within the request.
13. The Authority responded with submissions and a list of its searches to the Commissioner. The Applicant also supplied information and comments to assist its application to the Commissioner.

Commissioner's analysis and findings

14. In coming to a decision on this matter, the Commissioner considered all the withheld information and the relevant submissions, or parts of submissions, made to him by both the Applicant and the Authority. He is satisfied that no matter of relevance has been overlooked.

Application of the EIRs

15. The Authority explained that it believed that the information requested by the Applicant was planning information, which therefore fell within the definition of "measures" in regulation 2(1)(c) of the EIRs.
16. Having considered the nature of the information requested and his [guidance on environmental information](#)², the Commissioner is satisfied that the information covered by this request is environmental information, as defined in regulation 2(1) of the EIRs. (The Applicant has not disputed the Authority's decision to handle its request under the EIRs.)

² <https://www.itspublicknowledge.info/sites/default/files/2022-03/EIRBriefingsDefinition.pdf>

Section 39(2) of FOISA – Environmental information

17. The exemption in section 39(2) of FOISA provides, in effect, that environmental information (as defined by regulation 2(1) of the EIRs) is exempt from disclosure under FOISA, thereby allowing any such information to be considered solely in terms of the EIRs. In this case, the Commissioner accepts that the Authority was entitled to apply the exemption to the information withheld under FOISA, given his conclusion that it is properly classified as environmental information.
18. As there is a statutory right of access to environmental information available to the Applicant in this case, the Commissioner accepts, in all the circumstances, that the public interest in maintaining this exemption (and responding to the request under the EIRs) outweighs any public interest in disclosing the information under FOISA. Both regimes are intended to promote public access to information and there would appear to be no reason why (in this particular case) disclosure of the information should be more likely under FOISA than under the EIRs.
19. The Commissioner therefore concludes that the Authority was correct to apply section 39(2) of FOISA, and consider the Applicant's information request under the EIRs.

Regulation 5(1) of the EIRs - Duty to make available environmental information on request

20. Regulation 5(1) of the EIRs (subject to the various qualifications contained in regulations 6 to 12) requires a Scottish public authority which holds environmental information to make it available when requested to do so by any applicant. This obligation relates to the information held by an authority when it receives a request. Under the EIRs, a public authority may refuse to make environmental information available if one or more of the exceptions in regulation 10 apply.

The Applicant's submissions

21. The Applicant explained its dissatisfaction in its requirement for review and then to the Commissioner in its application and related comments. For ease, this is summarised below. (The Commissioner has considered all the points raised by the Applicant, though he has not set them out in full).
22. The Applicant referred to an "Education Consultation response" and sought this information from the Authority. The Applicant believed that this information must either be held by the Authority (but had not been located) or that it had been withheld.
23. The Applicant explained that it had specifically asked the Authority for the Education Consultation response referred to in [Committee report no 353/15](#)³, dated 15 September 2015. The Applicant added that this information was referred to in various documents provided in response to another information request.
24. The Authority had said that the reference in the Committee report was to a letter from the Authority's Chief Executive to the Applicant, dated 7 September 2015. However, the Applicant did not accept that the reference to "Education Consultation response" was to this letter and stated that information it had been provided with suggested that, between 3 August

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https://www.angus.gov.uk/committees/development_standards/development_standards_15_september_2015

and 7 September 2015, some form of consultation was received from the Education Department.

25. The Applicant also referred to the Authority's use of regulation 6 of the EIRs and noted that if the information was publicly available then the Authority should be able to make clear where exactly that information was.
26. The Applicant stated that all correspondence, including redacted emails and letter from the Authority's Chief Executive and committee reports, indicated that further consultation took place prior to the letter dated 7 September 2015. The Applicant submitted that, as the Authority had produced no recorded information to show how it had decided the education contribution for the specified development, either this information – the consultation response – was within the withheld information or it was not held by the Authority.
27. The Applicant also explained that the points it made in its requirement for review – that the Authority's review outcome stated asked for an explanation or interpretation and were not therefore within the terms of the Authority's duties under the EIRs – were made only to support the legitimacy of its claim that the full information it had requested had not been provided.

The Authority's submissions

28. The Authority stated that it had not withheld any further information from the Applicant.
29. Regarding the suggestion that the information was incomplete, the Authority said it had obtained the results of a further search in the Authority's Planning and Schools and Learning services and its Project Team in relation to the specified Planning Application, but this search had not found any additional information.
30. The Authority was asked by the Commissioner to explain in detail how it had established what recorded information it held that fell within the Applicant's request.
31. The Authority explained that the request was sent to the following departments of the Authority: Planning; Education; Economic Development and Office of the Chief Executive. These departments searched for any information that fell within the request and the Authority provided the Commissioner with screenshots and written accounts of the searches carried out.
32. However, the Authority acknowledged that, due to staff leaving and the searches not being recorded, not all departments confirmed what searches were carried out and how (although some departments did provide a written account of the systems or files searched).
33. The Authority also explained that it has a one-year retention policy on its email system. If the content of an email was deemed relevant to retain, it would be saved to a structured folder. However, the content of an email may have been used to form part of a larger document (e.g. letter, policy, application response, committee report, etc.) with the email itself not saved and therefore not retained for longer than the retention policy.
34. The Authority noted that the Applicant asked for the provision of committee reports and explained this was information which had been published under the its Publication Scheme or previously released to the Applicant (such as report 353/15, which had been made available to the Applicant when the planning application was determined), and would be information already publicly available and easily accessible to the Applicant in terms of Regulation 6(1)(b) of the EIRs.

35. Regarding the three points raised by the Applicant in its requirement for review, the Authority commented that it seemed to ask for an explanation or interpretation and the EIRs only gave a right to recorded information held by public authorities.
36. In terms of the reference in report 353/15 to “further consultation” at paragraph 3.3, the Authority stated that it was the recollection of the co-author of that report that the Education service position was taken directly from the letter from the Authority’s Chief Executive dated 7 September 2015 (given to the Applicant in response to its request). The Authority added that the terms of that letter, which indicated that the application would be presented to committee on 15 September 2015, “largely support that position”.
37. The Authority further explained that, with regard to educational requirements in general, it had adopted the Policy Procedure Guidance (report 345/15) at its meeting of 10 September 2015, which modified/replaced the Building Developers Contribution to School Buildings V.6 Policy of 02 May 2013. The Authority stated that the educational requirements set out in the Policy Procedure Guidance are reflected in the section 75 agreement entered into with the developer.

The Commissioner’s view

38. The standard of proof to determine whether a Scottish public authority holds information is the civil standard of the balance of probabilities. In determining this, the Commissioner will consider the scope, quality, thoroughness and results of the searches carried out by the public authority. The Commissioner will also consider, where appropriate, any reason offered by the public authority to explain why the information is not held.
39. Similarly, the EIRs only extend to recorded information held by an authority at the time of the request, with "information" defined in section 73 of FOISA as "information recorded in any form". Given this definition, FOISA and the EIRs do not usually require a Scottish public authority to create recorded information in order to respond to a request, or to provide information which is not held in a recorded form.
40. First, the Commissioner accepts that the Authority has taken a reasonable interpretation of the Applicant’s request and that there has been no misunderstanding of the terms of the request that has resulted in relevant information not being identified.
41. Second, the Commissioner accepts that the Authority has now conducted an adequate and proportionate appraisal of whether it holds the requested information, that its searches were focused on the relevant business areas and were performed by personnel with appropriate knowledge and that they were capable of locating and retrieving information falling within the scope of the Applicant’s request. The Applicant had also made clear to the Authority what information it believed had not been located – therefore, that information would reasonably have been included in the Authority’s actions as possibly information falling within scope.
42. While the Commissioner is satisfied that the Authority’s searches were adequate, he is disappointed that it was unable to (as detailed in paragraph 32) confirm the detail of all of its searches. [The Commissioner’s guidance](#)⁴ on this matter (at paragraph 50) is clear: Scottish public authorities should keep a record of searches, in case the requester seeks a review or appeals to the Commissioner.
43. Regarding the points made by the Applicant in its requirement for review that the Authority deemed were seeking an explanation and were therefore not subject to the EIRs, the

⁴ [BriefingSection17Informationnotheld.pdf \(itspublicknowledge.info\)](#)

Commissioner agrees with the Applicant that those points were made to explain why it believed more information was held by the Authority.

44. While the Commissioner accepts that they could be read as seeking an explanation, he considers they make most sense in the context of the Applicant's dissatisfaction (expressed in its requirement for review) that information which it expected to be held was not provided or was stated not to be held by the Authority.
45. The Commissioner appreciates why the Applicant believes that more information was held by the Authority. However, his remit extends only to the consideration of whether the Authority actually held the information requested (at the time the request was received) and whether it complied with the EIRs in responding to the Applicant's request. Whether a public authority should hold information which it does not hold is not a matter for the Commissioner to decide.
46. In all the circumstances, the Commissioner is satisfied, to the standard of the balance of probabilities, that the Authority does not (and did not, at the time it received the request from the Applicant) hold any further information falling within the scope of the request.

Regulation 10(4)(e) of the EIRs (internal communications)

47. Regulation 10(4)(e) of the EIRs provides that a Scottish public authority may refuse to make environmental information available to the extent that it involves making available internal communications.
48. In order for information to fall within the scope of this exception, it need only be established that the information is an internal communication.
49. As with all the exceptions in regulation 10, a Scottish public authority applying this exception must interpret the exception in a restrictive way (regulation 10(2)(a)) and apply a presumption in favour of disclosure (regulation 10(2)(b)). Even where the exception applies, the information must be disclosed unless, in all the circumstances, the public interest in making the information available is outweighed by that in maintaining the exception (regulation 10(1)(b)).
50. The Authority withheld two emails: one between managers of the Authority's Schools and Learning Service, dated 15 January 2015; the other between managers of the Schools and Learning Service and the Authority's Chief Executive, dated 16 August 2015.
51. Having considered the information withheld under this exception, the Commissioner is satisfied that this information forms internal communications and is therefore subject to the exception in regulation 10(4)(e): it is information in the form of communications (emails) that circulated within the Authority and which, on the date of the request, had not left the Authority's internal sphere. (The Applicant has not suggested that any of the withheld information is other than an internal communication.)
52. Having accepted that the provision applies, the Commissioner must, therefore, go on to consider whether, in all of the circumstances, the public interest in making the information available is outweighed by the public interest in maintaining the exception (and withholding the information).

The Authority's submissions on the public interest

53. The Authority referred to its original response, which had explained that two documents were withheld as internal communications and explained how the Authority had balanced the public interest.
54. The Authority explained that it had balanced the public interest by considering the following factors:
 - the general public interest in accountability and transparency;
 - the inhibitive effect on the exchange of officer views when making internal consultations and views public;
 - the presumption under the EIRs to make information available;
 - the passage of time since 2015;
 - the fact that planning contributions are subject to negotiation between parties; and
 - the nature of the planning process, which in itself provides a high degree of transparency with regard to the decision-making process.
55. On balance, the Authority concluded that there was a public interest in ensuring that “key professional advice in a planning context can be provided freely and frankly” and to disclose this kind of information would militate against the Authority being able to “think in private” and would not serve the public interest.

The Applicant's submissions on the public interest

56. In its requirement for review dated 19 January 2021, the Applicant submitted that the withheld information should be provided with the names redacted, as had been done for the other information disclosed.
57. Specifically, the Applicant explained that, given the Authority’s letter dated 15 June 2015 (from the Chief Executive) that further work and information would have been transferred via internal email, it was important to see this information in order to understand how the education contribution for the specified development was initially justified (particularly since the Authority had not provided the Consultation response referred to in the September committee report).
58. The Commissioner has also given due regard to the public interest arguments the Applicant provided in related applications.

The Commissioner's view on the public interest

59. The Commissioner has considered all these submissions carefully, alongside the withheld information (which he has accepted comprises internal communications for the purposes of this exception).
60. The Commissioner is unable to explain fully all his reasoning in the following, as to do so may reveal the content of the withheld information. However, as far as he can without revealing the content of information that is withheld, the Commissioner will explain his reasons below.
61. The Commissioner recognises the public interest in accountability and transparency with regard to the decision-making processes of public authorities, and in understanding how

particular decisions are reached. As has been stated previously in other decisions by the Commissioner, there is a particular public interest in the transparency of actions and decisions involved in a public authority's planning process and related aspects of this process.

62. The Commissioner notes that the withheld information dates from 2015. In general, the "sensitivity" of information diminishes with time. When applying the public interest test, Scottish public authorities should take into account the time that has passed since the internal communications took place.
63. In other words, while an objective of this exception is the creation of a protected space for public authorities to engage in reflection and pursue internal discussions, this does not mean that information cannot become "historical" – with the public interest being better served by making the information available. Equally, however, the Commissioner acknowledges that the exception is not formally limited by time (and that the material time for the purposes of this case is when the review was carried out in early 2021 and not now).
64. The Commissioner also accepts that there is a public interest in ensuring that advice can be imparted freely and frankly and that options can be considered on a fully informed basis. As has been stated in previous decisions, disclosure of the information under the EIRs puts the information into the public domain. The Commissioner is only considering here whether the information should have been disclosed to the Applicant under the EIRs, not in any other way.
65. The Commissioner also accepts that disclosure of the withheld information could discourage staff in the Authority from seeking internal advice and that this could inhibit the frankness and openness of parties involved in seeking advice, if they had concerns that their advice would be made public.
66. The Commissioner has considered whether the withheld information could, as suggested by the Applicant, be disclosed with redaction of names and personal data. Having read the internal communications, the Commissioner considers that it would be difficult for the information to be fully anonymised (even if that were to address the other issues raised in the Authority's submissions, which the Commissioner is not satisfied would be the case).
67. The Commissioner also accepts that the information is less likely to have been expressed or recorded as it was had if it had not been for the private space in which it was communicated. If, for this reason, the Authority were unable to obtain impartial, full and objective advice in respect of its actions, that would not be in the public interest.
68. The Commissioner has considered the above factors, bearing in mind the requirement to apply a presumption in favour of disclosure (regulation 10(2)(b)).
69. On balance, having examined the withheld information and the submissions from the Authority and the Applicant, the Commissioner is not satisfied that, at the time the Application's request was made and at the time of the Authority's review outcome, the public interest arguments in favour of disclosure presented by the Applicant were so strong as to outweigh the public interest arguments in maintaining the exception.
70. Consequently, the Commissioner finds that the public interest in maintaining the exception outweighs that in making the information available, and he accepts that the information was properly withheld under regulation 10(4)(e) of the EIRs.

Decision

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

Appeal

Should either the Applicant or the Authority 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

Euan McCulloch
Head of Enforcement

29 January 2024

Appendix 1: 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.
- (2) The person who makes such a request is in this Part and in Parts 2 and 7 referred to as the “applicant.”
- ...
- (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.
- ...

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.
- (3) Subsection (2)(a) is without prejudice to the generality of section 25(1).
- ...

47 Application for decision by Commissioner

- (1) A person who is dissatisfied with -
 - (a) a notice under section 21(5) or (9); or
 - (b) the failure of a Scottish public authority to which a requirement for review was made to give such a notice.

may make application to the Commissioner for a decision whether, in any respect specified in that application, the request for information to which the requirement relates has been dealt with in accordance with Part 1 of this Act.

- (2) An application under subsection (1) must -

- (a) be in writing or in another form which, by reason of its having some permanency, is capable of being used for subsequent reference (as, for example, a recording made on audio or video tape);
- (b) state the name of the applicant and an address for correspondence; and
- (c) specify –
 - (i) the request for information to which the requirement for review relates;
 - (ii) the matter which was specified under sub-paragraph (ii) of section 20(3)(c);
and
 - (iii) the matter which gives rise to the dissatisfaction mentioned in subsection (1).

The Environmental Information (Scotland) Regulations 2004

2 Interpretation

(1) In these Regulations –

“the Act” means the Freedom of Information (Scotland) Act 2002;

“applicant” means any person who requests that environmental information be made available;

“the Commissioner” means the Scottish Information Commissioner constituted by section 42 of the Act;

...

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

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- (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.

...

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.

...

(4) A Scottish public authority may refuse to make environmental information available to the extent that

...

(e) the request involves making available internal communications.

...

