



Scottish Information
Commissioner
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Decision Notice 055/2025

Report of handling for a specified planning application

Authority: South Lanarkshire Council

Case Ref: 202401217

Summary

The Applicant asked the Authority for information about a specified planning application. The Authority withheld some information, including the report of handling, and informed the Applicant that it did not hold other information. During the investigation the Authority disclosed the report of handling, but maintained that it was correct to have withheld it at the time of the request, on the grounds that it was an internal communication and the public interest favoured withholding it.

The Commissioner investigated and found that the Authority was entitled to withhold the report of handling under the exception cited, at the time it received the Applicant's request.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2) and (6) (General entitlement); 47(1) and (2) (Application for decision by Commissioner)

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (definition of "the Act", "applicant" and "the Commissioner") (Interpretation); 5(1) (Duty to make environmental information available on request); 10(4)(e) (Exceptions from duty to make environmental information available); 17(1), (2)(a) and (b) (Enforcement and appeal provisions)

Background

1. On 29 June 2024, the Applicant made a request for information to the Authority.

He asked for reports, emails, minutes, correspondence about a specified planning application and correspondence between planning officer and the planning committee regarding the same planning application.

2. The Authority responded on 10 July 2024. The Authority provided a small amount of information to the Applicant. It withheld some information under regulation 10(4)(e) of the EIRs, because it was internal communications, and other information under regulation 11(2) of the EIRs because it was the personal data of third parties. The Authority also notified the Applicant, citing regulation 6(1)(b) of the EIRs, that it was not required to provide the remaining information as it was publicly available and could be accessed via the Public Access Advanced search page of its online planning register. It provided the Applicant with a weblink to this search page.
3. On 15 July 2024, the Applicant wrote to the Authority requesting a review of its decision. The Applicant stated that he was dissatisfied with the decision because the Authority had not provided any minutes of meetings or reports, including the decision report, and that it had not stated which information was being withheld nor given specific reasons for its use of exceptions.
4. The Authority notified the Applicant of the outcome of its review on 14 August 2024. The review generally upheld the initial response and explained in more details its reasons for applying the exceptions. Two documents that had previously been withheld were disclosed. Furthermore, the Authority also applied regulation 10(4) of the EIRs [understood to be a reference to regulation 10(4)(a) of the EIRs] because it did not hold any meeting minutes falling within scope of his request.
5. On 8 September 2024, 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 applies to the enforcement of the EIRs as it applies to the enforcement of FOISA, subject to specified modifications. The Applicant stated he was dissatisfied with the outcome of the Authority's review because it had refused to provide him with the report of handling for the specified planning application.

Investigation

6. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
7. On 22 October 2024, 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.
8. During the investigation, the Authority published the report of handling (the Report) on its online planning register and it informed the Commissioner that it had notified the Applicant of this and provided a link to the publication.
9. 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 its reasons for withholding the Report.

Commissioner's analysis and findings

10. The Commissioner has considered all of the submissions made to him by the Applicant and the Authority.

Scope of investigation

11. This investigation will focus on whether the Authority was entitled to withhold the Report for the specified planning application under regulation 10(4)(e) of the EIRs, at the time it addressed the Applicant's requirement for review.

Application of the EIRs

12. Having considered the withheld information (which relates to a specified planning application) the Commissioner is satisfied that the information sought by the Applicant is properly considered to be environmental information, as defined in regulation 2(1) of the EIRs (in particular, paragraphs (a) and (c) of that definition).
13. The Applicant has not disputed the Authority's decision to handle the request under the EIRs and the Commissioner will consider the information in what follows solely in terms of the EIRs.

Regulation 5(1) of the EIRs

14. Regulation 5(1) of the EIRs 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 information that is held by the authority when it receives a request.
15. On receipt of a request for environmental information, therefore, the authority must ascertain what information it holds falling within the scope of the request. Having done so, regulation 5(1) requires the authority to provide that information to the requester, unless a qualification in regulations 6 to 12 applies (regulation 5(2)(b)).

Regulation 10(4)(e) - Internal communications

16. Regulation 10(4)(e) allows authorities to refuse to disclose internal communications. This is a class-based exception, meaning that there is no need to consider whether disclosure of the communication would cause harm before applying the exception.
17. For information to fall within the scope of the exception in regulation 10(4)(e) it need only be established that the information is an internal communication.

The Applicant's comments on the exception

18. The Applicant did not agree with the Authority's decision to withhold the information. He submitted that the Authority was wrong to claim that its ordinary practice was to withhold the Report until planning obligation negotiations were complete. He argued that the Authority regularly made other such reports of handling available on its online planning portal ahead of these negotiations being concluded.
19. The Applicant submitted that since the planning decision had already been made, the outstanding negotiations were irrelevant to the withholding of the Report. It was his view that, as soon as the planning decision was made, the Report should have been published on the planning portal.

The Authority's comments on the exception

20. The Authority explained that the planning application was considered under delegated powers and was not determined by committee. The Authority submitted that it withheld the Report because, at the time of the request, it was an internal communication which represented the planning officer's view at that time and set out their recommended position based on the circumstances that existed at that time. The Authority noted that the final recommendation was subject to the successful conclusion of statutory planning agreement, known as a section 75 agreement or planning obligation and, at the time of the request, it was not guaranteed that such agreement would be concluded to the satisfaction of all parties.
21. The Authority explained that if negotiations broke down and the agreement was not concluded then the original recommendation to grant consent would have to be reviewed and a different outcome might be necessary, such as a recommendation to refuse planning permission. The Authority submitted that the Report would then have to be updated to reflect that new position. The Authority argued that, at the time it received the Applicant's information request, it was conceivable that the planning officer could reach a different recommendation.
22. The Authority explained that the statutory process to constitute a planning obligation arising from the granting of planning permission, once registered in the Land Register, is set out in Section 75 of the Town and Country Planning (Scotland) Act 1997 and that it would have been premature to publish the Report prior to the interim decision becoming a final decision.
23. The Authority confirmed that the Report was not shared with any external third parties, such as the planning applicant, their agent or any external consultant prior to its publication on the Authority's website on 29 October 2024 once the planning decision, and the related section 75 agreement, had been finalised. The Authority confirmed that the planning decision itself was confirmed on 28 October 2024.
24. The Authority agreed with the Applicant that there are examples of reports of handling having been published on its online planning portal prior to the conclusion of legal agreements or the finalisation of planning decisions; however, it submitted that these were instances where the planning decision was made by the planning committee, generally in a public committee meeting. In these circumstances, the committee meeting papers, including reports of handling, were published with the committee agenda.

The Commissioner's view about the exception

25. The Commissioner has carefully considered the Applicant's argument that, in some cases, the Authority's practice is to publish other such reports of handling on its online planning portal, prior to the conclusion of planning obligation agreements. However, the Commissioner accepts the Authority's submission that reports of handling may be published in those circumstances where the planning decision is to be made by planning committee, by virtue of these proceedings being held in public. The planning application which is the subject of the Applicant's request was not heard in public by the planning committee; rather, the decision was made by a planning officer through delegated powers.
26. Given that the information withheld from the Applicant under regulation 10(4)(e) was not shared externally or in any public forum such as a committee meeting, the Commissioner is satisfied that it was an internal communication and that the cited exception is relevant.

27. The Commissioner must, therefore, go on to consider whether, in all of the circumstances of this case, the public interest in disclosing the information is outweighed by the public interest in maintaining the exception.

Public interest test - regulation 10(4)(e)

28. The Applicant submitted that at the time of his request, it was his view that the final planning decision had been made and, for this reason, he argued that disclosure of the Report was in the public interest. He submitted that a number of local residents directly affected by the proposed planning development were interested in the content of the Report and had also asked the Authority to disclose it.
29. The Applicant expressed his concerns in relation to the Authority's mismanagement of the planning process in relation to this planning application. In particular, he argued that the Authority deliberately withheld the information until the finalisation of the legal agreement in order that the public had no ability to object.
30. The Authority recognised the importance of the public being able to exercise their rights under the EIRs, and it acknowledged the public interest in obtaining information about planning applications. However, it submitted that this public interest was met by the publication of other information on its online planning portal. The Authority argued that disclosure of the Report would not have aided understanding, transparency or accountability around the planning application process.
31. The Authority submitted that there was a greater public interest in preserving the ability of its officers to share information internally in a free and frank manner without such information being subject to disclosure. It argued that there was no public interest in publishing the Report in a form which was subject to change if the related planning agreement was not concluded.

The Commissioner's view on the public interest - Regulation 10(4)(e)

32. The Commissioner acknowledges that the Report has since been published by the Authority, but he must consider the public interest arguments in relation to the circumstances that existed on 15 July 2024, when the Applicant made his requirement for review.
33. Regulation 10(2)(b) of the EIRs builds in an explicit presumption in favour of disclosure, which makes it clear that where arguments are evenly balanced for withholding and disclosing the information, the information must be disclosed.
34. The starting position is, therefore, that there is a public interest in disclosure of environmental information (as expressed in the EIRs and associated EU Directive) and that only if there is a stronger competing public interest in withholding the information should exceptions be applied.
35. 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. In this regard, the inherent transparency of the planning process itself goes a considerable way to serving this purpose.
36. The Commissioner has considered the Applicant's argument that the Report was withheld deliberately in order that the public would have no opportunity to object to the planning application. The Commissioner notes that the Town and Country Planning (Scotland) Act requires planning authorities to carry out consultation in connection with the determination of applications.

The planning process provided the Applicant and others with an opportunity to make representations, even although practically it appears that he, and they, were unable to make a valid representation within statutory timescales for doing so.

37. It is not within the Commissioner's remit to comment on the effectiveness, or otherwise, of planning processes. However, the Commissioner is not satisfied that disclosure of the Report, at the time of the Applicant's request, would have been of any material use to the Applicant. It is clear that by the time the Applicant submitted his request for the Report, the statutory opportunity to object had passed.
38. The Commissioner is persuaded by the Authority's arguments that, at the time of the Applicant's information request, the planning decision had not been finalised. He accepts that, contrary to the views of the Applicant, insofar as delegated planning decisions are concerned, reports of handling would not ordinarily be published until the final planning decision has been made.
39. In the particular circumstances of this case, the Commissioner concludes, on balance, that the public interest in making this information available is outweighed by that in maintaining the exception in regulation 10(4)(e) of the EIRs. Therefore, he considers the Authority to have been justified in withholding the information under this exception. Under different circumstances, however, there might be a more compelling public interest in making a report of this kind available and the outcome might be different.
40. The Commissioner finds that the Authority complied with the EIRs in withholding the Report.

Decision

The Commissioner finds that the Authority complied with the Environmental Information (Scotland) Regulations 2004 (the EIRs) 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

27 February 2025