

Decision Notice

Decision 171/2016: ABW Consultants Limited and West Lothian Council

Planning correspondence

Reference No: 201502206

Decision Date: 8 August 2016



Scottish Information
Commissioner

Summary

On 14 January 2016, ABW Consultants Limited (ABWCL) asked West Lothian Council (the Council) for information relating to a specific planning application.

The Council informed ABWCL that it did not hold a letter it had requested. It disclosed other information, from which personal data had been redacted.

During the investigation, the Council disclosed further information, explaining what information it had redacted.

Following investigation, the Commissioner found the Council did not hold the letter in question. She also found that the Council had failed to comply with regulation 11(2) of the EIRs (Personal data) in responding to the request.

Relevant statutory provisions

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

Data Protection Act 1998 (the DPA) section 1(1) (definition of "personal data") (Basic interpretative provisions); Schedule 1 (The data protection principles, Part I: the principles) (the first data protection principle) and Schedule 2 (Conditions relevant for purposes of the first principle: processing of any personal data) (condition 6(1))

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 14 January 2015, ABWCL made a request for information to the Council. The information requested was information relating to a specific planning application, which can be broken down as follows:
 - i. Copies of all correspondence including faxes, emails and letters in respect of the application.
 - ii. Details and minutes of all meetings or briefings in respect of the application.
 - iii. Details and copies of all correspondence with elected members, including complaints and responses, and including any letters of apology or explanation issued to elected members.
 - iv. Copies of the relevant council rules or standing orders regarding the use of delegated authority in planning matters, particularly where such delegated decisions would alter a previous committee decision, where such delegated decision is not expressly permitted by the committee.

v. Details of the impacts on education capacity forecasts flowing from the amendment.

ABWCL confirmed that any information available on the Council's Planning Portal should be excluded from the request.

2. On 3 February 2015, the Council wrote to ABWCL and sought clarification as to what was meant by copies of relevant council rules or standing orders regarding use of delegated authority (part iv.). ABWCL provided clarification on 6 February 2015.
3. On 9 March 2015, ABWCL wrote to the Council, requiring a review of its decision on the basis that it had failed to respond.
4. The Council notified ABWCL of the outcome of its review on 20 March 2015. The Council informed ABWCL that information pertaining to parts i. (in full) and iv. (in part) was available on its website. The Council also told ABWCL that it did not hold any information covered by part ii. of the request and provided some information and explanation in response to the remaining parts of the request.
5. On 7 May 2015, ABWCL wrote to the Commissioner. It applied to the Commissioner for a decision in terms of section 47(1) of the Freedom of Information (Scotland) Act 2002 (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. ABWCL stated it was dissatisfied with the outcome of the Council's review because the Council had not complied with the terms of the request and had failed to provide all of the relevant information it held. ABWCL also submitted that since the Council had not applied any exemptions, it had not complied with the requirements of FOISA or the EIRs.
6. On 25 June 2015, the Commissioner issued *Decision 097/2015 ABW Consultants Limited and West Lothian Council*, in which she required the Council to provide ABWCL with a further response to its requirement for review, which was compliant with the EIRs and addressed all relevant information it held.
7. On 25 August 2015, the Council provided ABWCL with a further review outcome in compliance with *Decision 097/2105*. The Council informed ABWCL that it did not hold a specific letter and disclosed further information, which had been redacted in terms of regulation 11(2) of the EIRs (Personal data).
8. On 24 November 2015, ABWCL wrote to the Commissioner. ABWCL applied to the Commissioner for a decision in terms of section 47(1) of FOISA. ABWCL stated it was dissatisfied with the outcome of the Council's review because it found it difficult to accept that the Council no longer held the letter in question. ABWCL also stated that the information requested had been so heavily redacted as to make it unintelligible.

Investigation

9. The application was accepted as valid. The Commissioner confirmed that ABWCL 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.
10. On 4 December 2015, the Council was notified in writing that ABWCL had made a valid application. The Council was asked to send the Commissioner the information withheld from ABWCL. The Council provided the information and the case was allocated to an investigating officer.

11. 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, including justifying its reliance on any provisions of the EIRs it considered applicable to the information requested.
12. The Council responded, submitting that in relation to the specified letter it maintained reliance on regulation 10(4)(a) of the EIRs, on the basis that the letter was not held. The Council also confirmed that all the redactions consisted of personal data.
13. The investigating officer noted that the only elements of information that had been withheld were names, addresses, email addresses and telephone numbers. It was noted that by redacting all such information, whether the emails were internal documents or had been sent to or from the Council could not be established.
14. It was suggested to the Council by the investigating officer that it appeared a blanket approach had been taken in relation to the redaction of each of the documents provided, with little or no consideration as to what was truly personal data and the expectation of privacy; for example, the difference between junior and senior staff members. It was also explained to the Council that any information after the “@” symbol within an email address, which identified either the Council or an external organisation could not, in this case, be considered to be personal data. The investigating officer raised concerns regarding what appeared to be the wholesale redaction of all names and email contact details.
15. The Council responded and conceded that any information following the “@” symbol within an email address could have been disclosed. It provided ABWCL with an explanation and a schedule, showing whether the correspondence provided earlier was an internal communication or identifying the organisations with which the exchange had taken place.
16. ABWCL acknowledged receipt of the schedule and, whilst content that the schedule provided satisfied the request, wished a decision notice to be issued regarding the specific letter and the fact that the information disclosed had been over-redacted by the Council.

Commissioner’s analysis and findings

17. 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 ABWCL and the Council. She is satisfied that no matter of relevance has been overlooked.

Application of the EIRs

18. It is clear that any information falling within the scope of the request would be environmental information, as defined in regulation 2(1) of the EIRs. The information in question concerns a planning application in relation to a substantial development and, as such, the Commissioner is satisfied that it would fall within either paragraph (a) or paragraph (c) of the definition of environmental information in regulation 2(1) of the EIRs (reproduced in Appendix 1 to this decision).

Regulation 5(1) of the EIRs

19. 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. It is important to bear in mind that this obligation relates to information actually held by an authority when it receives the request, as

opposed to information an applicant believes the authority should hold, but which is not in fact held.

20. Under the EIRs, a public authority may refuse to make environmental information available if one or more of the exceptions in regulation 10 apply and, in all the circumstances of the case, the public interest in maintaining the exception or exceptions outweighs the public interest in making the information available.

Regulation 10(4)(a) of the EIRs

21. Regulation 10(4)(a) of the EIRs provides that a Scottish public authority may refuse to make environmental information available to the extent that it does not hold that information when an applicant's request is received. The exception in regulation 10(4)(a) is subject to the public interest test in regulation 10(1)(b) of the EIRs and so can only apply if, in all the circumstances of the case, the public interest in maintaining the exception or exceptions outweighs the public interest in making the information available.
22. ABWCL believed the letter in question should be held by the Council and provided submissions to the effect that the letter requested was, at one time, held by the Council.
23. During the investigation, the Council provided full submissions on the steps taken to identify and locate the specific letter. It described the searches carried out, in electronic and paper records, to establish what relevant information it held, providing evidence of the outcome of these searches.
24. Having considered all relevant submissions and the terms of the request, the Commissioner accepts, on balance of probabilities, that the Council does not (and did not, at the time it received the request from ABWCL) hold the letter in question. The searches carried out by the Council were adequate and proportionate. If the Council did hold the letter, the Commissioner is satisfied that it would have been found.
25. As noted in paragraph 21, the exception in regulation 10(4)(a) is subject to the public interest test. In the circumstances, the Commissioner does not consider there to be any conceivable public interest in requiring that any information be made available. She therefore concludes that, in all the circumstances of this case, the public interest in making the requested information available is outweighed by that in maintaining the exception in regulation 10(4)(a) of the EIRs.
26. The Commissioner is satisfied, therefore, that the Council was entitled to inform ABWCL, under regulation 10(4)(a) of the EIRs, that the letter in question was not held.

Regulation 11(2) of the EIRs – third party personal data

27. The Council submitted that the information redacted from the information provided to ABWCL was exempted from disclosure as it comprised personal data (regulation 11(2) of the EIRs).
28. Regulation 10(3) of the EIRs provides that a Scottish public authority can only make personal data in environmental information available in accordance with regulation 11. Regulation 11(2) exempts personal data where the applicant is not the data subject and other specified conditions apply. These include where disclosure would contravene any of the data protection principles in Schedule 1 to the DPA. The Council argued that disclosure of some of the information would breach the first data protection principle.

29. As mentioned above, during the investigation, it was brought to the Council's attention that information that related to organisations (and not named individuals) could not be classed, in this case, as "personal data" for the purposes of the DPA.
30. As noted above, the Council provided ABWCL with a schedule showing whether the correspondence was internal or external, and provided the names of the other organisations involved. The Council submitted that all of the initial redactions had been carried out in accordance with the Council's Data Protection Policy and with guidance issued by the Council's Chief Solicitor. The guidance was to the effect that all personal information, as defined by the Council's Data Protection Policy, must be fully redacted.
31. The Commissioner notes that following this advice is likely to lead to further applications to her regarding the over-redaction of information.
32. Although ABWCL was satisfied with the information it had received by the end of the investigation, it wanted the Commissioner to determine whether the Council was justified in withholding all of the information it had withheld under regulation 11(2) of the EIRs.
33. In providing its submissions, the Council wholly relied upon the internal guidance mentioned in paragraph 30 above. Whilst accepting that authorities have to be careful regarding the disclosure of personal data, information can only be withheld under regulation 11(2) of the EIRs where:
 - (i) it satisfies the definition of personal data in section 1(1) of the DPA and
 - (ii) neither condition 1 in regulation 11(3) nor condition 2 in regulation 11(4) of the EIRs (see Appendix 1) can be met.
34. It is apparent that in responding to ABWCL, the Council redacted all contact information that *might* be classed as personal data. It gave no consideration as to whether all of the information redacted was, in fact, "personal data" for the purposes of the DPA (the information following the "@" symbol could not be personal data in these circumstances) or whether conditions 1 or 2 in regulation 11 could be met.
35. In this case, the Council did not provide sufficient submissions to show that the disclosure of all of the information redacted was personal data or that disclosure would contravene conditions 1 or 2. In the absence of such evidence, and having considering the information that was actually withheld, the Commissioner finds that the Council was not justified in withholding all the information that it did under regulation 11(2) of the EIRs. By doing so, the Council failed to comply with regulation 5(1) of the EIRs in responding to ABWCL.
36. Given that ABWCL was satisfied with the explanation and schedule provided during the investigation, the Commissioner does not require the Council to take any action regarding this failure. However, she recommends that the Council revisits its internal guidance to ensure that it does not withhold personal data in breach of regulation 11 of the EIRs (or section 38 of FOISA, as appropriate) when responding to future requests.

Decision

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

The Commissioner finds that by informing ABWCL that it did not hold the specific letter, the Council complied with the EIRs.

However, the Commissioner finds that the Council was not entitled to withhold all of the information it withheld in terms of regulation 11(2) of the EIRs. By doing so, it failed to comply with regulation 5(1) of the EIRs.

Appeal

Should either ABWCL or the 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

8 August 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–

(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;

...

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
 - (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress) and; in all the circumstances of the case, the public interest in making the information available is outweighed by that in not doing so; and
 - (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.
- (4) The second condition is that by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1) of that Act and, in all the circumstances of the case, the public interest in making the information available is outweighed by that in not doing so.

Data Protection Act 1998

1 Basic interpretative provisions

(1) In this Act, unless the context otherwise requires –

...

“personal data” means data which relate to a living individual who can be identified –

(a) from those data, or

(b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,

and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual;

...

Schedule 1 – The data protection principles

Part I – The principles

1. Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –

(a) at least one of the conditions in Schedule 2 is met, and

(b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.

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