

Decision Notice

Decision 193/2015: Mr Alexander Ward and Shetland Islands Council

Information relating to planning application

Reference No: 201500197

Decision Date: 17 December 2015



Scottish Information
Commissioner

Summary

On 3 October 2014, Mr Ward asked Shetland Islands Council (the Council) for information relating to a planning application.

The Council disclosed some of the information to Mr Ward. The Council also told him how he could access other publicly available information and that it did not hold some of the information he had requested. The Council withheld the rest of the information in terms of FOISA, considering some of it to be Mr Ward's own personal data and some of it to be legally privileged. Following a review, Mr Ward remained dissatisfied and applied to the Commissioner for a decision.

The Commissioner investigated. She found that the Council had failed to identify that the information was environmental and should have been considered under the EIRs. The Council was also wrong to withhold some information as legally privileged.

The Commissioner required the Council to disclose further information to Mr Ward.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (4) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 36(1) (Confidentiality)

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (paragraphs (a) and (c) of definition of "environmental information") (Interpretation); 5(1) and (2)(b) (Duty to make available environmental information 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. It may be helpful to explain the context of Mr Ward's request. Mr Ward made an application to the Council to vary a condition of an existing planning permission. Mr Ward was dissatisfied with the way in which the Council had dealt with this planning application, considering he had been treated unfairly. He pursued this through a complaint to the Scottish Public Services Ombudsman (the SPSO). His concerns also gave rise to the information request under consideration here.
2. On 3 October 2014, Mr Ward made a request for information to the Council. The information he requested was:
"... any emails, documents, meetings and minutes from meetings and any enforcement issues that have arisen, to include the legal department, relating to planning application VCON2013/322. Also, any other information that relates to my planning application or parts of it.

I [would] also like to know how much in money and man hours to date dealing with this simple application has cost the Council."

3. The Council responded on 31 October 2014.
 - (i) It provided Mr Ward with some information.
 - (ii) It informed him that other information on the application was otherwise accessible by him on its planning website, citing section 25(1) (Information otherwise accessible) of FOISA.
 - (iii) It withheld correspondence with its legal section under section 36(1) (Confidentiality) of FOISA, considering this to be legally privileged.
 - (iv) It explained to Mr Ward that some of the information was his own personal data and so was exempt from disclosure under section 38(1)(a) of FOISA: it explained how he could obtain this under the Data Protection Act 1998.
 - (v) Finally, the Council informed Mr Ward, in terms of section 17(1) of FOISA, that it did not hold information relating to the cost or time taken in processing individual planning applications.
4. On 12 November 2014, Mr Ward wrote to the Council requesting a review of its decision. He did not believe the Council had provided all the information to which he was entitled.
5. The Council notified Mr Ward of the outcome of its review on 12 December 2014: it upheld its original decision without modification and provided further explanation of its application of the exemptions and of the public interest test.
6. On 2 February 2015, Mr Ward 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. Mr Ward stated he was dissatisfied with the outcome of the Council's review because it had failed to disclose information, specifically:
 - (i) correspondence between its Planning Department and its lawyers,
 - (ii) initial contact between an architect and the Planning Department,
 - (iii) costs or time involved in dealing with his planning application,
 - (iv) references to meetings, or minutes of meetings that Mr Ward believed had taken place.

He did not raise the Council's application of sections 25(1) (in relation to information it considered otherwise accessible) or 38(1)(a) (in relation to Mr Ward's own personal data) of FOISA.

Investigation

7. The application was accepted as valid. The Commissioner confirmed that Mr Ward 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.
8. On 9 February 2015, the Council was notified in writing that Mr Ward had made a valid application. The Council was asked to send the Commissioner the information withheld from him. The Council provided the information and the case was allocated to an investigating officer.

9. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The investigating officer invited the Council to comment on this application and answer specific questions. In line with his application, these focused on the steps taken to identify and locate the requested information, and the Council's decision to withhold correspondence with its lawyers. The Council was also asked to comment on whether it considered the requested information to be environmental information, and thus subject to the EIRs.
10. In response, the Council acknowledged that the withheld information contained some environmental information, which could be dealt with under the EIRs. However, it adhered to its original handling of the request under FOISA. It submitted that if it were to consider the request under the EIRs, it would apply the exception in regulation 10(4)(e) to the withheld information.
11. Mr Ward was asked for, and provided, submissions during the investigation.

Commissioner's analysis and findings

12. In coming to a decision on this matter, the Commissioner has considered all of the withheld information and the relevant submissions, or parts of submissions, made to her by both Mr Ward and the Council. She is satisfied that no matter of relevance has been overlooked.

FOISA or EIRs?

13. Environmental information is defined in regulation 2(1) of the EIRs, and paragraphs (a) and (c) of the definition are reproduced in full in Appendix 1. Where information falls within the scope of this definition, a person has a right to access it under the EIRs, subject to various restrictions and exceptions contained in the EIRs.
14. The Commissioner's views on the relationship between FOISA and the EIRs are set out in detail in *Decision 218/2007 Professor A D Hawkins and Transport Scotland*¹, and need not be repeated in full here. However, she will reiterate some of the key points which are relevant in this case:
 - (i) The definition of what constitutes environmental information should not be viewed narrowly, but in line with the definition of environmental information in the EIRs.
 - (ii) There are two separate statutory frameworks for access to environmental information and an authority is required to consider any request for environmental information under both FOISA and the EIRs.
 - (iii) Any request for environmental information, therefore, **must** be dealt with under the EIRs.
 - (iv) In responding to a request for environmental information under FOISA, an authority **may** claim the exemption in section 39(2).
15. *Decision 218/2007* means that the Commissioner must first determine whether any of the information withheld is environmental information. If it is, she must go on to consider the Council's handling of the request in terms of both FOISA and the EIRs.

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

16. In this case, the Council responded to Mr Ward solely in terms of FOISA. Although the Council accepted that some of the information was environmental information, it adhered to its original decision to respond to Mr Ward under FOISA rather than the EIRs.
17. Having considered the nature and content of the withheld information, the Commissioner is satisfied that all of it is environmental information as defined within regulation 2(1) of the EIRs. The information relates to an application to vary a condition of planning permission, involving a change of use of premises and the erection of a flue for a wood-burning stove. The Commissioner is satisfied that it would fall within paragraphs (a) of the definition of environmental information (as information on the state of the elements of the environment, in particular land and landscape) or paragraph (c) (as information on measures, including legislation and plans, affecting or likely to affect those elements).
18. Having reached this conclusion, the Commissioner must conclude that, by failing to consider and respond to Mr Ward's request in terms of the EIRs, the Council failed to comply with regulation 5(1) of the EIRs.
19. Given her conclusion that withheld information is environmental information, the Commissioner also concludes that the exemption in section 39(2) of FOISA could have been applied to this information. If this exemption had been applied by the Council, this would have allowed the Commissioner to consider whether the information had otherwise been properly withheld only in terms of the EIRs.
20. As noted in *Decision 218/2007*, there is no obligation on an authority to rely upon any exemption in FOISA. In the circumstances, the Commissioner has found it necessary to consider the Council's handling of Mr Ward's request and to set out her conclusions in terms of both FOISA and the EIRs.

Information held by the Council

21. In order to ascertain whether all relevant information had been identified and located by the Council, it was asked to provide an explanation of the searches that it had undertaken in order to locate and retrieve any information falling within the scope of Mr Ward's request.
22. The Council explained that its Planning Service was obliged to maintain a full record of all correspondence relating to a planning application as part of the deliberation and decision-making process. The Council went on to explain that searches of paper and electronic records were carried out within its Planning Service, and also within those departments involved in consultation or discussion with the Planning Service (namely Legal, Roads and Environmental Services). Searches included word searches on emails held by the officers involved, where Mr Ward and his planning application was the subject. These were cross-referenced against the Planning Service's files held in relation to Mr Ward's planning application.
23. The Council submitted that it was satisfied all correspondence falling within the scope of Mr Ward's request was held within the Planning Service, and that it held no further information.
24. Examination of the withheld information identified a reference to legal advice having been taken by the Council prior to 15 November 2013, yet no such legal advice was included in the withheld information provided to the Commissioner. The Council was asked to comment on this.

25. The Council conducted a further review of the documents held on file and identified the relevant legal advice: this was provided to the investigating officer. The Council explained that it had not considered this information to fall within the scope of Mr Ward's request, as it related to legal advice on a matter that was not ultimately considered as part of Mr Ward's planning application.
26. Having considered this further information, it is clear that it did relate to an aspect of Mr Ward's planning application at the material time, regardless of whether it was included in the Council's subsequent deliberation on the application. This further information is therefore considered to fall within the scope of Mr Ward's request.

Communications between an architect and the Council

27. In his application to the Commissioner, Mr Ward stated that he was dissatisfied he had not been provided with information evidencing contact between a particular architect and the Council. During the investigation, Mr Ward informed the investigating officer that he believed, from the information provided by the Council in response to his request, that there may have been such contact, prior to the architect writing to the Council on 30 June 2014. Although he confirmed he had no recorded evidence to support this, he wished to ascertain which party had made the initial contact.
28. The Council was asked to comment on this. Referring to the searches it had carried out, it confirmed it held no information evidencing any contact between the architect and the Council prior to 30 June 2014.

References to meetings and minutes of meetings

29. In his application, Mr Ward also expressed dissatisfaction that he had not been provided with references to meetings, or minutes of meetings that he believed had taken place in relation to his planning application. During the investigation, Mr Ward informed the investigating officer he had been made aware verbally, by a third party, that his application had been discussed at one meeting at least. Mr Ward confirmed he had no recorded evidence to support this.
30. Referring to its searches, the Council submitted that all information pertaining to Mr Ward's planning application was contained in the file which was held for that purpose. It confirmed it held no other information on the matter.

Costs involved and time taken

31. In his application, Mr Ward also submitted that he was dissatisfied he had not been provided with information on the costs involved, and the time taken, in dealing with his particular planning application.
32. In its submissions to the Commissioner, the Council referred to its review outcome, reiterating that it did not record the time or costs Mr Ward sought. The Council further confirmed that there was no policy, procedure or system in place for time-recording any of its administrative activities, nor was there any requirement for it to do so.

The Commissioner's conclusions about the information held by the Council

33. In terms of section 1(4) of FOISA, the information to be provided in response to a request under section 1(1) is that falling within the scope of the request and **held** by the authority at the time the request is received (the Commissioner's emphasis).
34. The standard proof to determine whether a Scottish public authority holds information is the civil standard of the balance of probabilities. In determining this, the Commissioner

considers the scope, quality, thoroughness and results of the searches carried out by the public authority. She also considers, where appropriate, any reason offered by the public authority to explain why the information is not held. While it may be relevant as part of this exercise to explore what information should be held, ultimately the Commissioner's role is to determine what relevant information is (or was, at the time the request was received) held by the public authority.

35. Having considered all the relevant submissions and the terms of the request, the Commissioner is satisfied that, with the exception of the information referred to in paragraphs 24 to 26 above, the Council took adequate, proportionate steps to establish what information it held and which fell within the scope of Mr Ward's request. She accepts, on balance, that any information relevant to the request was capable of being identified using the searches described by the Council. She is therefore satisfied that the Council does not (and did not, on receiving the request) hold any further information falling within the scope of the request.
36. The Council was required through its searches to both locate and retrieve the information it held. While the Council located the information relevant to Mr Ward's request, it failed to retrieve it all. The information referred to in paragraphs 24 to 26 above should have been found to fall within the scope of Mr Ward's request. In failing to identify the relevance of this information, the Council failed to comply with section 1(1) of FOISA and regulation 5(1) of the EIRs. The Commissioner will consider this information further below.

Information withheld – correspondence between Planning Department and lawyers

37. In his application to the Commissioner, Mr Ward was dissatisfied he had not been provided with communications between the Council's Planning Department and its lawyers. The Commissioner must consider this matter in terms of both FOISA and the EIRs.

Section 36(1) of FOISA (Confidentiality)

38. Section 36(1) of FOISA provides that information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings is exempt information. One type of communication covered by this exemption is that to which legal advice privilege, a form of legal professional privilege, applies. Legal advice privilege covers communications between lawyers and their clients in the course of which legal advice is given or sought.
39. For the exemption to apply to this particular type of communication, certain conditions must be fulfilled:
 - (i) The communications must involve a professional legal adviser, such as a solicitor or an advocate. This may include an in-house legal adviser or an external solicitor engaged by the authority.
 - (ii) The legal adviser must be acting in his/her professional capacity, and
 - (iii) The communications must occur in the context of the legal adviser's professional relationship with his/her client.
40. The Council was asked to justify its reliance on section 36(1) of FOISA. The investigating officer also asked the Council to comment on particular issues in relation to specific documents it was withholding under this exemption.
41. The Council submitted that disclosure of the information would prejudice its ability to defend its actions, should this planning application, or future similar planning applications, be

challenged. In doing so, the Council explained, it was upholding a long-recognised public interest in maintaining the right to confidentiality of communications between legal advisers and their clients on administration of justice grounds. The Council argued it must be able to rely on full and frank advice received from its solicitors or other officers on matters relating to the interpretation and application of the law, and its impact on matters which were subject to a quasi-judicial process, such as planning applications.

42. Having considered the content of the information withheld under section 36(1) and the circumstances under which the communications were made, the Commissioner is satisfied that the majority of this information meets the conditions set out in paragraph 39 above. She does not find this to be the case in relation to the information in five of the withheld documents (documents 83, 86 (with the exception of one phrase, in which the content of legal advice is conveyed), 89, 91 and 92).
43. These documents all contain, and relate to, communications between the Council and the Scottish Government's Directorate for Planning and Environmental Appeals (the DPEA). The Council considered them to be properly withheld under section 36(1), because they informed the Council's legal position with regard to the processing of Mr Ward's application and formed part of the considerations undertaken by its legal adviser in giving advice.
44. The Commissioner cannot accept that legal advice privilege could apply to these communications. While information does not have to be legal advice to fall within the ambit of legal advice privilege, it does have to involve a professional legal adviser directly, in the context of legal advice being sought or given. References to the involvement of legal advisers or to obtaining of legal advice, in communications or other documents not involving legal advisers directly, and making no reference to the substance of the legal advice concerned, will not qualify.
45. Having reviewed these documents, the Commissioner does not accept that the majority of the information in them involves a legal adviser directly, in circumstances in which legal advice privilege could be said to apply. Document 89 is an internal email between staff within the Council's Planning Department, while documents 86, 91 and 92 are communications between the Council and the DPEA: of these, only the one phrase conveying the terms of legal advice, referred to above, could be said to attract legal advice privilege. Document 83 is an item of purely administrative correspondence, containing nothing which could be said to qualify for legal advice privilege.
46. Consequently, the Commissioner does not consider the information in these documents (with that small exception in document 86) to qualify for exemption under section 36(1) of FOISA. In withholding the information under that exemption, the Council failed to respond to Mr Ward's request in accordance with section 1(1) of FOISA (the Commissioner must still consider the application of the EIRs to the information – see below).
47. The Commissioner will now go on to consider the remainder of the information withheld under section 36(1).

Quality of confidence

48. Information cannot be privileged unless it is also confidential. For the section 36(1) exemption to apply, the withheld information must be information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings. In this case, the claim to confidentiality is in the form of legal advice privilege. The claim must be capable of being sustained at the time the exemption is claimed. For this to be the case, the

information must possess the quality of confidence at that time, i.e. at least up to the point when the authority carries out its review and communicates the outcome to the requester.

49. The Council acknowledged that some of the information contained in communications with solicitors had been relayed to Mr Ward in response to his queries and, in that respect, the information relevant to his application had been provided to him. The Council maintained it was withholding the actual correspondence with solicitors as it contained other legal advice and information related to such legal advice.
50. Having considered the contents of the remaining withheld information, the Commissioner is satisfied that the majority of the legal advice referred to above has not been made public, either in full, or in summary. Therefore, she is satisfied that this is (and was, at the material time) information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings. The Council was therefore entitled to conclude that this information was exempt from disclosure under section 36(1) of FOISA.
51. The Commissioner does not accept that this conclusion applies to the information in documents 5, 47, 48 and 126. Having considered that information, alongside the information already disclosed to Mr Ward by the Council and that publicly available on the Council's website, she finds that the substance of the legal advice in all of these four documents has effectively been disclosed, and had been at the time of Mr Ward's request. The same can be said of the legal advice quoted in document 86: its limited sharing with the DPEA did not affect its confidential quality, but it is information covered by the wider disclosure referred to above. An example of this can be found in an email to Mr Ward dated 27 November 2013, which is also published on the Council's planning portal here². It is not, therefore, information which could be said to possess the quality of confidence (then or subsequently), so section 36(1) of FOISA could not be said to apply to it.
52. The Commissioner must consider these documents again below, under the EIRs.
53. The Commissioner will first go on to consider where the balance of public interest lies with regard to the disclosure of the remainder of the information being withheld under section 36(1).

Public interest test – Section 36(1)

54. The exemption in section 36(1) is a qualified exemption, which means that its application is subject to the public interest test set out in section 2(1)(b) of FOISA. Therefore, having decided that the majority of the information is exempt under section 36(1), the Commissioner must go on to consider whether, in all the circumstances of the case, the public interest in disclosing the information is outweighed by the public interest in maintaining the exemption.
55. 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.
56. The Council advised the Commissioner that it wished to rely on its public interest arguments set out in its review outcome of 12 December 2014. It recognised there was a public interest in accountability, transparency and effective scrutiny of decision-making. The Council submitted that this had been served, insofar as the information and decision-making process relating to the application had been made public through the publication of some

² <http://pa.shetland.gov.uk/online-applications/applicationDetails.do?activeTab=summary&keyVal=MT0PZ00A01E00>

94 documents on its Planning Service webpage³, plus 165 pages of information presented to the Planning Committee, also available on the Council's website⁴.

57. The Council took the view that the public availability of this information was more than sufficient to ensure a high level of public scrutiny associated with the relevant planning process, thus satisfying the general public interest in disclosure. It contended that disclosure of information relating to detailed legal advice would do nothing to enhance that scrutiny.
58. The Council maintained that the public interest lay in solicitors being able to provide free and frank advice to client departments without the need to frame that advice in a manner which might be politically acceptable to the public at large.
59. Mr Ward expressed concerns about the fair handling of his planning application. A complaint in this regard was under consideration by the SPSO. He believed access to the legal advice would assist him in assessing whether his application had been dealt with competently, and whether its handling had been influenced by non-planning considerations. He highlighted these issues as matters of public interest.
60. Mr Ward contended that it was fundamental to good local governance that Councils acted within the law and discharged their functions competently, objectively and fairly. Disclosure of the information would show whether the Council had met these standards in handling his planning application, and acted consistently with Scottish planning law and proper procedures. Mr Ward argued that disclosure of the legal advice would not be detrimental unless the Council was trying to hide something, or had failed to adhere to proper protocols.
61. Mr Ward submitted that the public had a right to expect the planning function to be exercised objectively, to be transparent and open to scrutiny. Given that the Planning Service was publicly funded, Mr Ward argued that it must be accountable for its actions, identifying and learning from any shortcomings.
62. The Commissioner has considered carefully the submissions made by both the Council and Mr Ward.
63. In this case, the Commissioner accepts there is a public interest in disclosure of the information under consideration, in order to allow scrutiny of the Council's actions in relation to Mr Ward's planning application and to contribute to transparency and accountability.
64. The Commissioner has also considered the strong public interest in ensuring that public bodies, including the Council, are able to obtain and consider legal advice on a confidential basis. She acknowledges that 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.
65. The Commissioner acknowledges the arguments that Mr Ward has advanced, and the obvious concerns he has regarding the Council's handling of his planning application. However, in this case, bearing in mind the information made public already, she is not satisfied that the public interest in disclosure of this information is sufficiently compelling to

³ <http://pa.shetland.gov.uk/online-applications/applicationDetails.do?activeTab=summary&keyVal=MT0PZ0OA01E00>

⁴ <http://shetland.gov.uk/coins/submissiondocuments.asp?submissionid=16813>

outweigh the strong public interest in maintaining confidentiality of communications between legal adviser and client.

66. Consequently, the Commissioner accepts that the Council was entitled to withhold the remaining legal advice under section 36(1) of FOISA.
67. The Commissioner will now go on to consider the Council's withholding of the information in terms of regulation 10(4)(e) of the EIRs (which the Council submitted it would apply if it had to consider the request under the EIRs). In support of its position, the Council chose to rely on the arguments summarised above, relating to section 36(1) of FOISA.

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

68. Under regulation 10(4)(e) of the EIRs, a public authority may refuse to make environmental information available to the extent that it involves making available internal communications. In order for information to fall within the scope of this exception, it need only be established that the information is an internal communication. If the Commissioner decides that a document is an internal communication, she will be required to go on and consider the public interest test.
69. As with all exceptions in regulation 10 of the EIRs, the Council is obliged to apply this exception restrictively and with a presumption in favour of disclosure (regulation 10(2)).
70. Having considered all of the information originally withheld by the Council under section 36(1) of FOISA, the Commissioner does not accept that the communications between the Council and the DPEA (documents 86, 91 and 92) are internal communications. These are clearly communications between the Council and a third party (a Scottish Government department).
71. Therefore, the Commissioner considers the Council was not entitled to apply regulation 10(4)(e) to these communications. As she has not found them to be exempt under FOISA either, she must require their disclosure to Mr Ward (with any personal data redacted).
72. The Commissioner is satisfied that the remainder of the withheld information comprises internal communications and therefore is subject to the exception in regulation 10(4)(e). This includes correspondence between the Council and its external legal advisers, seeking and providing legal advice in relation to the planning application.
73. The Commissioner will now go on to consider where the balance of public interest lies with regard to the disclosure of this information, as required by regulation 10(1)(b) of the EIRs.

Public interest test – Regulation 10(4)(e)

74. The Council's public interest arguments, along with those provided by Mr Ward, are summarised above, where the Commissioner considers the application of section 36(1) of FOISA. She has considered them again carefully, in the context of this exception.
75. The Commissioner recognises the significant public interest in transparency and accountability in relation to the decision-making processes associated with planning applications, and therefore in ensuring that these processes are open to effective public scrutiny. In this context, she notes the substantial amount of information about this application which has been made available, both to Mr Ward as a party and to the wider public, through the Council's own planning portal and its website. To a significant extent, this satisfies the public interest highlighted by Mr Ward. The information which remains withheld

in this case reflects the Council's internal discussions, with reference to legal advice sought and received on aspects of the planning application.

76. In the particular circumstances of this case, the Commissioner is satisfied that there is weight to the argument that protection should be afforded to the Council to have such exchanges with its legal advisers, commensurate with the importance attached by the courts to maintaining confidentiality of communications in such circumstances. She must consider such questions in the circumstances prevailing at the time the Council considered the request, not the time at which she is asked to make her decision.
77. Having considered the withheld information and all relevant submissions, the Commissioner concludes, on balance, that the public interest in making the majority of the information available is outweighed by that in maintaining the exception in regulation 10(4)(e) of the EIRs. Therefore, she considers the Council to have been justified in withholding the majority of the information under that exception.
78. The Commissioner is unable to reach this conclusion in relation to the information in document 89, or the purely administrative exchange in document 83. The Council's arguments for withholding this information are entirely those advanced in relation to section 36(1). They are based on the information being subject to legal advice privilege. As indicated above, the Commissioner cannot accept that this document is a privileged communication. It is conceivable that there might be other public interest reasons for withholding this information, but the Commissioner cannot identify any on the basis of the arguments the Council has presented in this case.
79. In addition, as with the section 36(1) exemption, the Commissioner is unable to reach this conclusion in relation to the information in documents 5, 47, 48 and 126. Effectively, this has been disclosed already, either in communications with Mr Ward as a party in the planning application, and/or to the wider public in documents published on the Council's website.
80. As the substance of that legal advice is inextricably linked to that information which has already been disclosed by the means described above, the Commissioner considers that confidentiality has been lost, thereby diminishing very substantially any public interest in withholding the information.
81. The Commissioner therefore finds the Council was incorrect to withhold these communications under regulation 10(4)(e) of the EIRs.

Compliance required – FOISA and EIRs

82. The Council is required to disclose to Mr Ward the information in documents 83, 86, 89, 91 and 92. Mr Ward has stated that he does not object to the redaction of personal data from these documents, and this should be done before disclosure.
83. The Council is not required to disclose to Mr Ward the information in documents 5, 47, 48 and 126. Having considered this information, she is not satisfied that it contains anything of substance which has not been conveyed to Mr Ward already.

Handling issues

84. The Commissioner has some concerns about the Council's approach in relation to this application and the original request. While these concerns do not amount to breaches of FOISA or the EIRs, the Council's actions had the effect of delaying the investigation, adding costs to both her office and the Council in meeting statutory duties and, ultimately, in

delaying the disclosure of information to which Mr Ward is entitled. She would ask the Council to reflect on the following points.

- (i) At the start of the investigation, the Council did not provide a schedule of documents or equivalent, when it sent the withheld information to her office, despite being asked to do so. This resulted in there being insufficient information about what was being withheld for what reason. The investigator had to seek clarification of the Council's position on more than one occasion. At the second attempt, not only did the Council provide the information it was withholding under section 36(1) of FOISA, but also a large amount of unnecessary additional information which took extra time and resource to consider.
- (ii) It is important that the appropriate legislation is used when considering requests. The Commissioner is concerned that the Council did not, apparently, identify the withheld information as environmental and, even when given the opportunity to consider Mr Ward's request under the EIRs, it chose not to do so. The impact of this was again that the Commissioner had to consider Mr Ward's application both in terms of FOISA and the EIRs, resulting in considerable extra time and work for both her office and the Council.

85. The Commissioner encourages the Council to reflect on whether its resources and procedures fully support efficient handling of information requests.

Decision

The Commissioner finds that Shetland Islands Council (the Council) partially complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) and with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by Mr Ward.

The Commissioner finds that the Council complied with Part 1 of FOISA and with the EIRs by:

- (i) correctly withholding some information under section 36(1) of FOISA, which it was also entitled to withhold under regulation 10(4)(e) of the EIRs.
- (ii) taking adequate steps to identify and locate all of the information it held and which fell within the scope of his request.

However, the Commissioner finds that the Council failed to comply with Part 1 of FOISA and with the EIRs by:

- (i) failing to identify the information Mr Ward requested as environmental information and respond under the EIRs, thereby failing to comply with regulation 5(1) of the EIRs.
- (ii) incorrectly withholding some information under section 36(1) of FOISA or under regulation 10(4)(e) of the EIRs.
- (iii) failing to identify the information in one document as falling within the scope of Mr Ward's request, thereby failing to comply with section 1(1) of FOISA and with regulation 5(1) of the EIRs.

The Commissioner therefore requires the Council to provide Mr Ward with further information, namely that in documents 83, 86, 89, 91 and 92 (with any personal data redacted) by

1 February 2016.

Appeal

Should either Mr Ward or Shetland Islands 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 Shetland Islands Council (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.

Rosemary Agnew
Scottish Information Commissioner

17 December 2015

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.

...

(4) The information to be given by the authority is that held by it at the time the request is received, except that, subject to subsection (5), any amendment or deletion which would have been made, regardless of the receipt of the request, between that time and the time it gives the information may be made before the information is given.

...

(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.

...

36 Confidentiality

(1) Information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings is exempt information.

...

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.

...

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

...

- (e) the request involves making available internal communications.

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