

# Decision Notice



Decision 208/2013 Mr Ernest Hurry and the Scottish Ministers

Names and addresses of planning application correspondents

Reference No: 201301654

Decision Date: 16 September 2013

[www.itspublicknowledge.info](http://www.itspublicknowledge.info)

**Rosemary Agnew**

Scottish Information Commissioner

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## Summary

On 9 October 2012, Mr Hurry asked Marine Scotland, a Division of the Scottish Ministers (the Ministers), for a copy of all public representations received in relation to two wind farm planning applications. The information was disclosed to Mr Hurry with the names and addresses of the correspondents redacted under regulation 11(2) of the EIRs, on the grounds that it was the personal data of the correspondents and its disclosure would breach the first data protection principle. Following an investigation, during which the Ministers disclosed information relating to the corporate bodies which had made representations, the Commissioner accepted this reasoning in relation to the remaining withheld information.

## Relevant statutory provisions

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

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

The full text of each of the statutory provisions cited above is reproduced in the Appendix to this decision. The Appendix forms part of this decision.

## Background

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1. On 9 October 2012, Mr Hurry made a verbal information request to the Ministers, asking for a copy of all the public representations relating to the Beatrice Offshore Wind Farm and the Aberdeen Offshore Wind Farm.
2. The Ministers responded on 5 December 2012, disclosing the information with the personal details of the correspondents redacted under regulations 10(5)(f) and 11(2) of the EIRs. This information was also published on the Scottish Government's website.



3. On 25 January 2013, Mr Hurry wrote to the Ministers requesting a review of its decision. Referring to the practice of local planning authorities, he saw no reason why the names and addresses of the correspondents should be withheld.
4. The Ministers notified Mr Hurry of the outcome of their review on 22 February 2013. They upheld their reliance on regulation 11(2) of the EIRs.
5. On 17 July 2013, Mr Hurry wrote to the Commissioner, stating that he was dissatisfied with the outcome of the Ministers' review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA. By virtue of regulation 17 of the EIRs, Part 4 of FOISA applies to the enforcement of the EIRs as it applies to the enforcement of FOISA, subject to certain specified modifications.
6. The application was validated by establishing that Mr Hurry made a request for information to a Scottish public authority and applied to the Commissioner for a decision only after asking the authority to review its response to that request. The case was then allocated to an investigating officer.

## Investigation

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7. The investigating officer contacted the Ministers, giving them written notice of the application and an opportunity to provide comments on it (as required by section 49(3)(a) of FOISA). They were asked to justify their reliance on regulation 11(2) of the EIRs.
8. The Ministers provided submissions and, in the course of the investigation, disclosed to Mr Hurry the names and addresses relating to those representations made by companies and organisations, as opposed to by private individuals.
9. Mr Hurry also provided submissions. In response to the Ministers' disclosure of the corporate information to him, he confirmed that he wished the Commissioner's investigation to continue and focus on the remaining information still withheld from him. He did not dispute the Ministers' application of the EIRs (and indeed his request, as a verbal request, could only be valid under the EIRs).
10. During the investigation, Mr Hurry also expressed concern about the format in which the information had been provided to him. This was not raised in his information request, request for review or application to the Commissioner, and therefore cannot be considered by the Commissioner in this decision.



## Commissioner's analysis and findings

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

### Regulation 11(2) of the EIRs

12. The Ministers submitted that the information was excepted from being made available under regulation 11(2) of the EIRs. Regulation 11(2) excepts personal data of which the applicant is not the data subject, where either "the first condition" (set out in regulation 11(3)) or "the second condition" (set out in regulation 11(4)) applies.
13. The Ministers' arguments relate to those parts of the first condition which apply where making the information available would contravene the data protection principles. In order for a Scottish public authority to rely on this exception, it must show (i) that the information is personal data for the purposes of the DPA, and (ii) that making it available would contravene at least one of the data protection principles laid down in the DPA. In this case, the Ministers argued that the first data protection principle would be contravened.

### *Is the withheld information personal data?*

14. "Personal data" are defined in section 1(1) of the DPA as:  
*data which relate to a living individual who can be identified (a) from those data, or (b) from those data and other information which is in the possession of, or is likely to come into the 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.*
15. The Ministers submitted that the withheld information (the names, addresses, telephone numbers and email addresses of the individuals making representations) clearly identified the individuals and provided an insight into the opinions of those individuals by identifying them as having made the comments they submitted. As such, the Ministers submitted, the information was personal data.
16. In this case, the Commissioner is satisfied that the withheld information is the personal data of the individuals in question. The information identifies the individuals and, in the context in which it appears, the Commissioner is satisfied that it relates to those individuals. In that context, the information can be considered to be biographical about, and to focus on, them.
17. The first data protection principle states that the processing of personal data (in this case, making those data available in response to a request made under the EIRs) must be fair and lawful and, in particular, that personal data shall not be processed unless at least one of the conditions in Schedule 2 (to the DPA) is met. In the case of sensitive personal data, at least one of the conditions in Schedule 3 to the DPA must also be met.



18. The Commissioner has considered the definition of sensitive personal data set out in section 2 of the DPA and does not consider any of the withheld information to be sensitive personal data.
19. There are three separate aspects to the first data protection principle: (i) fairness, (ii) lawfulness and (iii) the conditions in the schedules. However, these three aspects are interlinked. For example, if there is a specific condition which permits the personal data to be made available, it is likely that disclosure will also be fair and lawful.
20. The Commissioner will now go on to consider whether there are any conditions in Schedule 2 to the DPA which would permit the personal data to be made available. If any of these conditions can be met, she must then consider whether the disclosure of these personal data would also be fair and lawful.

*Can any of the conditions in Schedule 2 be met?*

21. The Ministers considered that only condition 6 in Schedule 2 could potentially be applicable in this instance. The Commissioner has considered all of the conditions in Schedule 2 and agrees that condition 6 is the only one which might be considered relevant in this case.
22. Condition 6 allows personal data to be processed if the processing is necessary for the purposes of legitimate interests pursued by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject (i.e. the individual(s) to whom the data relate). The processing in this case would be making the data available in response to Mr Hurry's request.
23. There are, therefore, a number of different tests which must be satisfied before condition 6 can be met. These are:
  - Is Mr Hurry pursuing a legitimate interest or interests?
  - If yes, is the processing involved necessary for the purposes of those interests? In other words, is the processing proportionate as a means and fairly balanced as to its ends, or could these legitimate interests be achieved by means which interfere less with the privacy of the data subject(s)?
  - Even if the processing is necessary for the purposes of Mr Hurry's legitimate interests, is the processing nevertheless unwarranted in this case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject(s)?



*Is Mr Hurry pursuing a legitimate interest or interests?*

24. Mr Hurry believed the public had a right to know who was promoting or objecting to these windfarms, given the principles of transparency underpinned by the Aarhus Convention and the EIRs. In relation to objectors, he highlighted the importance of those with a common interest being able to make contact and form alliances. He also highlighted the amounts of public subsidy he understood to be involved in such developments, and contrasted the Ministers' practice here with the general practice of local planning authorities in making such information available.
25. The Ministers accepted that Mr Hurry might have a legitimate interest in transparency in relation to the wind farm planning process, but submitted that this was met by the information already disclosed to him.
26. Having considered the submissions made by both Mr Hurry and the Ministers, and taking into account the clear legitimate interest in public participation in the planning system, the Commissioner accepts that Mr Hurry is pursuing a legitimate interest in relation to the withheld personal data.

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

27. The Commissioner must now consider whether disclosure is necessary for Mr Hurry's legitimate interests. In doing so, she must consider whether these interests might reasonably be met by any alternative means.
28. The Commissioner is aware that copies of the representations received by the Ministers have been provided to the Councils covering those areas of Scotland closest to the proposed wind farm locations. On asking the Ministers about this, they confirmed to the Commissioner that the copies provided to the Councils were in the same redacted format as provided to Mr Hurry. Consequently, even assuming they were required to make that information available under the EIRs, it would not include the withheld personal data.
29. The Commissioner recognises that Mr Hurry is unhappy about the lack of full, unredacted copies being provided to the Councils, but would emphasise that it is outwith her remit to investigate whether or not they should have been provided with such copies.
30. Having accepted a legitimate interest in relation to the withheld personal data, the Commissioner can identify no means of meeting that interest other than by disclosure of the information by the Ministers. In the circumstances, she accepts that making the information available is necessary for that legitimate interest.





*Is the processing unwarranted by reason of prejudice to the rights and freedoms or legitimate interests of the data subject(s)?*

31. The Commissioner must now consider whether disclosure would nevertheless cause unwarranted prejudice to the rights, freedoms or legitimate interests of the data subjects concerned. As noted above, this will involve a balancing exercise between the legitimate interests of Mr Hurry and those of the data subjects. Only if the legitimate interests of Mr Hurry outweigh those of the data subjects can the information be disclosed without breaching the first data protection principle. There is no presumption in favour of making personal data available under the EIRs.
32. The Commissioner has issued guidance on the interpretation of the exceptions in regulation 11<sup>1</sup>. This identifies a number of factors which should be taken into account in carrying out this balancing exercise. These include:
  - whether the information relates to the individual's public life (i.e. their work as a public official or employee) or their private life (i.e. their home, family, social life or finances)
  - the potential harm or distress that may be caused by the disclosure
  - whether the individual has objected to the disclosure
  - the reasonable expectations of the individuals as to whether the information would be disclosed.
33. The Ministers submitted that the individuals providing the representations in this case would have no expectation that their names and addresses would be placed in the public domain. The Ministers explained that the Scottish Government's website<sup>2</sup> explicitly states that where representations are released, identifying personal data will be redacted.
34. The Ministers went on to state that the individuals had provided representations which in many cases were free and frank in nature on a sensitive subject. Given that they were not aware that in doing so their names and addresses could end up in the public domain, it was the view of the Ministers that releasing that personal data would be unwarranted. The Ministers stated that disclosure could allow any third party to contact the correspondents and, whether those contacting them agreed with or opposed the representations made by the correspondents, such approaches could be unwelcome.
35. With regard to consent being obtained from the correspondents, as Mr Hurry had suggested, the Ministers submitted this would be impractical, given that around 650 responses had been received.

### **The Commissioner's findings**

36. In reaching a finding the Commissioner has taken account of the submissions made by both the Ministers and Mr Hurry.

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

<sup>2</sup> <http://www.scotland.gov.uk/Topics/marine/Licensing/marine/support>



37. She has considered the context in which the individuals concerned made their representations (i.e. as private citizens, and not as representatives of companies or organisations). In the circumstances, she accepts that it would be impractical for the Ministers to contact all of the data subjects to seek their views on disclosure.
38. The Commissioner is aware that there is a great deal of public interest in the construction of wind farms and that the subject is a sensitive and emotive one. She accepts that some of the people with an interest in the outcome of the development process would find it helpful to be able to contact others who share that interest. On the other hand, she accepts that others might be caused some discomfort, at least, by particular views being attributed to them publicly. In this context, much will depend on the individuals' expectation, which the Commissioner will go on to consider.
39. She accepts Mr Hurry's assertion that names and addresses relating to planning applications in their area have been published by some local planning authorities. However, she must consider the expectations of data subjects in the light of how the specific public authority concerned (i.e. the Ministers) has stated it will treat their personal data. In the case of local planning authorities, it appears that those making representations are generally made aware (for example, on the authority's website) that their details will be published or otherwise made available.
40. In the circumstances, the Commissioner takes the view that the information being withheld is information which the correspondents would not reasonably expect to be made available publicly. In reaching this conclusion, she must attach particular weight to the explicit assurance given on the Scottish Government website in relation to the information which will be made available.
41. On balance, the Commissioner does not accept that Mr Hurry's legitimate interests in this case are sufficient to outweigh the prejudice that would be caused to the rights, freedoms or legitimate interests of the data subjects by making the information available. In the circumstances, the Commissioner finds that such prejudice would be unwarranted in this case. The Commissioner is therefore satisfied that condition 6 in Schedule 2 to the DPA cannot be met in this case.
42. Having concluded that making the withheld information available would lead to unwarranted prejudice, as described above, to the rights, freedoms or legitimate interests of the data subjects, the Commissioner must also conclude that such processing would be unfair. In the absence of a condition permitting disclosure, she must also find that processing to be unlawful. In all the circumstances, therefore, the Commissioner finds that making the information available would breach the first data protection principle. Consequently, she finds that the information was properly withheld under regulation 11(2) of the EIRs.





## **DECISION**

The Commissioner finds that the Scottish Ministers complied with the Environmental Information (Scotland) Regulations 2004 in responding to the information request made by Mr Hurry.

## **Appeal**

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Should either Mr Hurry or the Ministers 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**  
**16 September 2013**



## Appendix

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### Relevant statutory provisions

#### The Environmental Information (Scotland) Regulations 2004

##### 2 Interpretation

(1) In these Regulations -

...

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

(a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;

...

(c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in paragraphs (a) and (b) as well as measures or activities designed to protect those elements;

...

##### 5 Duty to make available environmental information on request

(1) Subject to paragraph (2), a Scottish public authority that holds environmental information shall make it available when requested to do so by any applicant.

(2) The duty under paragraph (1)-

...

(b) is subject to regulations 6 to 12.

...



## 10 Exceptions from duty to make environmental information available

...

- (3) Where the environmental information requested includes personal data, the authority shall not make those personal data available otherwise than in accordance with regulation 11.

...

## 11 Personal data

...

- (2) To the extent that environmental information requested includes personal data of which the applicant is not the data subject and in relation to which either the first or second condition set out in paragraphs (3) and (4) is satisfied, a Scottish public authority shall not make the personal data available.

- (3) The first condition is-

- (a) in a case where the information falls within paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998 that making the information available otherwise than under these Regulations would contravene-

- (i) any of the data protection principles;

...

- (b) in any other case, that making the information available otherwise than under these Regulations would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.

...



## Data Protection Act 1998

### 1 Basic interpretative provisions

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

...

"personal data" means data which relate to a living individual who can be identified -

(a) from those data, or

(b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller, and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual;

...

## Schedule 1 - The data protection principles

### Part I - the principles

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

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

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

...

### Schedule 2 - Conditions relevant for purposes of the first principle: processing of any personal data

...

6. (1) The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.

...

Decision 208/2013  
Mr Ernest Hurry  
and the Scottish Ministers

