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# Decision Notice 313/2025

## Information about planning decision

Authority: Stirling Council

Case Ref: 202500551

### Summary

The Applicants asked the Authority for information about a planning application. The Authority provided the Applicants with some information and withheld other information under various exceptions in the EIRs. The Commissioner investigated and found that the Authority was entitled to withhold most of the information it had withheld, but that it had incorrectly withheld some information. He required the Authority to disclose the incorrectly withheld information.

### Relevant statutory provisions

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

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (definition of “the Act”, “applicant”, “the Commissioner” “data protection principles” “data subject” and “environmental information”) (Interpretation); 5(1) (Duty to make environmental information available on request); 10(3), (4)(e) and (5)(d) (exceptions from duty to make environmental information available); 11(1) and (2) (Personal information); 17(1), (2)(a),(b) and (f) (Enforcement and appeal provisions).

United Kingdom General Data Protection Regulation (the UK GDPR) Articles 5(1)(a) and (b) (Principles relating to processing of personal data) and 6(1)(f) (Lawfulness of processing).

Data Protection Act 2018 (the DPA 2018) sections 3(2), (3), (4)(d), (5), (10) and (14)(a), (c) and (d) (Terms relating to the processing of personal data).

## Background

1. On 10 December 2024, the Applicants made the following request for information to the Authority:
  - (i) "All documentation leading to the decision on [a specific planning application]. This includes formal and informally held information such as handwritten notes, meeting notes, emails, briefing papers, instructions, correspondence and other information held by any officers in the [Authority] and by Elected Members and Community Councillors. This includes information in relation to the rationale for the decision, consideration of objections and any officer or elected member surgery /meeting discussions or lobbying regarding this application as well as agreed outcomes from such meetings. **This excludes information already made available to the public and to the applicant.**
  - (ii) All documentation (formal and informal as above) in relation to the Appeal (which was lodged in May 2024) held by officers, elected members and members of the Local Review Body (LRB). This includes all documentation in relation to the internal structure and process of the review - including: terms of reference for review and how this was discharged in this instance; content of the review and view of the LRB prior to the meeting on 9 December 2024; the consideration of appeal submission provided to the LRB. This includes briefing papers, agenda planning information, meeting minutes and notes on discussions amongst the LRB, other elected members, community councillors and any officers of the [Authority]. **This excludes information already made available to the public and the appellant.**
  - (iii) Any other information, not currently available publicly, related to either the original application or to the Appeal."
2. The Authority responded on 10 January 2025. It informed the Applicants that it was dealing with their request under the EIRs and that it would require additional time to respond to it, as permitted by regulation 7(1) of the EIRs.
3. The Authority responded on 7 February 2025. It disclosed some information to the Applicants and withheld other information under the exceptions in regulations 11(2) and 10(5)(d) of the EIRs, applying regulation 6(1)(b) to information it considered to be publicly available and easily accessible to the Applicant. It also informed Applicants, in terms of regulation 10(4)(a) of the EIRs, that it did not hold any briefing papers or the "content of the review and view of the LRB prior to the meeting on 9 December 2024".
4. On 13 February 2025, the Applicants wrote to the Authority requesting a review of the decision. They stated that they were dissatisfied with the Authority's decision because they considered the Authority held further information and that information had been inappropriately withheld from them.
5. The Authority notified the Applicants of the outcome of its review on 13 March 2025. It advised the Applicants that it had identified further information. It disclosed some of this information to the Applicants and it continued to withhold other information under the exceptions in regulations 10(5)(d) and 11(2) of the EIRs.
6. On 14 April 2025, the Applicants 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 Applicants stated that they were dissatisfied with the outcome of the

Authority's review because they were not satisfied that all the information had been identified, they did not consider that the exemptions cited by the Authority applied and they believed that the public interest favoured disclosure of the withheld information.

## **Investigation**

7. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
8. On 1 May 2025, the Authority was notified in writing that the Applicants had made a valid application. The Authority was asked to send the Commissioner the information withheld from the Applicants. The Authority provided the information, and the case was subsequently 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 Authority was invited to comment on this application and to answer specific questions. These related to the Authority's searches and the applicability of the exemptions.

## **Commissioner's analysis and findings**

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

### ***Application of the EIRs***

11. Having considered the withheld material and the terms of the request, the Commissioner accepts the decision of the Authority to deal with the request under the EIRs rather than under FOISA.
12. The Commissioner is satisfied that the information covered by the request is environmental information, as defined in regulation 2(1) of the EIRs. He would also note that he can see no detriment to the Applicants by considering their request under the EIRs rather than FOISA, nor have the Applicants disputed the Authority's decision to handle their request under the EIRs.

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

13. Regulation 5(1) of the EIRs (subject to the various qualifications contained in regulations 6 to 12) requires a Scottish public authority which holds environmental information to make it available when requested to do so by any applicant. This obligation relates to the information held by an authority when it receives a request. Under the EIRs, a public authority may refuse to make environmental information available if one or more of the exceptions in regulation 10 apply.
14. The standard of proof to determine whether a Scottish public authority holds information is the civil standard of the balance of probabilities. In determining where the balance lies, the Commissioner considers the scope, quality, thoroughness and results of the searches carried out by the public authority.
15. The Commissioner also considers, where appropriate, any reason offered by the public authority to explain why it does not hold the information. While it may be relevant as part of

this exercise to explore expectations as to what information the authority should hold, ultimately the Commissioner's role is to determine what relevant information is actually held by the public authority (or was, at the time it received the request).

#### *Searches*

16. The Authority explained that relevant departments were asked to carry out searches which included officers within Democratic, Governance, Legal, Planning and the Community Council Team.
17. The search terms used by the Authority in these searches were variations of the application number (which would produce a comprehensive result in the event the exact number was not used in records), the name of the applicant (again using variations in case the exact name was not used) and the name of the location of the application. The Authority also used variations of these search terms to identify occasions where full or exact names were not used.
18. The Commissioner has carefully considered the submissions from both parties, together with the information identified and the supporting evidence and explanation of searches. Having done so, he is satisfied that the searches carried out by the Authority would have been capable of identifying any relevant information.
19. The Commissioner therefore concludes, on balance, that the Authority does not (and did not, on receipt of the request) hold further information falling within the scope of the request, beyond that already identified by these searches.
20. While the Applicants believed and expected more information to be held by the Authority, the Commissioner is satisfied that this was not the case. He has no locus, in this context, to determine what information an authority ought to record, or how: he is concerned with what information the authority actually holds.

#### *The Authority's change of position*

21. During the investigation, the Authority indicated that it now considered some information previously withheld under the exceptions in regulations 10(5)(d) and 11(2) of the EIRs could be disclosed.
22. For the majority of this information, the Commissioner did not receive an explanation of why the Authority considered the information was appropriately withheld at the time of review. However, for some of the personal information, the Authority explained that it was unaware that the names of attendees of the Local Review Body were published. Having had this drawn to their attention, the Authority now considered that this information, in a different format, could be disclosed.
23. The Commissioner recognises that, given the range of material published by the Authority, confirming what material has and has not been published can be challenging. However, given this is information that the Authority does publish, he is not satisfied that the Authority was entitled to rely upon the exception in regulation 11(2) of the EIRs to withhold it.
24. In the absence of any explanation of the change in circumstances that led to a different approach, the Commissioner must also find that the Authority was not entitled to rely upon the exception in regulation 10(5)(d) of the EIRs to withhold the other information it has now reassessed. He must find that the Authority failed to comply with regulation 5(1) of the EIRs, in this respect.

25. The Commissioner requires the Authority to disclose this information to the Applicants.

***Regulation 10(5)(d) of the EIRs***

26. The exception in regulation 10(5)(d) of the EIRs provides that a Scottish public authority may refuse to make environmental information available to the extent that its disclosure would, or would be likely to, prejudice substantially the confidentiality of proceedings of any public authority where such confidentiality is provided for by law.

27. As with all exceptions contained within regulation 10 of the EIRs, a Scottish public authority applying this exception must interpret the exception in a restrictive way (regulation 10(2)(a)) and apply a presumption in favour of disclosure (regulation 10(2)(b)). Even where the exception applies, the information must be disclosed unless, in all the circumstances, the public interest in making the information available is outweighed by that in maintaining the exception (regulation 10(1)(b) of the EIRs).

28. In [The Aarhus Convention: an implementation guide](#)<sup>1</sup>, the Economic Commission for Europe (the United Nations agency responsible for the Convention the EIRs are designed to implement) notes that the Convention does not comprehensively define "proceedings of public authorities". It suggests that one interpretation is that these may be proceedings concerning the internal operations of a public authority rather than substantive proceedings conducted by the public authority in its area of competence.

29. The first matter to consider is whether the information relates to proceedings of the Authority, the confidentiality of which is protected by law. The Commissioner must then consider whether disclosure of the information would, or would be likely to, prejudice substantially the confidentiality of those proceedings.

30. The Commissioner has previously held, in [Decision 156/2020](#)<sup>2</sup>, that seeking and obtaining legal advice can constitute proceedings, in which a claim of confidentiality can be maintained, for the purposes of the exception in regulation 10(5)(d) of the EIRs.

31. Having reviewed the withheld information, the Commissioner accepts that the majority of it comprises communications with, or notes by, the Authority's legal advisors acting in their capacity as legal advisors and, therefore, constitutes legal advice. In the circumstances, he is satisfied that the information that constitutes legal advice was communicated in circumstances importing an obligation of confidentiality.

32. It is not sufficient, of course, for the information to be confidential for the exception in regulation 10(5)(d) of the EIRs to apply. The Commissioner must also consider whether disclosing the legal advice would, or would be likely to, prejudice substantially the confidentiality of the proceedings.

33. The test of substantial prejudice is a high one, requiring a real risk of actual, significant harm. 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.

34. Given the inherently confidential nature of material subject to legal professional privilege and the recent nature of the decision to which the advice relates, the Commissioner accepts that making this information available would, or would be likely to, prejudice substantially the

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<sup>1</sup> <https://unece.org/environment-policy/publications/aarhus-convention-implementation-guide-second-edition>

<sup>2</sup> <https://www.foi.scot/decision-1562020>

confidentiality of the Authority's proceedings. He is therefore satisfied that the exception in regulation 10(5)(d) of the EIRs was correctly applied to this information.

35. However, there is a small amount of information to which the Commissioner is not satisfied legal professional privilege applies. This information consists of purely stylistic and grammatical amendments to a draft report, comments from individuals who are not legal advisers and the underlying draft report itself.
36. While the Commissioner agrees that the process of sharing a draft report with a legal adviser (acting in their role as a legal adviser) attracts legal advice privilege, he does not consider that this necessarily means the draft report in question inherently attracts privilege.
37. While the scope of legal advice privilege is broad, the Commissioner is also not satisfied that all the purely grammatical and stylistic amendments to the document constitute legal advice. In this case, these amendments do not substantively relate to the legal rights, liabilities, obligations or remedies of the Authority and instead simply provide the writing skills to be expected of any member of the Authority's staff at the appropriate grade.
38. For the avoidance of doubt, the Commissioner considers that there may be cases where purely grammatical or stylistic amendments will constitute legal advice. However, he is not satisfied that the amendments in this case sufficiently relate to the specifically legal context of this document.
39. In any event, notwithstanding this view, even if this material fell within the outer boundaries of legal advice privilege, disclosure of this advice would not substantially prejudice the confidentiality of proceedings given its peripheral relationship to specifically legal questions.
40. The Commissioner therefore does not agree that this information was correctly withheld under the exception in regulation 10(5)(d) of the EIRs. (The Authority also applied the exception in regulation 10(4)(e) of the EIRs to this information. He will consider the application of this exception later in his decision notice.)

#### ***The public interest test – regulation 10(5)(d)***

41. The Commissioner must now consider whether the public interest in making the information correctly withheld under regulation 10(5)(d) available was outweighed by the public interest in maintaining that exception.

#### ***The Authority's submissions***

42. The Authority submitted that disclosure of the withheld information in question would adversely affect its ability to receive and consider legal advice in confidence, which is essential for fair and effective decision making.
43. The Authority argued that legal advice given to the public authority by its solicitors required to be protected by legal professional privilege, as did legal advice pertinent to internal discussions and reports before a formal decision was made.
44. The Authority explained that, while this advice was prepared in the context of a specific application, it was relevant to the process more broadly. It therefore considered that disclosure of this information would prejudice the process of giving advice on this matter but might also prejudice the advice when applied to every other case that the policy applied to.
45. The Authority further explained that planning decision making requires a thorough process of consideration before a decision can be made. It requires balancing many considerations, and

stakeholders' opinions. The weight to apply to each consideration may change in the decision maker's mind as they draft the report.

46. With the great public scrutiny that planning officers are under daily, the Authority argued that publications of drafts (in general and in this case) would undermine the process of an officer arriving at a conclusion on the determination of their applications, in taking advice, and indeed being properly supervised by senior officers. It also stressed that only the final decision has any legal significance.

*The Applicants' submissions*

47. The Applicants argued the public interest favoured disclosure as disclosure would provide transparency and accountability.
48. More specifically, the Applicants considered that their planning application was handled improperly, that they may have been excluded from key parts of the process and that there may have been "lobbying or political influence". They also suggested that they had professional advice indicating the issues they had with how their planning application was handled were not trivial or unfounded.

*The Commissioner's view*

49. The Commissioner has considered the submissions from both parties on the public interest test, in relation to the withheld information itself.
50. 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.
51. 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.
52. The Commissioner recognises the public interest in transparency and accountability in the decision-making processes of public authorities, and in understanding how particular decisions are reached. He acknowledges that disclosure of the information would assist such accountability and understanding.
53. However, the Commissioner also accepts that there is a considerable public interest in maintaining confidentiality of communications between legal adviser and client. In such circumstances, the Authority should be able to receive, obtain and consider legal advice in confidence, to ensure comprehensive advice is given and decision making is thus fully informed.
54. Having considered the public interest arguments advanced on both sides, the Commissioner is not satisfied that the public interest in making this particular information available outweighs the public interest in maintaining the confidentiality of communications between legal adviser and client. It is in the public interest that reasonable expectations of confidentiality be maintained, and in particular that (where necessary) an authority can communicate with its legal advisers freely and frankly in confidence, with a view to performing its statutory functions effectively.
55. In all the circumstances, therefore, the Commissioner concludes that the strong public interest in maintaining the exception outweighs such public interest as exists in making the

information available. He is, therefore, satisfied that the Authority was entitled to withhold the information requested under the exception in regulation 10(5)(d) of the EIRs.

#### ***Regulation 10(4)(e) – internal communications***

56. For the information that the Commissioner found was not appropriately withheld under the exception in regulation 10(5)(d) of the EIRs, the Authority indicated it would wish to withhold this information under the exception in regulation 10(4)(e) of the EIRs.
57. This information consists of draft documents and comments on the draft documents from a member of the Authority's staff who is not a legal adviser.
58. Regulation 10(4)(e) of the EIRs provides that a Scottish public authority may refuse to make environmental information available to the extent that the request involves making available internal communications.
59. In order for information to fall within the scope of this exception, it need only be established that the information is an internal communication.
60. As with all of the exceptions under regulation 10 of the EIRs, a Scottish public authority applying this exception must interpret it in a restrictive way and apply a presumption in favour of disclosure (regulation 10(2)). Even where the exception applies, the information must be disclosed unless, in all the circumstances, the public interest in making the information available is outweighed by that in maintaining the exception (regulation 10(1)(b)).
61. Having considered the withheld information under this exception, the Commissioner is satisfied that this information forms internal communications and is therefore subject to the exception in regulation 10(4)(e) of the EIRs. The Applicants have not suggested that any of the withheld information is other than an internal communication.
62. As the exception in regulation 10(4)(e) of the EIRs is subject to the public interest test in regulation 10(1)(b), the Commissioner must, therefore, go on to consider whether, in all of the circumstances of this case, the public interest in making the information available is outweighed by the public interest in maintaining the exception.

#### ***Public interest test – regulation 10(4)(e)***

##### *The Authority's submissions*

63. The Authority agreed that there was some public interest in the disclosure of draft documents as this would provide an insight into how the decision had been “crafted.”
64. The Authority argued that the release of draft reports into the public domain could result in officers being less willing to be full and frank with their internal communications. Officers and the planning authority rely on draft reports and internal communications to evaluate, communicate and make informed decisions, and releasing these to the general public would have a detrimental effect on the decision-making process.
65. The Authority also argued that draft reports, when not finalised or agreed, do not represent the final view of the planning authority and have no legal significance.

##### *The Applicants' submissions*

66. The Applicants submitted that the planning system in Scotland is governed by principles of transparency, fairness, and inclusive engagement as well as predictable and transparent decision-making. They did not consider that withholding internal documents was compatible with these requirements.

67. The Applicants also noted that the decision-making process was complete. They argued that if the decision had been made properly and without undue influence, it should no longer be sensitive to external pressure.

*The Commissioner's view*

68. The Commissioner has considered the submissions from both parties on the public interest test, in relation to the withheld information itself.

69. As stated above, 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.

70. The Commissioner notes the Applicants' view that the decision on this case has now been made. However, he recognises that the advice on this case may (as the Authority has indicated) have wider applicability on other cases where the same policy is applied.

71. The Commissioner also considers that there is a broader public interest in protecting the ability of the Authority to receive full and frank advice in reaching planning decisions, irrespective of the particular decision or policy in question.

72. The Commissioner agrees that there is significant public interest in the transparency of the planning system. However, as highlighted above, the withheld information consists of grammatical and stylistic amendments and specific comments on a draft document. The Commissioner considers that this information will provide only a limited insight into the substantive issues under consideration. In the circumstances, he considers that there is, by extension, a limited public interest in disclosure of this information.

73. 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

*Regulation 11(1) – Personal information*

74. Regulation 10(3) of the EIRs makes it clear that a Scottish public authority can only make personal data in environmental information available in accordance with regulation 11.

75. Regulation 11(1) prohibits public authorities from making an applicant's own personal data available in response to an EIRs request. This is because individuals have a separate right to make a request for their own personal data under the UK GDPR (or, as appropriate, under the DPA 2018). This route is more appropriate for individuals accessing their own personal data, as data disclosed in response to a Subject Access Request (SAR) is made available to the data subject: any data disclosed under the EIRs is placed into the public domain.

76. The Authority withheld a small amount of information under the exception in regulation 11(2) of the EIRs that referred to one of the Applicants. In response to a question from the Commissioner during his investigation, the Authority agreed that this information was the personal information of the Applicants.

77. The Authority also advised that, as this information had been provided by a representative of the Applicants, and had been disclosed elsewhere, it considered that it should not have redacted this information.

78. While the Commissioner notes the Authority's view that this information should not have been withheld, as it is the personal data of the Applicants, the exception in regulation 11(1) of

the EIRs applies to this information. As this exception is not subject to the public interest test, the Commissioner must find that this information should have been withheld under regulation 11(1) of the EIRs.

79. However, the Commissioner must find that the Authority failed to comply with the EIRs by wrongly relying on the exception in regulation 11(2) of the EIRs to withhold this information.
80. Given the Authority's view that this information does not need to be withheld, the Commissioner recommends that the Authority considers whether it would be appropriate to disclose this information to the Applicants outwith the EIRs.

#### ***Regulation 11(2) – Personal information***

81. As stated above, 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.
82. Regulation 11(2) provides that personal data shall not be made available where the applicant is not the data subject and other specified conditions apply. These include that disclosure would contravene any of the data protection principles in the UK GDPR or DPA 2018 (regulation 11(3A)(a)).

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

83. "Personal data" are defined in section 3(2) of the DPA 2018 as "any information relating to an identified or identifiable individual". Section 3(3) of the DPA 2018 defines "identifiable living individual" as a living individual who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, or an online identifier, or one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
84. Information will "relate to" a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them, or has them as its main focus. An individual is "identified" or "identifiable" if it is possible to distinguish them from other individuals.
85. Having considered the withheld information, the Commissioner notes that it consists of names, contact details, working patterns and a comment reflecting the viewpoint of a member of the public. He therefore accepts that the withheld information is personal data as it relates to identified (or identifiable) individuals and is satisfied that the withheld information in question is personal data in terms of section 3(2) of the DPA 2018.

#### *Would disclosure contravene one of the data protection principles?*

86. Article 5(1)(a) of the UK GDPR requires personal data to be processed "lawfully, fairly and in a transparent manner in relation to the data subject."
87. The definition of "processing" is wide and includes (section 3(4)(d) of the DPA 2018) "disclosure by transmission, dissemination or otherwise making available". For the purposes of the EIRs, personal data are processed when made available in response to a request.
88. This means that the personal data can only be made available if doing so would be both lawful (i.e. it would meet one of the conditions for lawful processing in Article 6(1) of the UK GDPR) and fair.

*Lawful processing: Article 6(1)(f) of the UK GDPR*

89. The Commissioner will first consider if disclosure of the personal data would be lawful. In considering lawfulness, he must consider whether any of the conditions in Article 6 of the UK GDPR would allow the personal data to be disclosed.
90. The Commissioner considers condition (f) (legitimate interests) in Article 6(1) of the UK GDPR to be the only one which could potentially apply in the circumstances of this case.

*Condition (f): legitimate interests*

91. Condition (f) states that the processing will be lawful if it is necessary for the purposes of legitimate interests pursued by the data controller or a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require the protection of personal data.
92. Although Article 6 of the UK GDPR states that this condition cannot apply to processing carried out by a public authority in performance of its tasks, regulation 11(7) of the EIRs makes it clear that public authorities can rely on Article 6(1)(f) when responding to requests under the EIRs.
93. The tests which must be met before Article 6(1)(f) can apply are as follows:
  - (i) Do the Applicants have a legitimate interest in obtaining the personal data?
  - (ii) If so, would making the personal data available be necessary to achieve that legitimate interest?
  - (iii) Even if the processing would be necessary to achieve that legitimate interest, would that be overridden by the interests or fundamental rights and freedoms of the data subject?

*Do the Applicants have a legitimate interest in obtaining the personal data?*

94. The Applicants argued that they have a legitimate interest in understanding why the Authority had reached a decision that differed from the advice that the Applicants had received at pre-application stage.
95. While the Commissioner considers that none of the information withheld under the exception in regulation 11(2) of the EIRs directly relates to this point, he considers that most of the information has the potential to assist – to a limited extent – the Applicants in fully understanding the information already provided to them. He therefore accepts that the Applicants have a legitimate interest in some of the withheld information.
96. However, the Commissioner does not accept that the Applicants have a legitimate interest in the withheld information relating to working patterns of staff members of the Authority.

*Is disclosure of the personal data necessary to achieve those interests?*

97. Having accepted that the Applicants have a legitimate interest in the withheld personal data, the Commissioner must consider whether disclosure of the personal data is necessary to meet that legitimate interest.
98. "Necessary" means "reasonably" rather than "absolutely" or "strictly" necessary. When considering whether disclosure would be necessary, public authorities should consider whether the disclosure is proportionate as a means and fairly balanced as to the aims to be

achieved, or whether the Applicants' legitimate interests can be met by means which interfere less with the privacy of the data subject.

99. The Applicants considered this information to be necessary to assess whether the planning process was conducted in accordance with planning law, policy, and the principles of fairness and transparency.
100. As rehearsed above, the Commissioner considers that disclosure of the information withheld under the exception in regulation 11(2) of the EIRs would only provide the Applicants with limited additional insight. However, insofar as it would assist in understanding the other information provided, the Commissioner can identify no less restrictive means to provide this additional insight.
101. The Commissioner therefore accepts that disclosure of the information withheld under the exception in regulation 11(2) of the EIRs would be necessary in order to satisfy the Applicants' legitimate interests.

*Interests of the data subjects*

102. The Commissioner has acknowledged that disclosure of the information in question would be necessary to achieve the Applicants' legitimate interests. This must be balanced against the interests or fundamental rights and freedoms of the third parties. Only if the legitimate interests of the Applicants outweigh those of the data subjects could personal data be disclosed without breaching the first data protection principle.
103. The Commissioner's [guidance on regulation 11 of the EIRs](#)<sup>3</sup> notes some of the factors that should be taken into account in considering the interests of the data subjects and carrying out the balancing exercise. He makes it clear that, in line with Recital (47) of the UK GDPR, much will depend on the reasonable expectations of the data subjects and that these are some of the factors public authorities should consider:
  - (i) whether the information relates to an individual's public life (i.e. their work as a public official or employee) or their private life (e.g. their home, family, social life or finances)
  - (ii) the potential harm or distress that may be caused by the disclosure
  - (iii) whether an individual objected to the disclosure
104. The Applicants also considered that information related to public officials acting in their professional roles in decision-making processes, should not be considered exempt under personal data provisions. They went on to speculate that there had been political influence on the planning process that disclosure of personal data would reveal.
105. The Authority maintained that the withheld information in question should continue to be withheld and noted that only one of the staff members whose names had been redacted had a decision-making role.
106. The Commissioner has fully considered the submissions from the Authority and from the Applicant, together with the nature and content of the withheld information in question.
107. The Commissioner notes that some of staff members of the Authority in question are junior. While two staff members occupy more senior roles (i.e. decision-making and advice-giving roles) in the process, neither occupy roles of a level of seniority where there would be an

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<sup>3</sup> <https://www.foi.scot/sites/default/files/2022-04/EIRs%20Guidance%20Regualtion%202011%20Personal%20Data.pdf>

expectation that their personal data would routinely be disclosed in response to an information request.

108. In any event, while one staff member does have a decision-making role within the planning process, the ultimate decision was made by elected councillors. In the circumstances, the Commissioner therefore considers that all of the staff members in question have a reasonable expectation of privacy.
109. With regards the comment reflecting the viewpoint of a member of the public, the Commissioner notes that this is described as being an informal view. He is unaware of any reason to consider that the individual in question would expect their informally expressed viewpoint to be disclosed to the world at large.
110. As stated above, the Commissioner also considers that disclosure of the withheld information in question would provide, at most, limited additional context to the information already provided to the Applicants.
111. Having fully considered the submissions of both parties, the nature of the withheld information and the competing interests in this particular case, the Commissioner finds that the Applicants' legitimate interest are outweighed by the prejudice to the interests, rights and freedoms of the data subjects that would result from disclosure. He therefore finds that condition (f) in Article 6(1) of the UK GDPR cannot be met.
112. In all the circumstances of this particular case, therefore, and in the absence of a condition in Article 6(1) of the UK GDPR being met, the Commissioner must conclude that that disclosure of the personal data would be unlawful and would therefore breach the data protection principle in Article 5(1)(a) of the UK GDPR. Consequently, he is satisfied that disclosure of the personal data is not permitted by regulation 11(2) of the EIRs.

## Decision

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

The Commissioner finds that by correctly withholding some information under the exceptions in regulations 10(4)(e), 10(5)(d) and 11(2) of the EIRs, the Authority complied with the EIRs.

However, by incorrectly withholding, under regulations 10(5)(d) and 11(2) of the EIRs, the information that it conceded should not have been withheld under these exceptions, the Authority failed to comply with the EIRs, and in particular regulation 5(1) of the EIRs.

The Commissioner therefore requires the Authority to disclose the incorrectly withheld information (except for information that the Commissioner found was correctly withheld under another exception), by **5 February 2026**.

## **Appeal**

Should either the Applicants 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.

## **Enforcement**

If the Authority fails to comply with this decision, the Commissioner has the right to certify to the Court of Session that the Authority has failed to comply. The Court has the right to inquire into the matter and may deal with the Authority as if it had committed a contempt of court.

**Euan McCulloch**  
**Head of Enforcement**

**22 December 2025**