



Scottish Information
Commissioner
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Decision Notice 219/2026

Retrospective Planning Case

Authority: Highland Council
Case Ref: 202300261

Summary

The Applicant asked the Authority for all information held about a specific road, retrospective planning permission relating to a shed and the layout of utilities underneath her property. The Authority provided some information,

but also advised the Applicant that it did not hold information which would fulfil two parts of her request and withheld third party personal data. The Commissioner investigated and found that the Authority partially complied with the EIRs.

Relevant statutory provisions

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

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

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

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

Background

1. On 8 November 2022, the Applicant made a request for information to the Authority. She asked for the following:
 - (i) All information held by the Authority - written, oral, emails, transcripts of meetings etc, (both Internal and External) communications relating to the decision to change Caulfield Road North from a 2 Way Road carrying traffic to and from Inverness to a No Through Road at the Railway Bridge.
 - (ii) All information held by the Authority - written, oral, emails, transcripts of meetings, consultations, technical drawings and schematics (both Internal and External) communications relating to the Decision to Grant Planning, outline and detailed in respect of our property
 - (iii) All information held by the Authority - written, oral, emails, drawings. Transcript of Meetings, consultations, (internal and external) culminating in the decision taken by the Authority Planning Ref: 21/00379/ENF to write to us in a letter dated 25 August 2021 and subsequent matters arising in respect of that i.e.: Planning Applications and so on until today's date.
 - (iv) All information held by the Authority - written, oral, emails, drawings, schematics. Transcript of Meetings, consultations, (internal and external) relating to the PUBLIC SERVICES i.e. layouts of drainage, electricity/gas supply attached to and below our property/the land adjoining our property/within the notifiable neighbours in the context of a Planning Application where the Authority undertake this as their statutory function.
2. The Authority responded on 14 December 2022 in terms of the Environmental Information (Scotland) Regulations 2004 (EIRs). The Authority advised that no information was held for parts (i) and (iv) of the Applicants request and it applied regulation 10(4)(a) to both parts. The Authority supplied documents comprising the planning application and correspondence relating to it for part (ii) and part (iii). The Authority also supplied an email exchange, subject to redaction, for which it relied on the exception in regulation 11(2).
3. On 22 January 2023, the Applicant wrote to the Authority requesting a review of its decision. The Applicant stated that she was dissatisfied with the decision because she did not agree that withholding/redacting third party information was appropriate. The Applicant did not believe that all the information held by the Authority had been supplied; in particular, she noted that nothing beyond 01/02/2022 had been provided.
4. The Authority notified the Applicant of the outcome of its review on 13 February 2023. The Authority identified two further emails between a Planning Officer and a Transport Planning Officer in relation to the planning application in question that had not been included in the original response. The Authority provided a link to its Planning Portal, advising that relevant information was there. It also enclosed copies of what was held for ease of reference. The Authority advised the Applicant that the Planning Review Body had discussed the application, and the minute of that discussion could be found online, but a PDF was supplied for ease. A further explanation about withholding personal data was provided but the application of Regulation 11(2) was upheld. The Authority apologised that the additional information supplied had not been disclosed in the first instance.

5. On 27 February 2023, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. By virtue of regulation 17 of the EIRs, Part 4 of FOISA applies to the enforcement of the EIRs as it applies to the enforcement of FOISA, subject to specified modifications. The Applicant stated she was dissatisfied with the outcome of the Authority's review because she was of the view that the Authority had still not provided all of the information. The Applicant also did not agree that the Authority was correct to withhold information cited as being of interest to her because it considered it to be contrary to the public interest to make it available.

Investigation

6. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
7. On 7 March 2023, the Authority was notified in writing that the Applicant had made a valid application. The Authority was asked to send the Commissioner the information withheld from the Applicant, which it did.
8. 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, which it did.
9. Following receipt of the Authority's comments the case was allocated to an investigating officer, who invited the Authority to answer specific questions. These related to the searches undertaken by the Authority to establish what recorded information was and was not held at the time of the request, together with any relevant legal basis for holding records applicable to the requested information and further explanation around the way the Authority handled the request. Comments were also requested on the Authority's consideration of the application of the public interest test. The Authority was also asked to provide submissions on its application of the exception in regulation 11(2) of the EIRs in respect of its position that certain information was exempt from disclosure as it constituted third party personal data, which if made available in response to this request would be a breach of the data protection principles.

Commissioner's analysis and findings

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

Application of the EIRs

11. The Authority responded to the initial request advising the Applicant that it was handling the request in terms of the EIRs.
12. Where information falls within the scope of the definition "environmental information" in regulation 2(1) of the EIRs, a person has a right of access to it (and the public authority a corresponding obligation to respond) under the EIRs, subject to various restrictions and exceptions contained within the EIRs.
13. The Applicant has not disputed the Authority's decision to handle the request under the EIRs.

14. The Commissioner is satisfied, in the circumstances, that the information requested by the Applicant falls within the definition of environmental information set out in regulation 2(1). In particular he would consider the request to fall within paragraphs (a) (Elements of the environment), (b) (Factors affecting or likely to affect the elements), (c) (Measures and activities) and (f) (Human health and safety) as the request relates to information associated with a retrospective planning application, changes to a road and underground utilities pipes and cabling.
15. In the circumstances, the Commissioner will consider the case, in what follows, solely in terms of the EIRs.

Regulation 5(1) – Duty to make available environmental information on request

16. Regulation 5(1) of the EIRs requires a Scottish public authority which holds environmental information to make it available when requested to do so by any applicant. This obligation relates to information that is held by the authority when it receives a request.
17. On receipt of a request for environmental information, therefore, the authority must ascertain what information it holds falling within the scope of the request. Having done so, regulation 5(1) requires the authority to make that information available, unless a qualification in regulations 6 to 12 applies (regulation 5(2)(b)).
18. Under the EIRs, a public authority may refuse to make environmental information available if one or more of the exceptions in regulation 10 apply and, in all the circumstances, the public interest in making the information available is outweighed by that in maintaining the exception.
19. In this case, the Authority submitted that it was relying on the exception in regulation 10(4)(a) of the EIRs as it did not consider it held recorded information in relation to parts (i) and (iv) of the request. It also applied the exception in regulation 11(2) to parts of the information provided in answer to part (iii) of the request.

Regulation 10(4)(a) – Information not held

20. Regulation 10(4)(a) of the EIRs states that a Scottish public authority may refuse to make environmental information available to the extent that it does not hold that information when the applicant's request is received.
21. The standard of proof to determine whether a Scottish public authority holds the 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.
22. The Commissioner also considers, where appropriate, any reasons 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 about what information the authority should hold, 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.

The Authority's submissions

23. The Authority supplied preliminary comments when the Appeal was validated in April 2023. In these comments the Authority explained that this request came about because of a retrospective planning application relating to a shed built at the boundary of the Applicant's property. Part of the shed falls over the boundary of her property and there is a planning

enforcement case relating to this as a consequence of part of the shed being constructed on an adopted road under the authority's control.

24. The Authority explained that its Planning, Roads, Legal and Archive services were approached for information. This involved asking Principal Planners, Planning Team leaders, Planning Enforcement Officers, Road Operations Managers and Roads Engineers to undertake searches for any relevant recorded information. The Authority advised that despite this no information was found for parts (i) and (iv) of the request.
25. The Authority advised that it had expected to hold a Traffic Regulation Order (TRO) in relation to the decision to change Caulfield Road North, which would have fulfilled part (i) of the request, but no TRO or any other relevant information was located despite a comprehensive search being carried out.
26. The Authority also advised that information for part (iv) was not held. The Authority explained that a Roads Operations Manager advised that information relating to public services, such as the layouts of drainage, electricity and gas supply, was likely to be held by the utility companies.
27. In the further submissions provided by the Authority, it explained that some of the staff involved in the initial request no longer worked with the Authority. The Authority further explained that due to staff changes and the passage of time a full record of this case was not retained.
28. The Authority supplied what was retained from the case file, which included some evidence of searches conducted at the time, in the form of correspondence between the information governance team and relevant services requesting information.
29. The Authority advised that it was still awaiting responses from the services in relation to the TRO records but referred to its earlier comments on this case, where it had explained that following a comprehensive search by Roads and Planning Officers at various stages of the request, no information was located.
30. The Authority also submitted, regarding information pertaining to utilities, that it was probable that its position would remain that this information was likely to be held by the utility companies themselves.
31. The Authority provided a copy of the Transport Planning Team's objection to the retrospective planning application, which stated that the presence of a sewerage pipe and electricity cable were identified through physical observation and examination during a visit to the site by the Authority's Road Team.

The Applicant's submissions

32. The Applicant explained that they had moved to this property in 1987 and had maintained the area in question (grassy verge adjacent to the wall at the boundary of their property) as they understood it to be part of their land and the Authority had never raised this as an issue.
33. The Applicant advised that she received communication from the Authority's Enforcement Department regarding a complaint raised in 2021, about works carried out on this piece of land. The Authority advised her in this letter that a retrospective planning application could be submitted.
34. The Applicant states that the planning application was submitted at a cost of £400 and was refused. In order to better understand the refusal, the Applicant submitted a request for

information regarding a Public Planning matter. The Applicant stated she became aware of email exchanges between named officers that referred to her as 'land grabbers', which she considered to be an allegation.

35. The Applicant believes that whoever raised the complaint is commenting on public matters and that there is considerable precedent in naming those involved. The Applicant is also concerned about unfounded allegations being made by Authority staff before they are in possession of the full facts of the case and apparently pre-judging the entire matter.
36. The Applicant advised that emails in which the unfounded allegations were made, were not made available to the Planning Review Body when they were considering the Planning Application, having been advised by the Planning Enforcement statutory consultee that the consultation emails were not available.
37. The Applicant believes that public bodies should be transparent when taking planning decisions.

The Commissioner's view

38. The Commissioner recognises that the passage of time in this case would not have been helpful in this matter, given staff changes and also the possible enforcement action that may have been pending. The Commissioner is cognisant that this exception was applied to parts (i) and (iv) of the Applicant's request.
39. The Commissioner would note that the questions presented to the Authority relating to this case were not addressed directly. The Authority chose to provide an overview of the areas rather than answer specific questions; given this, it seemed reasonable to go to Decision based on these rather than attempting to enter further requests for submissions.
40. In respect of part (i), the Commissioner considers the targeted searches to be reasonable for locating a Traffic Regulation Order (TRO) but would draw the Authority's attention to [Creating accessible rural routes in Inverness - Walk Wheel Cycle Trust Showcase](#)¹. There are records online that indicate that Caulfield Road North was added to the [National Cycle Network](#)². This indicates that it is possible that other information is held by the Authority that was not considered in scope at the time of the request.
41. In relation to the TRO in this case, had the Commissioner sought further submissions, the Authority would have been asked to check retention/destruction records for this type of information and supply evidence of this. The Commissioner notes that the Authority, failed to answer questions about whether there was a legal requirement for a TRO to be held, an answer to which might have altered the Commissioners view here.
42. In respect of part (iv) of the request, the Commissioner recognises that the Authority supplied a copy of the Transport Planning Team's objection to the retrospective planning application, which clearly states that it was noted that the shed would fall over a sewerage pipe and lighting cable. This appears to have been a physical observation, but without any evidence to support it. The Commissioner considers, in responding to a request of this nature, a fact checking of sorts to be entirely reasonable.

¹ <https://www.showcase-sustrans.org.uk/news/inverness-accessibility/>

² <https://www.inverness-courier.co.uk/news/new-active-travel-link-proposed-for-inverness-campus-267855/>

43. The Commissioner notes that any sewerage pipe would be maintained by Scottish Water, as per the [Sewerage \(Scotland\) Act 1968](#)³, which adds weight to the Authority's position that utilities companies would hold records of this type. However, the Authority [website](#)⁴ suggests that it is responsible for street lighting and therefore it is not unreasonable to expect that it may hold records that would show where subterranean cabling may be found. A reasonable person would consider that a Roads Authority would know what lies underneath land, in the event that there are works required.
44. In the circumstances, the Commissioner is therefore not satisfied, on the balance of probabilities, that the Authority does not (and did not, on receipt of the request) hold further recorded information falling within the scope of the Applicant's request.
45. The Commissioner therefore concludes that the Authority was not correct to give the Applicant notice, in terms of regulation 10(4)(a) of the EIRs, that it did not hold all of the information requested.
46. As the Commissioner is not satisfied that the Authority was correct to rely on the exception in regulation 10(4)(a) in respect of information which would fulfil the Applicant's request, he is not required to go on to consider the application of the public interest test.

Regulation 11(2) – Personal data

47. 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.
48. Regulation 11(2) of the EIRs 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)).
49. In this case, the Authority confirmed that it was withholding the information under regulation 11(2) of the EIRs. The Authority submitted that the withheld information constituted personal data of third parties, disclosure of which in response to this request would contravene the data protection principles in Article 5(1) of the UK GDPR.

Is the withheld information personal data?

50. 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 –
- i. an identifier such as a name, an identification number, location data, or an online identifier, or
 - ii. one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
51. 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.

³ <https://www.legislation.gov.uk/ukpga/1968/47/part/II/crossheading/duties-and-powers-of-local-authorities>

⁴ <https://www.highland.gov.uk/roads-pavements/street-lighting-traffic-signals>

52. The Commissioner has carefully considered the information the Authority withheld under the exception in regulation 11(2) of the EIRs. The Commissioner agrees that this information relates to identified (or identifiable) individuals, given that it comprises the names, telephone numbers, addresses, a signature and some collateral data that, if released, may identify individuals indirectly. He is therefore satisfied that this information is personal data in terms of section 3(2) of the DPA 2018.

Would disclosure breach one of the data protection principles?

53. The Authority submitted that the withheld information constituted personal data, disclosure of which in response to this request would contravene the data protection principles in Article 5(1) of the UK GDPR, but without specifying which principle would be contravened. In this case and as per the briefing notes on [Regulation 11](#)⁵, which states:

“Generally, the only principle which is likely to be relevant when considering whether to disclose personal data in response to an EIRs request is the “lawfulness, fairness and transparency” principle.”

54. As such, the Commissioner considers the first data protection principle, which requires personal data to be processed “lawfully, fairly and in a transparent manner in relation to the data subject” (Article 5(1)(a) of the UK GDPR), to be the most relevant in this case.
55. The definition of “processing” is wide and includes (section 3(4)(d) of the DPA 2018) “disclosure by transmission, dissemination or otherwise making available”. In the case of the EIRs, personal data are processed when disclosed in response to a request. This means that personal data can only be made available if making the data available would be lawful (i.e. if it would meet one of the conditions of lawful processing listed in Article 6(1) of the UK GDPR) and fair.

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

56. 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.
57. The Commissioner considers, in the absence of direct answers about this from the Authority, that, in the circumstances, the only condition in Article 6(1) which could apply is condition (f).

Condition (f): legitimate interests

58. Condition (f) states that processing will be lawful if it is necessary for the purposes of the 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 the personal data.
59. Although Article 6 states that this condition cannot apply to processing carried out by a public authority in the performance of their 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.
60. The tests which must be met before Article 6(1)(f) can be met are as follows:
- i. Does the Applicant have a legitimate interest in obtaining the personal data?

⁵ <https://www.foi.scot/sites/default/files/2023-08/EIRsGuidanceRegulation11Personaldata.pdf>

- ii. If so, would the disclosure of the personal data be necessary to achieve that legitimate interest?
- iii. Even if the processing would be necessary to achieve the legitimate interest, would that be overridden by the interests or fundamental rights and freedoms of the data subjects?

Does the Applicant have a legitimate interest in obtaining the personal data?

- 61. There is no definition within the DPA 2018 of what constitutes a “legitimate interest”, but the Commissioner takes the view that the term indicates that matters in which an individual properly has an interest should be distinguished from matters about which he or she is simply inquisitive.
- 62. The Applicant stated that redacting third party details was inappropriate. That individuals involved were commenting on public matters and should, therefore, be named.
- 63. The Authority did not explicitly state that they believed that the Applicant had a legitimate interest (or answer the questions that addressed this) but acknowledged a wider public interest in transparency. However, in the comments the Authority supplied at the time of the application in 2023, the Authority did provide contextual information about the redactions and the Applicant’s view on these, expressing some acknowledgement that the Applicant had an interest in this information.
- 64. The Commissioner considers this an acceptance, by the Authority, that there is a legitimate interest in obtaining the personal data, given that the Applicant believes this information to have influenced the decision making around a planning application that did not go in her favour. The Commissioner agrees with the Authority’s position.

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

- 65. Having accepted that the Applicant has a legitimate interest in the personal data, the Commissioner must consider whether disclosure of those personal data is necessary to meet that legitimate interest.
- 66. ‘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 Applicant’s legitimate interests can be met by means which interfere less with the privacy of the data subject.
- 67. The Authority did not answer the specific questions posed to them about this. The Authority’s position is that disclosure of personal data would undermine the integrity of the planning process and the public’s confidence in their right to complain. The Authority explained that the other personal data that was withheld did not inhibit the overall understanding of the process, simply protect the identity and address of those being notified. The Commissioner deduces from this that Authority does not agree that disclosure here is necessary.
- 68. The Commissioner agrees. The Commissioner does not accept that the disclosure of the personal data was necessary to achieve the Applicant’s legitimate interests. The Commissioner can see that the Applicant is dissatisfied with the outcome of her planning application and the personal data withheld (complainer or otherwise) does not have any bearing on that outcome.

69. As the Commissioner is not satisfied that disclosure of the withheld information is necessary to satisfy the Applicant's legitimate interests, he is not required to go on to consider whether the legitimate interests of the Applicant outweigh the interests or fundamental rights and freedoms of the data subject(s).
70. Having found that disclosure of the personal data would not be necessary to fulfil the Applicant's legitimate interests, the Commissioner finds that condition (f) in Article 6(1) of the UK GDPR cannot be met in this case and that disclosure of the information in question would be unlawful.

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 Applicant.

The Commissioner finds that by relying on 11(2) to withhold some information from documents disclosed to the Applicant, the Authority complied with the EIRs.

However, the Commissioner finds that the Authority was not entitled to rely on the exception in regulation 10(4)(a) of the EIRs in respect of information relating to parts (i) and (iv) of the Applicant's request.

The Commissioner therefore requires the Authority to carry out further searches (and retain evidence of this) to determine whether it holds any other relevant, recorded information in respect of parts (i) and (iv) of the request, and issue a revised review response to the Applicant by 18 October 2026.

Appeal

Should either the Applicant or the Authority wish to appeal against this decision, they have the right to appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days after the date of intimation of this decision.

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

3 September 2026