

Decision Notice

Decision 240/2014: Mr Graeme Baxter and the Scottish Ministers

Names and addresses of participants in a local inquiry

Reference No: 201400660

Decision Date: 19 November 2014



Summary

On 11 November 2013, Mr Baxter asked the Scottish Ministers (the Ministers) for a list of the names and addresses of those who had made representations to the public local inquiry into the proposed development at the Menie Estate, Aberdeenshire. The Ministers provided the relevant details for businesses and organisations, but withheld those relating to individuals under regulation 11(2) of the EIRs, on the grounds that it was the personal data of those making the representations and its disclosure would breach the first data protection principle. Following an investigation, the Commissioner accepted this reasoning.

Relevant statutory provisions

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (paragraphs (a), (b) and (c) of definition of “environmental information”); 5(1) and (2)(b) (Duty to make available environmental information on request); 10(3) (Exemptions from duty to make environmental information available); 11(2), (3)(a)(i) and (3)(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 1: the principles) (the first data protection principle), 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 Appendix 1 to this decision. The Appendix forms part of this decision.

Background

1. On 11 November 2013, Mr Baxter made a request for information to the Ministers. Previously, he had asked for the information in the representations made to the public inquiry held in 2008 into the proposed golf development at the Menie Estate, Aberdeenshire. This request having been refused as manifestly unreasonable (regulation 10(4)(b) of the EIRs), Mr Baxter asked for a list of all participants who made representations.
2. The Ministers responded on 13 January 2014, disclosing a list of the organisations and businesses which made representations. The Ministers applied the exception in regulation 11(2) of the EIRs to the remaining information sought by Mr Baxter request (i.e. the names and addresses of participants considered to be writing in a personal capacity). The Ministers applied the exception in regulation 10(5)(f) to part of the information, on the grounds that disclosure would prejudice substantially the interests of the person making the representations.
3. On 7 February 2014, Mr Baxter wrote to the Ministers requesting a review of their decision. He was not convinced that there was any reason for the information remaining private.
4. The Ministers notified Mr Baxter of the outcome of their review on 6 March 2014. They upheld their application of regulation 11(2). They did not refer to regulation 10(4)(f), but confirmed in subsequent submissions to the Commissioner that they were no longer relying on this exception. It will not be considered further in this decision.

5. On 26 March 2014, Mr Baxter wrote to the Commissioner. Mr Baxter applied 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 specified modifications.
6. Mr Baxter stated he was dissatisfied with the outcome of the Ministers' review in relation to the withheld names and addresses. He also highlighted concerns relating to the Ministers' document retention and disposal arrangements: from further communications with Mr Baxter, the Commissioner is satisfied that he was not seeking a decision on this point under section 47 of FOISA.

Investigation

7. The application was accepted as valid. The Commissioner confirmed that Mr Baxter made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to her for a decision.
8. On 3 April 2014, the Ministers were notified in writing that Mr Baxter had made a valid application. The Ministers were asked to send the Commissioner the information withheld from him. The Ministers provided the information and the case was allocated to an investigating officer.
9. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Ministers were invited to comment on this application and answer specific questions, including justifying their reliance on any provisions of FOISA and the EIRs which they considered applicable to the information requested. The Ministers were also asked for more detail on how they decided which personal data to redact.

Commissioner's analysis and findings

10. In coming to a decision on this matter, the Commissioner considered all of the withheld information and the relevant submissions, or parts of submissions, made to her by both Mr Baxter and the Ministers. She is satisfied that no matter of relevance has been overlooked.
11. Mr Baxter has expressed no disagreement with the Ministers handing this case under the EIRs. In relating to the processing of a significant planning application, the withheld information clearly falls within paragraph (c) of the definition of "environmental information" in regulation 2(1) of the EIRs (see Appendix 1). In the remainder of this decision, the Commissioner will consider this case solely in terms of the EIRs.

Regulation 11(2) of the EIRs – personal data

12. The Ministers submitted that the withheld names and addresses were excepted from disclosure 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 any of 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 possessions 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 clearly identified the individuals concerned and provided an expression of opinion about them by identifying them as having made the comments they submitted. While not persuaded that simply associating someone with comments they have made can be considered an expression of opinion about them, the Commissioner accepts that it follows from such association that the information relates to those individuals (who can be identified from it). The information is, therefore, their personal data.

The first data protection principle

16. The first data protection principle states that the processing of personal data (in this case, making those data publicly 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.

17. 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.

18. 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.

19. 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 to the DPA be met?

20. The Ministers considered that only condition 6 in Schedule 2 could potentially apply 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.

21. 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 Baxter's request.

22. There are, therefore, a number of different tests which must be satisfied before condition 6 can be met. These are:

a. Is Mr Baxter pursuing a legitimate interest or interests?

- b. 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 ends, or could these interests be achieved by means which interfere less with the privacy of the data subjects?
- c. Even if the processing is necessary for Mr Baxter's legitimate interests, is that processing nevertheless unwarranted in this case by reason of prejudice to the rights and freedoms or legitimate interests of the data subjects?

Is Mr Baxter pursuing a legitimate interest or interests?

23. There is no definition within the DPA 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. In the Commissioner's published guidance on regulation 11(2)¹ of FOISA, it states:

In some cases, the legitimate interest might be personal to the applicant – e.g. he or she might want the information in order to bring legal proceedings. With most requests, however, there are likely to be wider legitimate interests, such as the scrutiny of the actions of public bodies or public safety.

24. Mr Baxter explained how the information related to an academic research project he was conducting, involving comparison of two controversial coastal developments in North-East Scotland. The other was the St Fergus gas terminal in the 1970s. He explained how, in relation to the earlier development, there was considerable input from religious bodies and individual clergymen, concerned about the environmental and societal impacts of the development. He wished to examine whether there had been a similar input in relation to the Menie development, and the nature of these contributions. He believed the questions this raised (such as whether Scottish society was increasingly secular) were of wider academic and public interest.
25. The Ministers accepted that Mr Baxter had a legitimate interest in transparency in relation to this particular local inquiry process, which he saw as being "high-profile and controversial". While noting that Mr Baxter believed he needed a list of all participants to find representations that might be of particular interest relevance to his research, they submitted that this interest was already met by the information disclosed to Mr Baxter.
26. The Commissioner has considered both sets of submissions carefully. Any representation that was clearly from or on behalf of a particular religious body should have been caught by the disclosure made by the Ministers already. It is not entirely clear from Mr Baxter's submissions how the remaining withheld information, which is simply a list of names and addresses, could enable Mr Baxter to identify the submissions he is concerned about with the remotest chance of certainty. At best, the exercise would be speculative, which is not an appropriate starting point when considering personal data.
27. The Commissioner acknowledges that Mr Baxter has a legitimate interest in the issues he has described in paragraph 24. What she cannot accept, for the reasons she has set out in paragraph 26, is that he could reasonably be said to be pursuing that legitimate interest in having access to the full list of withheld names and addresses.

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

28. As Mr Baxter cannot be said to be pursuing a legitimate interest in this case, the Commissioner must find that condition 6 in Schedule 2 to the DPA cannot be met. In the absence of a condition permitting disclosure, she must also find that it would be unlawful to make the information available in response to Mr Baxter's request. Therefore, in all the circumstances, the Commissioner finds that making the information available would breach the first data protection principle, so 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 Baxter.

Appeal

Should either Mr Baxter 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

19 November 2014

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;
- (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in paragraph (a);
- (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^[6] 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.

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