



**Finance and Corporate Resources**  
Executive Director **Paul Manning**  
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Mr. G Patrick  
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9ab9a322@whatdotheyknow.com](mailto:9ab9a322@whatdotheyknow.com)

**Our ref:** WAD/CDCREV-16087  
**Your ref:**  
**If calling ask for:** Bill Dunn  
**Phone:** 01698 454564  
**Date:** 13 December 2017

Dear Mr Patrick

**Environmental Information (Scotland) Regulations 2004 (EISRs)**  
**Freedom of Information (Scotland) Act 2002 (FOISA)**  
**Request for a review – Decision Notice – R2017/28**

I refer to your email dated 14 November 2017 in which you were deemed to be asking for a review as the Council had not dealt with your request for information. I can advise that a review has now been held. This is the formal notification of the decision of the Review Panel.

**Background**

On 18 September 2017, you requested copies of any and all District Valuer's reports on the value per plot for all affordable housing calculations where the Council has accepted the payment of commuted sums in the Cambuslang & Rutherglen area.

On 14 November 2017, you sent an email to the Council complaining that you had not received a response to your request for information. This was deemed to be a request for a review.

**Summary of the decision of the Review Panel**

The Review Panel

- a) upheld your complaint, apologises for the Council's non-compliance with FOISA and processed the request for information on behalf of the Council and
- b) applied the exemption set down in section 39(2) of FOISA but proceeded to consider your request under the EI(S)Rs and
- c) decided to disclose the relevant information to you subject to withholding certain information in terms of Regulation 11(2) of the EI(S)Rs.

**The Review Panel's considerations**

**Did the Council respond to the original request?**

Upon receipt of your request, it was forwarded it to relevant Resources (Departments) of the Council for response .

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INVESTOR IN PEOPLE



Unfortunately, it would appear from the searches undertaken by the Resources concerned that a response was not issued to you within the statutory time limits. Under those circumstances, the Review Panel had to process your request and respond on behalf of the Council.

### **The Requested Information**

In order to facilitate the Review Panel's processing of the request for information, the two Resources, originally identified as being likely holders of the requested information, were asked to provide a copy of all of the reports caught by your request. These reports were provided to the Review Panel for its information.

### **Is the requested information environmental information?**

Before considering an appropriate response to you, the Review Panel had to consider whether the requested information was environmental in nature.

Regulation 2 of the EI(S)Rs defines "environmental information" in part as "any information in written, visual, aural, electronic or any other material form on –

- a) the state of the elements of the environment, such as ... land... and the interaction among these elements
- b) factors... 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....
- e) costs benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in paragraph (c);..."

In the Scottish Information Commissioner's decision **Professor A D Hawkins and Transport Scotland** (Decision 218/2007), the Commissioner advised that in his opinion "the definition of what constitutes environmental information should not be viewed narrowly..."

The Council's Supplementary Guidance 7: Affordable Housing and Housing Choice explains that policy 13 – Affordable and Housing Choice applies to all residential development sites of 20 units or more across South Lanarkshire for which planning consent is sought. As a result, the Council will seek up to 25% of a sites capacity as serviced land for provision of affordable housing. This would usually be onsite delivery but where this is not possible as the most effective means of delivery, taking account of a number of factors, the Council can consider other methods such a commuted sum payment.

For commuted sums, payments should be "*... of a value equivalent to the cost of providing the percentage of serviced land required by the policy*" (PAN 2/2010). In order to establish the value of the land that would have otherwise been transferred to the Council, the District Valuer (DV) is requested to determine these values taking account of the type of property and locality. It appears that you were seeking the information within these reports for the Cambuslang and Rutherglen area where the Council had accepted a commuted sum.

Taking all of these matters into account, the Review Panel decided that the requested information was environmental in nature and so the request should be processed under both FOISA and the EI(S)Rs.

### **Is the information exempt under FOISA?**

Section 39(2) of FOISA states that

- "(2) Information is exempt information if a Scottish public authority
  - a) Is obliged by regulations under section 62 to make it available to the public in accordance with the regulations; or
  - b) Would so be obliged but for any exemption contained in the regulations".

This exemption is subject to the public interest test. This means that even if the exemption applies the Council can only withhold information where the public interest in doing so outweighs the public interest in disclosing the information. It should be noted that the public interest test does not relate to a decision regarding whether the information is environmental information.

The effect of this exemption would be to exclude any information subject to the EI(S)Rs exempt in terms of FOISA. As it had been decided by the Review Panel that the requested information was environmental information, the exemption in FOISA applied. However, this exemption is subject to the public interest test. This means that even if the exemption applies the Council can only withhold information where the public interest in doing so outweighs the public interest in disclosing the information.

The Review Panel considered the following public interest test

#### **For Disclosure**

- the ability of members of the public to be able to exercise their rights in terms of FOISA
- ensuring openness and accountability of the Council in relation to the decisions made by and actions undertaken by the Council.

#### **Against Disclosure**

- The importance of ensuring that the public exercise their rights to obtain information under the most appropriate information

#### **Considerations**

Whilst there is a strong public interest in ensuring that the public are able to exercise their rights under FOISA, it may not be the most appropriate way to do so. However, given that the EI(S)Rs are in place in order to ensure openness and accountability in relation to environmental matters in a more proactive and less restrictive manner, there is a stronger public interest in processing requests in terms of that legislation. Under those circumstances, the Review Panel applied the exemption set down in section 39(2) of FOISA after consideration of the public interest test

It should be noted that this is a technical exemption insofar as it merely indicates that the Council will not deal with the request in terms of FOISA. It does not actually withhold any information as this would be considered under the EI(S)Rs.

The Review Panel then continued to consider the request in terms of the EI(S)Rs.

#### **Information Held**

Both Housing and Technical Resources and Community and Enterprise Resources have searched their records to identify relevant information. The outcome is that the Council has identified four District Valuer Valuation Reports for sites within the Rutherglen and Cambuslang Area where a commuted sum has been received in lieu of on-site provision of affordable housing namely:

CR/13/0118	Site at Buchannan Drive, Woodburn, Rutherglen
CR/14/0142	Site at East Hallside Farm, Cambuslang
CR/14/0200	Site at Langlea Road, Cambuslang
CR/15/0063	Site at Kirkconnell Drive, Rutherglen

It should be noted that some of these reports are shown as being Drafts. However, it is clear that whatever reports are held by Planning and Building Standards Services informs the process of agreement of the commuted sums. Some of the reports held by Community and Enterprise Resources are referred to as being draft. Despite this notation, it was accepted that these reports were the versions sought by you.

As part of the deliberations of the Review Panel, it considered whether any exceptions set down in the EI(S)Rs applied to some or all of the information contained within the reports.

The only relevant exception that could apply was identified as that set down in Regulation 11(2) of the EI(S)Rs.

Regulation 11(2) (when read with Regulation 11(3)(a)(i) or (b)) of the EI(S)Rs excepts information from disclosure if it is personal data and if its disclosure to a member of the public would contravene any of the data protection principles set down in Schedule 1 of the DPA.

Consequently, the Review Panel had to consider the following whether

- 1) any of the information sought by you contained within these documents amounted to personal data (or sensitive personal data) of third parties and
- 2) if it did, its disclosure to under the EI(S)Rs would breach the first data protection principle.

Personal data is defined by the Data Protection Act 1998 ("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..."

The information that had been identified as being personal data was any information that identified a particular employee of the Council or the District Valuer's Office by name.

However to qualify the data must also **relate** to the identifiable person. In the case of **Efifiom Edem v the Information Commissioner and the Financial Services Authority** C3/2013/0791, the issue as to whether information relates to someone will depend upon the context of that information. The Information Commissioner in his guidance "**Determining what personal data is**" sets out considerations as to what would indicate whether information is personal data. The Review Panel decided that the information is linked to employment tasks and opinions of the employees concerned. Consequently, the Review Panel decided that this information related to the individuals concerned and so constituted personal data.

It should be noted that merely because the information is personal data does not mean that the exemption applies. The disclosure of the personal data must breach a data protection principle. It is usual in cases involving requests for information that this is primarily concerned with whether the Council can meet the terms of the first data protection principle. This principle requires that personal data shall be processed fairly and lawfully and, in particular, shall not be processed (in this case, disclosed) unless one of the conditions set down in Schedule 2 to the DPA is met.

It is the practice to take these matters in reverse order.

### ***Meeting a condition in Schedule 2 of the DPA***

For the purposes of requests for information under the EI(S)Rs, where the Council does not have the consent of the individuals concerned to disclose their personal data into the public domain, the only other relevant condition is condition 6. This condition allows personal data to be processed if the processing is necessary for the purposes of legitimate interests pursued by the Council as data controller or 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. There are therefore a number of tests which must be satisfied before condition 6 can be met. These are considering whether

- 1) you have a legitimate personal interest in obtaining this information (or there is a public interest in disclosure) and
- 2) the disclosure of the information is necessary to meet that legitimate interest (or public interest) and
- 3) the disclosure of the information would be unwarranted as a result of prejudice to the individuals' legitimate interests or rights and freedoms

***Does you have a legitimate interest in obtaining this personal data or is there a public interest in disclosure?***

In your request for information, you did not specify any legitimate personal reason for obtaining this information. Further, given the context of the information, it was difficult to identify any relevant public interest in disclosing the information as the public interest would relate to the contents of the report rather than who compiled or received it within the Council.

Consequently, the Review Panel was of the view that this part of condition 6 could not be met and so the disclosure of this personal data would be in breach of the first data protection principle.

Under those circumstances, the Review Panel applied the exemption set down in terms of Regulation 11(2) of the EI(S)Rs in relation to that particular information.

**Appeal to the Scottish Information Commissioner**

If you are unhappy with the outcome of our review, you have the right to appeal to the Scottish Information Commissioner. You have 6 months from receiving this notice to appeal.

The Commissioner will decide whether the Council has dealt with your request properly. The Commissioner's contact details are as follows:-

Scottish Information Commissioner  
Kinburn Castle  
Doubledykes Road  
St Andrews  
Fife KY16 9DS  
Tel: 01334 464610  
Fax: 01334 464611

E-mail: [enquiries@itspublicknowledge.info](mailto:enquiries@itspublicknowledge.info)

For further details, please see the Commissioner's website at <http://www.itspublicknowledge.info/YourRights/Unhappywiththeresponse/AppealingtoCommissioner.aspx>. In addition the Commissioner has prepared a form that can be used to appeal to him. It can be found here - <http://www.itspublicknowledge.info/YourRights/Unhappywiththeresponse/ApplicationForm.aspx>

If you are unhappy about the final decision of the Commissioner, you are entitled to appeal to the Court of Session on a point of law.

Yours sincerely



**Paul Manning**  
**Reviewing Officer**