

Case RPSI/18/01

Decision of the Information Commissioner in his capacity as Appeal Commissioner on an appeal made under Regulation 10 of the European Communities (Re-Use of Public Sector Information) Regulations 2005 (as amended by the European Communities (Re-use of Public Sector Information) (Amendment) Regulations 2015 (the PSI Regulations)

Date of decision: 10 January 2020

Appellant: Mr MA

Public Sector Body: Dún Laoghaire-Rathdown County Council (the Council)

Issue: Whether the Council's decision to refuse the appellant's request for re-use of information concerning submissions/observations made on planning applications was in compliance with the PSI Regulations.

Summary of Commissioner's Decision: In accordance with Regulation 12(2) of the PSI Regulations, the Appeal Commissioner reviewed the decision of the Council on the appellant's request. The Commissioner found that the Council's refusal was not in compliance with the PSI Regulations. Accordingly, the Commissioner annulled the Council's decision to refuse the appellant's request. He directed the Council to grant the appellant's request for re-use.

Right of Appeal: A party to this appeal or any other person affected by this decision may appeal this decision to the High Court on a point of law from the decision, as set out in Regulation 15 of the PSI Regulations. Such an appeal must be initiated not later than eight weeks after notice of this decision was given to the person bringing the appeal.

Background to review

On 26 September 2018, the appellant made an application for re-use of an electronic copy or negotiated extract listing all submissions/observations made to the Council in relation to all planning applications from 1 January 2009 to date, to include the relevant planning reference and the name of the party making the comment. He clarified that he was seeking a list of this information and not copies of the documents concerned. The appellant stated that he was willing to abide by and commit to any licencing terms or usage restrictions imposed on the re-use of this information by the Council. He also stated that the request was made as part of a journalistic project [removed] and was “motivated solely with the public interest in mind”.

The Council issued a decision on the appellant’s request on 23 October 2018. It refused his request on the basis that the requested records were already “in the public realm” and included a link to planning records which are available on its website. The Council informed the appellant of a right to internal review in error (see further below). He requested such a review and the Council affirmed its original decision to refuse to allow re-use on 13 November 2018. It stated that it was refusing his request under Regulation 3(1)(c)(iii) on the basis that the information was already in the public domain, and under Regulation 3(1)(c)(v) on the basis that the information comprised personal data, and processing it in this way would breach data protection principles.

On 16 November 2018, the appellant appealed the Council’s decision to my Office. As Information Commissioner, I am the designated “appeal commissioner” under the PSI Regulations. Regulation 12 provides that, on receipt of a valid request for an appeal under the PSI Regulations, I must carry out a review. Following this review, I may decide to affirm, vary or annul the decision under review.

In the course of my review, I have considered the Council’s refusal to release the record sought for re-use, the presumption for the release of documents for re-use provided by Regulation 5(2) and the limitation of the PSI Regulations under Regulation 5(5)(b).

I have also had regard to submissions made to my Office by the parties as well as to the Department of Finance Circular 32/2005 and the Department of Public Expenditure and Reform Circular 12/2016.

I regret the delay in finalising this review; it took longer than I would have liked due to the volume of work in the Office of the Information Commissioner and the Office of the Commissioner for Environmental Information in recent months.

Preliminary Matters

The PSI Regulations do not provide for an internal review by a public sector body on a decision on a request for re-use. In this case, the Council informed the appellant that it was open to him to request an internal review on the payment of a fee. The Council has acknowledged that this was done in error and stated that the appellant was allowed to offset the fee paid against another statutory request to the Council. Although no detriment

resulted from this failure on this occasion, I must emphasise the importance of public sector bodies being aware of the relevant PSI provisions in every case.

In submissions to this Office, the Council indicated that it was also relying on Regulation 5(5)(a) in support of its decision to refuse to allow the re-use of the information sought by the appellant. This Regulation provides that there is no requirement on a public sector body to create or adapt any document in order to comply with a request, or to provide extracts from a document, where this would involve a disproportionate effort. During the course of this review, this Office's Investigator contacted the Council and requested it to clarify its position. The Council subsequently stated that while it did not hold a record containing the information in the form sought by the applicant, that it would be possible to create such a file from its database, and that it was not relying on this Regulation in support of its refusal of the appellant's request.

Scope of review

Regulation 10(1)(a) of the PSI Regulations provides a right of appeal against a decision by a public sector body to refuse to allow a requester to re-use a document. Accordingly, this review is solely concerned with whether the Council's refusal of the appellant's request was in compliance with the PSI Regulations.

Analysis and Findings

As I previously stated in my decision in [Case RPSI/16/02](#), a right of access to a document is an essential precursor to the right to re-use such a document.

Rights of access to documents are primarily defined by national legislation, and not by the PSI Regulations. In the present case, an express legislative right of inspection of records such as those sought in this case is created by section 38 of the Planning and Development Act 2000, as amended.

Regulation 2(1) defines re-use as "the use by an individual or legal entity of the document for commercial or non-commercial purposes other than the initial purpose within the public task for which the document was produced".

A "document" is defined as all or part of any form of document, record or data, whether in physical, electronic or other form.

Under Regulation 5(1)(a) of the PSI Regulations, an individual or a legal entity may make a request to a public sector body to release documents for re-use. Regulation 5(2) provides that on receipt of a request to re-use a document, a public sector body must allow the re-use of the document for commercial or non-commercial purposes in accordance with the conditions and time limits provided for by the PSI Regulations.

Regulation 8 provides that a public sector body may allow re-use without conditions, or may impose conditions for re-use, including conditions under licence.

Publicly Available – Section 15 of the FOI Act 2014

Regulation 3(1)(c)(iii) of the PSI Regulations, among other things, provides that the Regulations do not apply to documents, access to which could be excluded by virtue of the Freedom of Information Act 2014, other than section 15(2) of that Act [emphasis added].

Section 15 of the FOI Act provides for the refusal of FOI request on administrative grounds. Section 15(1)(d) provides that a request may be refused where the information is already in the public domain. Section 15(2) provides that an FOI request may be refused where the record at issue is available for inspection by members of the public upon payment or free of charge, or is available for purchase or removal free of charge by members of the public, under an enactment or otherwise.

The Council has sought to rely on section 15(1)(d) of the FOI Act in this case to refuse to allow re-use of the document sought as it stated that the information is already in the public domain.

I note that this Office's Investigator drew the Council's attention to my decision in [Case RPSI/16/03](#) where I was not satisfied that the public sector body was justified in refusing the appellant's request to re-use its database on the basis that the information was accessible online. I also note that the Council did not address this in its submissions to this Office.

While it is not in dispute that the information is available to view online or to inspect at the Council's offices, the PSI Regulations do not concern access to public sector information, they concern its re-use. It seems to me that, while there might arguably be some overlap between sections 15(1)(d) and 15(2) of the FOI Act, the PSI regulations clearly set out to address this potential ground for refusal by a public sector body. In my view, this is clear in the reference to section 15(2) of the FOI Act in Regulation 3(1)(c). Public sector information is often available to view online (or otherwise), but that is very different from providing it in a manner that allows re-use.

Furthermore, section 38 of the Planning and Development Act provides that planning documents shall be made available for inspection and purchase, as well as online. This clearly comes within the provisions of section 15(2) of the FOI Act.

Based on the wording and clear intention of the Regulations, I find that the Council's refusal to allow re-use of the document sought on the basis that the information is in the public realm and would not be subject to release under the FOI Act does not comply with the PSI Regulations.

Incompatible with Data Protection Principles

The second ground for refusal of the appellant's request for re-use relied upon by the Council was that granting the request would involve processing the data concerned in a manner which is incompatible with data protection legislation.

As I have stated previously, a right of access is required in order to re-use a document under the PSI Regulations. Furthermore, just because a document is accessible, it does not mean that it can be re-used unconditionally.

Regulation 3(1) of the PSI Regulations, among other things, provides that the Regulations do not apply to:

“(c) documents, access to which could be excluded by virtue of –

(i) the Data Protection Acts 1988 and 2003...

(cc) (i) documents, access to which could be excluded or restricted by virtue of the enactments referred to in subparagraph (c) or any other enactment on the grounds of protection of personal data, and

(ii) parts of documents that are accessible by virtue of the enactments referred to in subparagraph (c) or any other enactment and contain personal data the re-use of which would be incompatible with the law concerning the protection of individuals with regard to the processing of personal data.”

The Data Protection Acts 1993 and 2003 ceased to apply to the processing of personal data from the date of commencement of section 8 of the Data Protection Act 2018 (the DP Act) – i.e. 25 May 2018. However, the reference to "any other enactment" in Regulation 3(1)(cc) includes the DP Act. This, and the GDPR, are the legal basis of the protection of personal data relevant to this decision.

In its submission, the Council referred to its obligations under section 71 of the DP Act which sets out general principles for the processing of personal data under the Act. It stated that releasing information about submissions in any other way other than in association with a specific planning application would “amount to a breach of data”.

Section 71(1) of the DP Act provides that “[a] controller shall, as respects personal data for which it is responsible, comply with the following provisions: (b) the data shall be collected for one or more specified, explicit and legitimate purposes and shall not be processed in a manner that is incompatible with such purposes”. The Council’s position is that complying with the applicant’s re-use request would constitute processing which is incompatible with the specified, explicit and legitimate purposes for which the data was collected.

I accept that the names of the individuals making observations/submissions on planning applications is personal data as defined in the Regulations which refer to the Data Protection Acts 1988 and 2003. However, I do not consider that the planning reference and relevant date fall into the same category.

The DP Act defines processing in section 69 as follows:

“... an operation or a set of operations that is performed on personal data or on sets of personal data, whether or not by automated means, including-

(b) the adaptation or alteration of the data,

(c) the retrieval, consultation or use of the data,

(d) the disclosure of the data by their transmission, dissemination or otherwise making the data available...”

I note that the actual submission letters themselves are scanned onto the system and are available on the Council’s [website](#). Relevant submissions/observations can be viewed by searching on a map view and clicking onto an individual property to see all the documents concerning a particular application. A search can also be run by using the relevant planning reference, location, proposal description or surname of planning applicant.

I also note that the applicant is merely seeking the name of the person making a submission, as well as the date and the relevant planning reference. He is not seeking any further details contained in the letters, which are available for inspection and published online.

Having regard to the above, I am satisfied that the collation/extraction of the relevant information into a machine readable file for the purposes of re-use would constitute processing as defined in the DP Act.

Accordingly, the central issue for me is to determine the purpose for which the data was gathered by the Council. Observations and submissions on planning applications are collected and published under a statutory obligation in the Planning and Development Regulations 2001 as amended. However, Article 29(1) of these Regulations does not set out the purpose behind the obligation to gather the data. Section 38 of the Planning and Development Act 2000 (as amended) obliges the Council to put submissions and observations received on planning applications onto its website or make them available in electronic form. The Council publishes such submissions online and its website informs the public of this.

The Council stated in its second decision on the matter that the planning process is open and transparent. Essentially, its position is that the limited availability of the information concerned meet the purposes of openness and transparency. It was of the view that any further processing or release of the data would go beyond that.

I note that Principle 10 of the Government’s [2015 Planning Policy Statement](#) provided that planning was to be conducted “in a manner that affords a high level of confidence in the openness, fairness, professionalism and efficiency of the process, where people have the opportunity to participate at both the strategic plan making and individual planning application level with decisions always being taken in the interests of the common good and in a timely and informed fashion and where people can have confidence that appropriate enforcement action will be taken where legal requirements are not upheld.”.

Apart from the Council’s obligations under planning legislation, I also note that it is under an obligation arising from Directive 2003/4/EC on public access to environmental information to “make all reasonable efforts to maintain environmental information held by or for it in a manner that is readily reproducible and accessible by information technology or by other electronic means” under article 5(1)(b) of the European Communities (Access to Information on the Environment) Regulations 2007 to 2018 (AIE Regulations).

It is evident from the various statutory provisions underpinning it, that the entire planning process is designed to ensure that there is public participation in planning decisions, to ensure transparency and openness in how the process is administered and overall to engender confidence in the system. Accordingly, I am of the view that the purpose for which the relevant data is gathered and processed by publishing it on the planning authority's website is to allow for transparency in the planning process, to ensure that the relevant information is provided to allow planning authorities to make informed decisions and to encourage public acceptance of planning decisions and of the planning process in general.

In this particular case, the appellant is a journalist who has stated that he is carrying out research as part of an investigation into the planning process. He stated that his research was being done in the public interest and that he was willing to be bound by whatever conditions that Council imposed on the re-use of the information sought.

Essentially, the Council is of the view that processing the data concerned for the purposes of granting the appellant's request, and/or allowing its re-use by the appellant, is incompatible with the purpose for which it was collected. I do not agree. All of the information at issue is currently available to the public as required by law, albeit in a less accessible format. Furthermore, the data subjects (objectors/interested parties) were informed that the information would be published. It seems to me that re-use for the purpose of public interest journalism is entirely within the scope of the original purpose of the processing of the data. I consider that the re-use of this data will allow for greater scrutiny of and public participation in the planning process.

Accordingly, I find that the DP Act would not exclude access to the information sought for the purposes of re-use.

Information submitted for specific planning purposes

The Council also stated that Article 29 of the Planning and Development Regulations indicated that submissions could only be used as they relate to planning applications, with an inference that submissions were linked to applications for that sole purpose and were not to be re-used for any other purpose. This appears to be a reference to the marginal note at Article 29, which indicates that it concerns "[s]ubmissions or observations in relation to planning application." However, having reviewed the [Planning and Development Regulations](#), I am satisfied that it does not provide that submissions are to be used for that sole purpose. Furthermore, I note that section 18(g) of the Interpretation Act 2005 states that marginal notes placed at the side of a section of an enactment to indicate the subject, contents or effect of the section or provision should not be taken to be part of the enactment, or be construed in relation to the interpretation of the enactment.

The Council went on to say that each submission made related to a specific planning application and was required to be kept on the planning file for the sole purpose of assessing an application and that the details were not intended for re-use beyond that.

Public sector bodies collect, produce, reproduce and disseminate documents to fulfil their public tasks. While I accept that the information concerned was submitted as part of the

planning process and contains personal data, I am also conscious of the presumption in favour of release of records for the purpose of re-use set out in the Regulations.

Regulation 5(2) states that “[s]ubject to paragraph (2A), a public sector body shall, on receipt of a request under paragraph (1) in respect of a document held by it to which these Regulations apply, allow the re-use of the document for commercial or non-commercial purposes in accordance with the conditions and time limits provided for by these Regulations.”. I see nothing in the Planning and Development Act as amended that would preclude the re-use of the information sought.

Having considered the Council’s refusal to allow re-use of the record sought, I find that its refusal was not in compliance with the PSI Regulations and I direct the release of the information sought to the appellant for the purposes of re-use.

Journalistic Purposes

Section 43 of the DP Act provides as follows:

“(1) The processing of personal data for the purpose of exercising the right to freedom of expression and information, including processing for journalistic purposes or for the purposes of academic, artistic or literary expression, shall be exempt from compliance with a provision of the Data Protection Regulation specified in subsection (2) where, having regard to the importance of the right of freedom of expression and information in a democratic society, compliance with the provision would be incompatible with such purposes.

(2) The provisions of the Data Protection Regulation specified for the purposes of subsection (1) are Chapter II (principles), other than Article 5(1)(f), Chapter III (rights of the data subject), Chapter IV (controller and processor), Chapter V (transfer of personal data to third countries and international organisations), Chapter VI (independent supervisory authorities) and Chapter VII (cooperation and consistency).”

I should state that, in the circumstances of this case, even if I had found that access to the information sought would otherwise be excluded by virtue of the DP Act, I am of the view that section 43 of the DP Act could be relevant, given that the appellant in this case is seeking the information for journalistic purposes, arguably in the public interest. However, given my findings above, it is not necessary for me to determine the matter in this case.

Decision

In accordance with Regulation 12(2) of the PSI Regulations, I have reviewed the decision of the Council on the appellant’s request. I find that the Council was not justified in refusing the appellant’s request on the basis of Regulation 3 of the PSI Regulations.

Accordingly, I annul the decision of the Council to refuse the appellant’s request and direct the release of the record sought for the purposes of re-use. It is open to the Council to

impose conditions on the re-use of the information, subject to Regulation 8 of the PSI Regulations.

Right of Appeal

A party to this appeal or any other person affected by this decision may appeal this decision to the High Court on a point of law from the decision, as set out in Regulation 15 of the PSI Regulations. Such an appeal must be initiated not later than eight weeks after notice of this decision was given to the person bringing the appeal.

Peter Tyndall
Information Commissioner