Case RPSI/18/02

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 MB

Public Sector Body: Fingal 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 Information Commissioner reviewed the decision of the Council on the appellant's request. The Commissioner found that the Council was not justified in refusing the appellant's request on the basis of the reasons stated. 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 24 November 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 and was "motivated solely with the public interest in mind".

The Council's decision on December 2018 refused the appellant's request. It stated that a list or database of planning submissions as requested did not exist. It said that if such a list existed, the Council "would be happy to supply it for re-use", but that it was not required to create a record to respond to re-use requests (Regulation 5(5)(b) refers).

Further correspondence between the appellant and the Council led to a more formal decision issuing on 14 December. In its email, the Council relied on Regulation 5(5)(b) and data protection grounds to refuse the appellant's request.

On 14 December 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.

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

Regulation 5(5)(b)

The Council refused the appellant's request in the first instance on the basis that under the Regulations, it was not required to create such a record or to go beyond a simple operation.

Regulation 5(5)(b) provides that a public sector body is not required

> "(i) to create or adapt any document in order to comply with a request,
> (ii) to provide extracts from documents where this would involve disproportionate effort, going beyond a simple operation...".

In its initial submissions to my Office, the Council stated that it would have to design a query to extract the information from three tables. It said that in doing so, a new table would have to be created containing what it described as "new records" of all objectors to planning applications.

In the same submission, the Council stated that if the request had been to re-use purely statistical data, without the names of those making submissions, its response would have been different, regardless of the effort involved, which it stated "was never an issue". During the course of this review, this Office's Investigator asked the Council to confirm that it was not relying on regulation 5(5)(b) to refuse access to the record sought.

In its response, the Council stated that it normally approached such a request by assessing whether the records already existed; if the Council had the technical ability to create the record sought; what amount of staff time and resources were required; would the Council require a time extension or a refinement of the request, and, finally whether collating the records/information sought would cause a serious disruption to the day-to-day work of the relevant department.

It stated that as long as a serious disruption would not be caused and it was simply a matter of extracting a record from an electronic database, that would not be an issue. It went on to describe the applicant's request as requiring it to isolate submissions issuing from four specific email addresses over the course of nine years, which it stated would involve more than a reasonable effort. It went on to say that providing the entire list of submissions to the applicant, as other local authorities had appeared to do for the applicant, instead of concentrating on four specific submitters, would be in breach of GDPR (General Data Protection Regulation (EU) 2016/679) principles. However, it did not state that providing the entire list would be too onerous or involve more than a reasonable effort.

When asked to clarify its response, the Council explained that it had confused an FOI request made by the applicant with the RPSI request at issue. It said that its comments relating to four separate email addresses should be discounted. It did not make any more submissions in relation to the RPSI request.

I am satisfied that the extraction of data spanning three tables and its formatting as described by the Council is more in the nature of extracting data from the existing database,

rather than the creation of a new document, or the adaption of the database itself. In my view, the circumstances are such that Regulation 5(5)(b) does not apply.

Right of Access

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.

Incompatible with Data Protection

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 for purposes other than which it was originally submitted. Its position is that processing the data for the purposes of the appellant's re-use request would be "outside the reasons for which it was collected" and in contravention of data protection principles.

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.

The Council's submission to my Office stated that planning applications and submissions were made available to the public as required by legislation to provide a transparent and open process. Essentially it is of the view that it has a legal basis to process the data concerned under its obligations in planning legislation, but that there is no such legal basis to process the information further by releasing it for re-use under the Regulations.

The Council compared the information sought in this case with the un-edited version of the electoral register, which comprises personal data and is available for purchase. It stated that despite the availability of the un-edited register, the information could only be used for electoral purposes. However, I understand that this is because this restriction is specifically provided for in section 32 of the Electoral (Amendment) Act, 2001. I am not aware of, neither has it been argued that there is, any equivalent provision in planning legislation.

In any event, 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". In essence, the Council's position is that complying with the appellant'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(1) 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 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 puts the submissions on its website when they are received and its website informs the public of this.

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.".

Furthermore, 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).

I note that this Office's Investigator brought the AIE obligations to the Council's attention. In response, it stated that it makes all reasonable efforts to maintain environmental information in an accessible manner as required.

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 to engender confidence in the system overall. 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 available to allow planning authorities to make informed decisions and to encourage public acceptance of planning decisions and 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.

The Council is of the view that the purpose for which the appellant intends to use the information 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.

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 be otherwise 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 Regulations 3 and 5 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.

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Peter Tyndall
Information Commissioner