



Response by the Scottish Information Commissioner to the Independent Review of Planning

As Scottish Information Commissioner, I have responsibility for enforcing and promoting Scotland's Freedom of Information (FOI) law¹, and good FOI practice. This encompasses both investigation and enforcement of applications about compliance with FOI and promoting and enforcing the duty placed on public authorities to proactively publish information. All of this supported by a duty on authorities to provide advice and assistance to requesters or potential requesters.

1. It is particularly in the context of advice and assistance, proactive publication and good FOI practice that I welcome the opportunity to respond to the Commission's call for written evidence. This response focuses specifically on:
 - (i) Leadership, resourcing and skills
 - (ii) Community engagementand their relationship to access to access to information law.
2. A significant proportion of applications to the Commissioner over the last 10 years have concerned access to information about planning matters: from development control to strategic planning frameworks. Many high profile planning issues have been the subject of information requests, including Trearne Quarry, Whitrigg East and the Menie Estate. Increasingly the Commissioner is asked to determine cases involving access to information about renewable energy and fracking. Some of these cases may have been handled more effectively, or even been avoided, had there been a different approach to the willingness to disclose information proactively, without waiting for someone to make an information request, or to engage more with requesters through the giving of advice and assistance.
3. Access to information about planning issues has also been the subject of appeals to the Court of Session. In the following cases, the Commissioner ordered disclosure of planning information and the Court agreed with the approach:
 - **Decision 060/2005, Mr David Elstone and the Scottish Executive; Mr Martin Williams of The Sunday Herald and the Scottish Executive**
 - **Decision 231/2006, Mr Jim Thomson and the Scottish Executive**

¹ Freedom of Information (Scotland) Act 2002 and Environmental Information (Scotland) Regulations 2004

4. Fife Council also appealed to the Court of Session against a decision from the Commissioner ordering information to be disclosed in the following case. The Council abandoned the appeal shortly before the hearing and disclosed the information:

- **Decision 200/2012, Clatto Landscape Protection Group and Fife Council**

Leadership, Resourcing and Skills

5. We observe an underlying theme in planning cases about leadership (both provided and given) and the extent to which it promotes openness in the planning system and, particularly, the giving of advice and assistance. At a leadership level, openness of planning systems should be considered within the wider context of openness as one of the two underpinning principles of good governance². This in turn influences and fosters a culture of openness across all areas of service delivery which in FOI terms manifests itself through proactive publication and willingness to engage with requesters.
6. It is important that knowledge, awareness and skills are not just about developing expertise in planning, but also about ensuring that planning professionals are aware of other statutory obligations e.g., provision of access to information. Do planners recognise, when they're asked for information, that the request carries rights under FOISA and the EIRs, not simply that there is a right of access under planning law? Do they know they must follow the charging provisions under FOISA and the EIRs? Equally, it is important that FOI officers and reviewers are aware of planning-specific issues.
7. It's essential to look at consistency across the full spectrum of planning activity. Applicants tell us that it is easier to access planning information from some authorities rather than others, and at different stages of the planning process. We perceive the need for partnership working, integration and working together to promote the consistency of good practice in access to information.
8. It is leaders' responsibility to ensure there are structures to underpin community engagement at every stage: pre-planning, applications and consents, and inquiries. Information must be accessible, consistent and clear.

Community engagement

9. It is essential to refer to the Aarhus Convention as many planning requests are for environmental information and so subject to the EIRs (which derive from the Convention):
- (i) "Public participation in decision-making is the second "pillar" of the Convention. Public participation cannot be effective without access to information, as provided under the first pillar, nor without the possibility of enforcement, through access to justice under the third pillar.
 - (ii) In its ideal form, public participation involves the activity of members of the public in partnership with public authorities to reach an optimal result in decision-making and policymaking. There is no set formula for public participation, but at a minimum it

² <http://www.cipfa.org/policy-and-guidance/standards/international-framework-good-governance-in-the-public-sector>

requires effective notice, adequate information, proper procedures and appropriately taking account of the outcome of the public participation. The level of involvement of the public in a particular process depends on a number of factors, including the expected outcome, its scope, who and how many will be affected, whether the result settles matters on a national, region or local level, and so on. In addition, different persons may have different status in connection with participation on a particular matter.

(iii) Those who are most affected by the outcome of the decision-making or policymaking should have a greater chance to influence the outcome.”³

10. Access to information is a cornerstone of community engagement. Current access to information arrangements tend to focus on the application phase of planning, but ought to apply to every stage, from pre-submission to inquiry and after approval or refusal.
11. To a large extent, applications for planning permission are already widely accessible, both through public planning offices and the growth in e-planning services. But there is a disconnect in the access for people who live distantly from offices or who cannot access the internet.
12. We also question the level of access exercised by specific groups. For example, children and young people: to what extent are they made aware of planning issues and kept informed? Both are critical to their engagement.
13. Could planning documents, particularly planning notices, be expressed in plain English? If there is a statutory need to include technical or legal terms in documents might they also be included in plain English to support understanding of lay readers?
14. We hear of difficulties for people who want *paper copies* of planning applications. Planning service charges for providing paper copies are not always compliant with FOI law. For example, in **Decision 153/2015: Q and Aberdeen City Council Q** asked whether there had been any building warrants applied for or granted for a named property since 1994. The Council informed Q that it would cost £70 simply to confirm whether warrants had been applied for or granted, the standard fee for its Property History search service. The Commissioner found the Council was not entitled to charge for a search service under its publication scheme.
15. It's difficult for people to check whether planning conditions have been complied with – they have to know whether there were any conditions at the time of approval in order to follow a case up later. Planning applications are live for only a limited period (they contain personal information), but the need for access is often longer.
16. On improving the public's perceptions about planning, there would be benefit in greater consistency of approach across Scotland. While Standard 6 of the Scottish Government's Planning Advice Note on Community Engagement focuses on sharing information, from experience, authorities would benefit from more specific guidance. For example, lists of

³ Aarhus Implementation Guide

http://www.unece.org/fileadmin/DAM/env/pp/Publications/Aarhus_Implementation_Guide_interactive_eng.pdf.

information that should be available at each stage, whether public registers ought to be available online, guidance on charging under the EIRs and providing information in paper form or alternative formats.

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