



Scottish Information
Commissioner
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Decision Notice 249/2024

Documentation from a Local Access Forum meeting

Authority: Orkney Islands Council
Case Ref: 202400523

Summary

The Applicant asked the Authority for a copy of all “Downies Lane recommendation documentation” sent to the Authority from the Orkney Local Access Forum (OLAF) meeting held on 26 October 2022. The Authority stated that it did not hold the information requested. The Commissioner investigated and found that the Authority had failed to provide adequate submissions to justify its position. He required the Authority to carry out a fresh review and to provide the Applicant with a revised review outcome.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 17(1) (Notice that information is not held); 39(2) (Health, safety and the environment); 47(1) and (2) (Application for decision by Commissioner)

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (definition of “the Act”, “applicant”, “the Commissioner” and the definition of “environmental information”) (Interpretation); 5(1) (Duty to make environmental information available on request); 10(1), (2) and (4)(a) (Exceptions from duty to make environmental information available); 17(1), (2)(a), (b) and (f) (Enforcement and appeal provisions)

Background

1. According to the OLAF [website](#)¹, the agenda for a meeting held by OLAF on 26 October 2022 contained an item entitled “Downies Lane, Stromness”.
2. On 16 December 2023, the Applicant made a request for information to the Authority. They asked for a copy of all Downies Lane recommendation documentation sent to the Authority from the OLAF meeting held on the 26 October 2022.
3. The Authority responded on 22 December 2023, stating that it did not hold the information requested.
4. On 25 January 2024, the Applicant wrote to the Authority in respect of what they considered to be its failure to respond as they had not received its response of 22 December 2023. The Authority provided evidence to the Applicant that it had responded to their request on 22 December 2023.
5. On 29 February 2024, the Applicant wrote to the Authority requesting a review of its decision. On 4 March 2024, the Authority sought clarification from the Applicant regarding their reasons for dissatisfaction. On the same day, the Applicant responded to clarify that they were dissatisfied with the decision because:
 - they did not receive the Authority’s initial response on 22 December 2023
 - they believed that the Authority did hold the information requested as there were three employees of the Authority present at the meeting specified in their request and it was reasonable to assume that those employees would have generated some recorded information relevant to their request (e.g. a report on their safety concerns).
6. The Authority notified the Applicant of the outcome of its review on 26 March 2024. The Authority explained that it had received confirmation from its IT service that its initial response was successfully delivered to the Applicant on 22 December 2023. In terms of the information requested, the Authority confirmed that “the matter was raised verbally” by an employee of the Authority who had attended the specified meeting, but it held no information relevant to the Applicant’s request.
7. On 11 April 2024, the Applicant wrote to the Commissioner, applying 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. The Applicant stated that they were dissatisfied with the outcome of the Authority’s review because they did not believe the Authority did not hold information relevant to their request.

Investigation

8. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
9. On 12 April 2024, the Authority was notified in writing that the Applicant had made a valid application. The case was subsequently allocated to an investigating officer.
10. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Authority was invited to comment

¹ <https://www.orkneycommunities.co.uk/OLAF/index.asp?pageid=593738>

on this application and to answer specific questions. These related to how the Authority had determined that it held no information falling within the scope of the request and whether it considered the request ought to have been handled in terms of the EIRs.

Commissioner's analysis and findings

11. The Commissioner has considered all of the submissions made to him by the Applicant and the Authority.

FOISA or EIRs?

12. The relationship between FOISA and the EIRs was considered at length in [Decision 218/2007](#)². Broadly, in the light of that decision, the Commissioner's general position is as follows:
 - (i) The definition of what constitutes environmental information should not be viewed narrowly.
 - (ii) There are two separate statutory frameworks for access to environmental information and an authority is required to consider any request for environmental information under both FOISA and the EIRs.
 - (iii) Any request for environmental information therefore must be handled under the EIRs.
 - (iv) In responding to a request for environmental information under FOISA, an authority may claim the exemption in section 39(2).
 - (v) If the authority does not choose to claim the section 39(2) exemption, it must respond to the request fully under FOISA: by providing the information; withholding it under another exemption in Part 2; or claiming that it is not obliged to comply with the request by virtue of another provision in Part 1 (or a combination of these).
 - (vi) Where the Commissioner considers a request for environmental information has not been handled under the EIRs, he is entitled (and indeed obliged) to consider how it should have been handled under that regime.
13. As rehearsed earlier, given his understanding of the subject matter of the request, the Commissioner asked the Authority to consider whether the request properly fell to be handled as a request for environmental information, and therefore responded to under the EIRs.
14. In response, the Authority stated that, on reflection, it should have had regard to the EIRs and, had it done so, it believed it would have considered the information requested to be environmental information. The Authority confirmed that it now wished to rely on the exemption in section 39(2) of FOISA, to consider the request in terms of the EIRs and to rely on the exception in regulation 10(4)(a) of the EIRs as it did not hold the information requested.
15. It is clear to the Commissioner from the information falling within the scope of the request, that this would be environmental information, as defined in regulation 2(1) of the EIRs.

² <https://www.foi.scot/decision-2182007>

16. Given that the information requested is properly considered to be environmental information, the Authority has a duty to consider it in terms of regulation 5(1) of the EIRs. In failing to do so (until during the investigation), the Commissioner finds that the Authority failed to comply with regulation 5(1).

Section 39(2) of FOISA – environmental information

17. The exemption in section 39(2) of FOISA provides, in effect, that environmental information (as defined by regulation 2(1) of the EIRs) is exempt from disclosure under FOISA, thereby allowing any such information to be considered solely in terms of the EIRs.
18. In this case, as rehearsed earlier, the Authority confirmed that it now considered the request fell to be considered under the EIRs and that it wished to rely on the exemption in section 39(2) of FOISA.
19. The Commissioner finds that the Authority was entitled to apply this exemption to the request, given his conclusion that the information requested was properly classified as environmental information.
20. As there is a separate statutory right of access to environmental information available to the Applicant, the Commissioner also accepts that, in this case, the public interest in maintaining this exemption and in handling the request in line with the requirements of the EIRs outweighs any public interest in disclosing the information under FOISA.

Regulation 16 of the EIRs

21. Regulation 16 of the EIRs states that, on receipt of a requirement to conduct a review, the authority shall review the matter and decide whether it has complied with the EIRs, within 20 working days (regulations 16(3) and (4)). It also states that, where an authority has not complied with its duty under the EIRs, it shall immediately take steps to remedy the breach of duty (regulation 16(5)).
22. Although the Authority responded to the Applicant's requirement for review on 26 March 2024, as explained above, this was a result of the Authority considering the request solely in terms of FOISA and not under the EIRs.
23. It is apparent that the Authority failed to respond to the Applicant's request of 16 December 2023 in terms of the EIRs, and therefore failed to comply with regulation 5(1) of the EIRs. It is also apparent that the Authority failed to carry out a review meeting the requirements of regulation 16 of the EIRs.
24. Having found that the Authority should have responded to the Applicant's request in terms of the EIRs, the Commissioner will now decide whether the information requested was held by the Authority.

Regulation 5(1) – Duty to make environmental information available

25. Regulation 5(1) of the EIRs requires a Scottish public authority which holds the information to make it available when requested to do so by any applicant. This obligation relates to information that is held by the authority when it receives a request.
26. On receipt of a request for environmental information, the authority must ascertain what information it holds falling within the scope of the request. Having done so, regulation 5(1) of the EIRs requires the authority to make the information available, unless a qualification in regulation 6 to 12 applies (regulation 5(2)(b)).

27. Under the EIRs, a Scottish public authority may refuse to make environmental information available if one or more of the exceptions in regulation 10 applies.

Regulation 10(4)(a) – Information not held

28. Regulation 10(4)(a) of the EIRs provides that a Scottish public authority may refuse to make environmental information available to the extent that it does not hold that information when an applicant's request is received.
29. The standard of proof to determine whether a Scottish public authority holds information is the civil standard of the balance of probabilities. In determining where the balance of probabilities lies, the Commissioner considers the scope, quality, thoroughness and results of the searches carried out by the public authority.
30. The Commissioner also considers, where appropriate, any reason offered by the public authority to explain why it does not hold the information. While it may be relevant as part of this exercise to explore expectations about what information the authority should hold, ultimately the Commissioner's role is to determine what relevant recorded information is (or was, at the time the request was received) actually held by the public authority.

The Applicant's submissions

31. The Applicant characterised the subject of "Downies Lane", raised at the 26 October 2022 OLAF meeting, as a high-profile safety concern which could have significant safety implications.
32. The Applicant submitted that there were three employees of the Authority in attendance at the 26 October 2022 OLAF meeting, including the Authority's rural planner. The Applicant considered that the Authority's rural planner, who raised the Downies Lane subject at the meeting, should have reported back to the Authority.

The Authority's submissions

33. The Authority explained that it had interpreted the Applicant's request to be for information held by it which related to any recommendation made by OLAF at the meeting on 26 October 2022 regarding the "Downies Lane, Stromness" item on the agenda.
34. The Authority submitted that it had consulted its rural planner regarding the request because they were the most appropriate person to contact. This was because the rural planner was an officer in the Authority's Neighbourhood Services and Infrastructure Directorate (responsible for land access matters), they had attended the 26 October 2022 OLAF meeting and they were the Authority's sole point of contact for all land access matters, including any queries relating to OLAF.
35. While the Authority confirmed that its rural planner had attended the 26 October 2022 OLAF meeting, it could not confirm whether other employees had attended. The Authority noted that OLAF's secretary did not produce a minute of the meeting and that the secretary had not responded to subsequent correspondence from the Authority on this matter.
36. As a result of the rural planner no longer working for the Authority, there being no minute of the 26 October 2022 OLAF meeting and the lack of response from OLAF, the Authority stated that it was unable to corroborate the Applicant's assertion that there were three persons from the Authority present at the meeting.

37. In summary, the Authority's position that no information was held which fell within the scope of the request was based on a single email from its (former) rural planner stating that the Authority did not hold any "recommendation documentation" relating to "Downies Lane, Stromness".
38. The Authority confirmed that, as the rural planner was no longer employed by the Authority, it was unable to verify what searches they undertook and explained that it had been advised by its IT service that the rural planner's email account was no longer accessible.

The Commissioner's view

39. Having closely considered the terms of the request and the submissions provided by the Authority, the Commissioner is satisfied that the Authority's interpretation of the request was reasonable.
40. In all cases, however, it falls to the public authority to persuade the Commissioner, with reference to adequate, relevant descriptions and evidence, that it does not hold the information requested. In this case, notwithstanding the opportunity given to provide comments, the Commissioner is not satisfied that the Authority has achieved this.
41. Specifically, the Commissioner finds that the Authority's submissions on searches fall short because it has not provided him with adequate evidence of the searches it undertook in response to the request. Instead, the Authority has only provided him with an email containing an assurance from the rural planner who attended the 26 October 2022 OLAF meeting confirming that the Authority held no information relevant to the request.
42. The Commissioner accepts that the rural planner was an appropriate person to ask, given they were an officer within the Authority's Neighbourhood Services and Infrastructure Directorate and were the Authority's sole point of contact for all land access matters, including any queries relating to OLAF.
43. The Commissioner also recognises that the rural planner in question no longer works for the Authority and that it cannot access their email account.
44. However, the Commissioner considers it possible that information relevant to the request might be located were further searches to be undertaken (e.g. by using relevant keywords and by searching relevant locations more broadly).
45. In all the circumstances, therefore, the Commissioner cannot, based on the submissions he has received, uphold the Authority's claim that it does not hold any information relevant to the request.
46. The Commissioner therefore concludes, on balance, that the Authority was not entitled to rely on the exception in regulation 10(4)(a) of the EIRs.
47. The Commissioner requires the Authority to carry out fresh searches for information relevant to the request, reach a decision on the basis of those searches and notify the Applicant of the outcome (all in terms of regulation 16 of the EIRs).
48. The Commissioner's decision below states a compliance date of 06 January 2025 in line with the timescales he is required to follow. This is the latest day on which the Authority must issue a response; the deadline does not prevent the Authority from issuing one sooner.

Decision

The Commissioner finds that the Authority failed to comply the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by the Applicant.

Specifically, the Commissioner finds that:

- the Authority should have dealt with the request under the EIRs rather than under the Freedom of Information (Scotland) Act 2002. In responding under FOISA, the Authority failed to comply with regulations 5(1) and 16 of the EIRs.
- the Authority has failed to satisfy him that it does not hold any information relevant to the Applicant's request. As a result, it failed to comply with regulation 5(1) of the EIRs.

The Commissioner therefore requires the Authority to carry out adequate, proportionate searches for the information, reach a decision on the basis of those searches and notify the Applicant of the outcome (all in terms of regulation 16 of the EIRs), by **06 January 2025**.

Appeal

Should either the Applicant or the Authority 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.

Enforcement

If the Authority fails to comply with this decision, the Commissioner has the right to certify to the Court of Session that the Authority has failed to comply. The Court has the right to inquire into the matter and may deal with the Authority as if it had committed a contempt of court.

Cal Richardson
Deputy Head of Enforcement

14 November 2024