



Scottish Information
Commissioner
www.foi.scot

Decision Notice 271/2024

Purchase of the AP Jess plot

Authority: Inverclyde Council
Case Ref: 202401211

Summary

The Applicant asked the Authority for a copy of the paper on the purchase of the AP Jess plot which was presented to the Environment and Regeneration Committee on 31 August 2023. The Authority disclosed information relating to the AP Jess Plot within the paper and redacted certain information it considered fell outwith the scope of the request. The Commissioner found that request ought to have been properly considered under the EIRs, but that the Authority had disclosed all information falling within the scope of the request.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 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) and (2) (Duty to make environmental information available on request); 16(4) (Review by Scottish public authority); 17(1), (2)(a), (b) and (f) (Enforcement and appeal provisions)

Background

1. On 24 June 2024, the Applicant made a request for information to the Authority. The Applicant asked for a copy of the paper on the purchase of the AP Jess plot which was presented to the Environment and Regeneration Committee on 31 August 2023.

2. The Authority failed to respond.
3. On 27 July 2024, the Applicant wrote to the Authority requiring a review in respect of its failure to respond.
4. The Authority notified the Applicant of the outcome of its review on 2 September 2024. The Authority apologised for its failure to respond to the Applicant's request and for the delay in responding to his requirement for review. The Authority disclosed to the Applicant a copy of the report submitted to the Environment & Regeneration Committee on 31 August 2023, subject to the redaction of information it considered fell out with the scope of the request as it did not relate to the purchase of the AP Jess plot.
5. On 5 September 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 he was dissatisfied with the outcome of the Authority's review for the following reasons:
 - the Authority failed to respond to his request and requirement for review within the timescales allowed
 - he was not satisfied that the Authority's redactions were necessary, and he believed that disclosure of the redacted information would clarify the whole purchase process of the AP Jess plot.

Investigation

6. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
7. On 24 September 2024, the Authority was notified in writing that the Applicant had made a valid application. The Authority was asked to send the Commissioner the information withheld from the Applicant. The Authority provided the information, and the case was subsequently allocated to an investigating officer.
8. 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 on this application and to answer specific questions, including on whether the request ought to have properly been considered under the EIRs.

Commissioner's analysis and findings

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

FOISA or the EIRs?

10. In [Decision 218/2007](https://www.foi.scot/decision-2182007)¹, the Commissioner confirmed (at paragraph 51) that, where environmental information is concerned, there are two separate statutory frameworks for

¹ <https://www.foi.scot/decision-2182007>

access to that information and, in terms of the legislation, an authority is required to consider the request under both FOISA and EIRs.

11. As stated above, the Authority was asked whether it believed the request ought to have properly been considered under the EIRs, given the nature of the information requested.
12. In response, the Authority accepted that the request should have been more appropriately dealt with under the EIRs.
13. Having considered the terms of the request and the Authority's submissions on this point, it is clear that any information falling within the scope of the request would be environmental information, as defined in regulation 2(1) of the EIRs.
14. The Authority confirmed that it wished to rely on the exemption in section 39(2) of FOISA, where the public interest lay in favour of applying the exemption. The Authority considered that the public interest in disclosing any relevant information under FOISA was outweighed by that in considering a request for environmental information in accordance with the EIRs.
15. In this case, the Commissioner accepts that the Authority was entitled to apply the exemption in section 39(2) of FOISA, given his conclusion that the information requested is properly considered to be environmental information. This exemption is subject to the public interest test in section 2(1)(b) of FOISA.
16. As there is a separate statutory right of access to environmental information available to the Applicant in this case, the Commissioner accepts that the public interest in maintaining this exemption and dealing with the request in line with the requirements of the EIRs outweighs any public interest in disclosure of the information under FOISA. In the circumstances, he will consider this case, in what follows, solely in terms of the EIRs.
17. The Commissioner recognises that, in this case, the outcome would have been the same regardless of whether the request was dealt with under FOISA or the EIRs. However, as the Authority failed to recognise and respond to the request as a request for environmental information, the Commissioner must find that the Authority failed, in this respect, to respond in accordance with regulation 5(1) of the EIRs.

Regulation 5(1) - Duty to make available environmental information on request

18. Regulation 5(1) of the EIRs requires a Scottish public authority that holds environmental information to make it available when requested to do so by any applicant. This obligation relates to the information held by an authority when it receives a request.
19. On receipt of a request for environmental information, therefore, the authority must ascertain what information it holds falling within the scope of the request. Having done so, regulation 5(1) requires the authority to provide that information to the requester, unless a qualification in regulations 6 to 12 applies (regulation 5(2)(b)).
20. 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 lies, the Commissioner considers the scope, quality, thoroughness and results of the searches carried out by the public authority.
21. 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 as to what information the authority should hold,

ultimately the Commissioner's role is to determine what relevant information is actually held by the public authority (or was held, at the time it received the request)

The Applicant's submissions

22. The Applicant explained that the information he requested concerned the purchase of the AP Jess plot. He stated that the report presented to the Environment and Regeneration Committee on 31 August 2023 sought the support from councillors on the Committee to purchase the AP Jess plot and apply for City Deal funding. He explained that he required clarity on what organisation the report stated would purchase the plot and receive the funding.
23. In terms of the redacted information, the Applicant submitted that he believed information was withheld regarding the process on purchasing the AP Jess plot and the ownership. He stated that he required the full information from the report to determine whether public funds were used properly and legally for the purchase of the AP Jess plot.

The Authority's submissions

24. The Authority explained that the report requested by the Applicant was considered, in private, by the Environment and Regeneration Committee on 31 August 2023. It interpreted the request as seeking information contained within the report relating solely to the acquisition of the AP Jess plot.
25. The Authority confirmed that it redacted certain information from the report disclosed to the Applicant as that information did not relate to the purchase of the AP Jess plot and instead related to a "completely separate" property transaction. It therefore concluded that the redacted information fell outwith the scope of the request.

The Commissioner's view

26. 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 (i.e. the request sought information relating to the purchase of the AP Jess plot solely). He notes that, during the investigation, the Applicant confirmed that the information he requested concerned the purchase of the AP Jess plot.
27. Having reviewed the withheld information, the Commissioner is satisfied that the Authority was correct to withhold as falling outwith the scope of the request the information that it redacted from the report it disclosed to the Applicant. In other words, he is satisfied that the redacted information does not relate to the AP Jess plot and instead relates, as the Authority stated, to a separate property transaction.
28. Given the specific terms of the request, the Commissioner is satisfied that the Authority has identified and disclosed to the Applicant all relevant information falling within the scope of the request.
29. The Commissioner is therefore satisfied that the Authority was entitled to withhold as falling outwith the scope of the request the information that it redacted from the report disclosed to the Applicant and that, in this respect, the Authority complied with regulation 5(1) of the EIRs in responding to the request.

Handling of the request

30. As rehearsed earlier, the Authority considered the request in terms of FOISA, but the Commissioner has found that request ought to have been properly considered under the EIRs.
31. Regulation 5(2)(a) of the EIRs gives Scottish public authorities a maximum of 20 working days following the date of receipt of the request to comply with a request for information. This is subject to qualifications which are not relevant in this case.
32. Regulation 16(4) of the EIRs gives Scottish public authorities a maximum of 20 working days following the date of receipt of the requirement to comply with a requirement for review. Again, this is subject to qualifications which are not relevant in this case.
33. The Authority apologised for its failure to respond to the Applicant's original request and for its late response to his requirement for review.
34. However, it is a matter of fact that the Authority did not respond to the Applicant's request within the statutory timescale. As such, he finds that the Authority failed to comply with regulation 5(2)(a) of the EIRs.
35. It is also a matter of fact that the Authority did not respond to the Applicant's requirement for review within the statutory timescale. As such, he finds that the Authority failed to comply with regulation 16(4) of the EIRs.
36. The Commissioner has recorded these procedural failures in his case management database, which is used to inform and monitor FOI practice by authorities.

Decision

The Commissioner finds that the Authority failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) and with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by the Applicant.

The Commissioner finds that, by failing to recognise and respond to the request as a request for environmental information, the Authority failed to comply with regulation 5(1) of the EIRs.

The Commissioner also finds that the Authority failed to comply with regulations 5(2)(a) and 16(4) of the EIRs respectively, by failing to respond to the Applicant's request and requirement for review within statutory timescales.

However, the Commissioner is satisfied that Authority identified all information falling within the scope of the request and that it was entitled to withhold as falling outwith the scope of the request the information that it redacted from the report it disclosed to the Applicant.

In the circumstances, the Commissioner therefore does not require the Authority to take any action in respect of these failures in response to the application.

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.

Cal Richardson
Deputy Head of Enforcement

25 November 2024