



Scottish Information  
Commissioner  
[www.itspublicknowledge.info](http://www.itspublicknowledge.info)

# Decision Notice 272/2024

---

## Information relating to a sewage system

**Authority: Scottish Borders Council**

**Case Ref: 202200840**

### Summary

The Applicant asked the Authority for information relating to a sewage system. The Authority informed the Applicant that it did not hold the information requested and that her request was manifestly unreasonable. The Commissioner investigated and found that the Authority had failed to provide adequate submissions to justify its position that the Applicant's request was manifestly unreasonable, but he did not require it to take any action.

### 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" and "the Commissioner" and definition of "environmental information") (Interpretation); 5(1) (Duty to make environmental information available on request); 10(4)(b) (Exceptions from duty to make environmental information available); 17(1), (2)(a), (b) and (f) (Enforcement and appeal provisions)

### Background

1. On 27 February 2022 the Applicant made a request for information to the Authority. At the same time as making a subject access request, she asked for information relating to the opening of a soakway/sewage system. The full text of the request, subject to the removal of the subject access request, is set out in Appendix 1.

2. The Authority responded on 24 March 2022. The Authority confirmed that it held “no new information” and issued a notice in terms of regulation 10(4)(a) of the EIRs. The Authority stated that it also considered the request to be “both vexatious and repeated” in terms of under regulation 10(4)(b) of the EIRs.
3. On 24 March 2022, the Applicant wrote to the Authority requesting a review of its decision. The Applicant stated that she was dissatisfied with the response because she disagreed that her request was either vexatious or repeated.
4. The Authority notified the Applicant of the outcome of its review on 30 March 2022, which upheld its original response. In terms of its reference to the request being “repeated”, the Authority explained that the Applicant had asked for the same information over a number of years in different ways and any information held “would be in relation to the building warrant” which it stated it had already disclosed to her.
5. On 27 July 2022 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 she was dissatisfied with the outcome of the Authority’s review because the Authority had accused her of being vexatious when she was not and because it had not provided her with the information she had requested.

## **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 3 October 2022, and in line with section 49(3)(a) of FOISA, the Commissioner gave the Authority notice in writing of the application and invited its comments.
8. The case was subsequently allocated to an investigating officer.
9. As the Applicant’s requirement for review was limited to challenging the Authority’s reliance on the exception in regulation 10(4)(b) of the EIRs, the Commissioner’s investigation can only consider that exception in his decision – he cannot consider the Authority’s reliance on 10(4)(a) of the EIRs.

## **Commissioner’s analysis and findings**

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

### ***Handling in terms of the EIRs***

11. The Authority considered the Applicant’s request under the EIRs, having concluded that the information requested was environmental information as defined in regulation 2(1) of the EIRs.
12. Where information falls within the scope of this definition, a person has a right to access it (and the public authority has a corresponding obligation to respond) under the EIRs, subject to the various restrictions and exceptions contained in the EIRs.

13. In the circumstances, the Commissioner is satisfied that the information requested by the Applicant falls within the definition of environmental information set out in regulation 2(1) of the EIRs.
14. The Applicant has not disputed this, and the Commissioner will consider the request solely in terms of the EIRs.

***Regulation 5(1) of the EIRs – Duty to make environmental information available***

15. Regulation 5(1) of the EIRs (subject to the various qualifications contained in regulations 6 to 12) requires a Scottish public authority which holds environmental information to make it available when requested to do so.
16. Under the EIRs, a public authority may refuse to make environmental information available if one or more of the exceptions in regulation 10 applies.

***Regulation 10(4)(b) of the EIRs – Manifestly unreasonable***

17. Under the exception in regulation 10(4)(b) of the EIRs, a Scottish public authority may refuse to make environmental information available to the extent that the request for information is manifestly unreasonable. In considering whether the exception applies, the authority must interpret it in a restrictive way and apply a presumption in favour of disclosure. Even if it finds that the request is manifestly unreasonable, it is still required to make the information available unless, in all the circumstances, the public interest in doing so is outweighed by that in maintaining the exception.
18. The Commissioner's general approach is that the following factors are relevant when considering whether a request is manifestly unreasonable under regulation 10(4)(b) of the EIRs. These are that the request:
  - would impose a significant burden on the public body
  - does not have a serious purpose or value
  - is designed to cause disruption or annoyance to the public authority
  - has the effect of harassing the public authority
  - would otherwise, in the opinion of a reasonable person, be considered to be manifestly unreasonable or disproportionate.
19. This is not an exhaustive list. Depending on the circumstances, other factors may be relevant, provided the impact on the authority can be supported by evidence. The Commissioner recognises that each case must be considered on its merits, taking all the circumstances into account.
20. In this case, the Authority has failed to provide evidence to justify its application of the exception in regulation 10(4)(b) of the EIRs to the request.
21. The Authority's initial response stated that, in addition to the information requested not being held, it considered the Applicant's request to be "both vexatious and repeated" under regulation 10(4)(b) of the EIRs.
22. The Authority's review outcome upheld its initial response and explained, regarding the request being "repeated", that the Applicant had asked for the same information over a number of years in different ways and any information held "would be in relation to the building warrant" which it stated it had already disclosed to her.

23. During the investigation, the Authority provided submissions to the Commissioner. However, the Authority's submissions were very general in nature and did not elaborate on why it considered the Applicant's request "vexatious and repeated", except to note that the Applicant had been in correspondence with the Authority regarding the matters specified in the request for a number of years.
24. In the circumstances, the Commissioner cannot conclude, on the basis of the submissions he has received, that the Authority was entitled to rely on the exception in regulation 10(4)(b) of the EIRs. As such, he is not required to go on to consider the application of the public interest test in regulation 10(1)(b) of the EIRs.
25. The Commissioner would like to reiterate that he has reached this conclusion on the basis of the submissions he has received in this case. He is aware that the Applicant has submitted a significant number of information requests to the Authority on similar matters over a number of years. No doubt the Authority has found these frustrating. Indeed, the Commissioner has questioned the extent to which the issues between the Applicant, the Authority and others can reasonably be expected to be brought to a useful conclusion through the use of FOISA and/or the EIRs. However, it is not for the Commissioner to infer or presume that a request is manifestly unreasonable from previous circumstances, where the Authority has failed to provide sufficient submissions to evidence such a conclusion in a given case. While the Commissioner understands the challenges faced by the Authority in these cases, he cannot be expected to delve back into the previous history between the Authority and the Applicant and make the case on the exception for the Authority: it falls to the Authority to satisfy the Commissioner that it has met the requirements of the legislation in each individual case.
26. As rehearsed earlier, the Authority also relied on the exception in regulation 10(4)(a) of the EIRs in responding to the information request made by the Applicant. However, as the Applicant did not challenge the Authority's reliance on the exception in regulation 10(4)(a) in her requirement for review, the Commissioner cannot investigate this.
27. In all the circumstances, therefore, in the absence of a challenge to the Authority's conclusion that it did not hold the information, there is no action the Commissioner can require the Authority to take, in addition to finding its failure to comply with regulation 5(1) of the EIRs by relying on the exception in regulation 10(4)(b) when it was not entitled to.

## Decision

The Commissioner finds that the Authority partially failed to comply with 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 was not entitled to rely on the exception in regulation 10(4)(b) of the EIRs for information which would fulfil the Applicant's request and therefore failed to comply with regulation 5(1) of the EIRs in refusing to respond to the request.

Given that the Authority also applied regulation 10(4)(a) to the Applicant's request, which the Applicant did not challenge in her requirement for review, the Commissioner does not require the Authority to take any action in response to the Applicant's 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.

**Euan McCulloch**  
**Head of Enforcement**

**25 November2024**

## **Appendix 1: Information request**

*Request made on 27 February 2022*

“SAR and FOI Request Opening up the Sewage System

Following Netta Meadows aggressive and quite shocking letter to me of the 24<sup>th</sup> February, 2022, we would like to make a FOI/SAR request for:-

...

FOI - All correspondence, surrounding meetings, minutes, telephone conversations, letters, emails, notes, and all evidential documentation, internally or externally with third party involvement, our neighbours themselves their agents or anyone else, where Netta Meadows and/or the SBC have clearly been in contact with our neighbours and/or their agents, to open up their sewage system, for her to stated that the opening of their soakaway/sewage system is “Something they will not do” – first page – last paragraph.”