



Scottish Information
Commissioner
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Decision Notice 005/2025

Decontamination works - North Shore Development, Ardrossan

Authority: North Ayrshire Council
Case Ref: 202401111

Summary

The Applicant asked the Authority for information about decontamination works at the North Shore Development, Ardrossan. The Authority provided the majority of the information requested, but the Applicant was dissatisfied with how it had handled her request and request for review with regard to various technical aspects. The Commissioner investigated and found that the Authority had failed to comply with the requirements of the EIRs relating to extension of the response time, and had failed to issue a review outcome which was compliant with the EIRs.

Relevant statutory provisions

[Freedom of Information \(Scotland\) Act 2002](#)¹ (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)

[Environmental Information \(Scotland\) Regulations 2004](#)² (the EIRs) regulations 2(1) (definition of “the Act”, “applicant” and “the Commissioner” and paragraphs (a), (c) and (f) of “environmental information”) (Interpretation); 5(1) (Duty to make environmental information available on request); 7(1), (2) and (3)(b) (Extension of time); 9(2)(a) (Duty to provide advice and assistance); 16(3) (Review by Scottish public authority); 17(1), (2)(a) and (b) (Enforcement and appeal provisions)

¹ <https://www.legislation.gov.uk/asp/2002/13/contents>

² <https://www.legislation.gov.uk/ssi/2004/520/contents>

Background

1. On 20 March 2024, the Applicant made a seven-part request for information to the Authority, in which she asked for documents concerning decontamination works at the North Shore Development, Ardrossan. The full text of the request can be found in Appendix 1 to this Decision Notice. The Appendix forms part of the Decision Notice.
2. The Authority acknowledged receipt of the request on 25 March 2024. It stated that:
 - the Applicant's FOI request had been acknowledged and a response would be issued within 20 working days, as required by FOISA
 - it would contact the Applicant if any further information or clarification was required
 - if the request related to environmental information, the EIRs would also apply, and
 - If the request related to environmental information, in terms of "Section 7 of the Regulations (complex or voluminous requests)" it might extend the timescale to 40 working days, and would write to the Applicant as soon as possible after receipt of the request if this was the case.
3. On 7 May 2024, the Authority wrote to the Applicant and apologised for the delay in responding. It informed her that, due to the complexity and volume of the information requested, it required to extend the response deadline by an extra 20 working days, dating back to the date of receipt of the request.
4. The Applicant wrote to the Authority on 12 May 2024. She stated that she believed her request was now being treated under the EIRs. She was dissatisfied as:
 - in her view, the request did not fall under this legislation, but fell under the FOI Act
 - the Authority had failed to respond to her request within 20 working days, and
 - the Authority had failed to inform her, within 20 working days, of any requirement for an extension to the response deadline.
5. On 13 May 2024, the Authority wrote to the Applicant. It informed her that, under regulation 9(2) of the EIRs, it required further clarification of parts 2 and 6 of her request to allow it to respond. It explained that it had suspended her request until clarification was received, at which point the statutory response timescale would recommence.
6. The Applicant wrote to the Authority on 13 May 2024, providing the clarification requested. She argued that the Authority had failed to seek clarification within 20 working days, as required by regulation 9(2)(a) of the EIRs. She remained dissatisfied that the Authority's request to extend the response timescale had not been sent within 20 working days of receipt of her request, and again argued that her request did not fall under the EIRs, but rather under the FOI Act.
7. The Authority responded to the Applicant's clarified request on 15 May 2024. It explained that the information sought in part 1 was not issued with the remediation tender, but existed within the documents provided in response to parts 2-7 of the request. The Authority explained that some third party personal data had been redacted under regulation 11(2) of the EIRs, and that some information had been withheld under regulation 10(5)(f) of the EIRs, where disclosure would, or would be likely to, prejudice substantially the interests of the person who supplied the information.

8. On 9 July 2024, the Applicant wrote to the Authority requesting a review of its decision. She referred to a previous request where the Authority had breached timescales and had given commitment that this would not happen again, yet within three months it had. The Applicant asked for a full review of the Authority's failings to meet her FOI request under the required legislation, stating that she was dissatisfied with the Authority's decision because:
- it had failed to respond to her request within the 20 working days allowed under the FOI Act
 - the information she had requested did not fall within the public interest test, therefore no extension could be used and, further, no extension could be applied under the FOI Act, and
 - it had failed to inform her within 20 working days that an extension was being applied.
9. The Authority notified the Applicant of the outcome of its review on 1 August 2024. It upheld her request for review in the following respects:
- The Authority acknowledged that it had failed to contact the Applicant until after the 20 working day timescale, when the extension was applied under the EIRs, and that it had not formally notified the Applicant of the change of legislation.
 - It accepted that it had failed to notify the Applicant, within 20 working days of receipt of her request, of the extension, as required by regulation 7(2) of the EIRs.
 - It acknowledged that it had failed to give reasons for considering the information to be voluminous and complex, and had failed to inform the Applicant of the review provisions, as required by regulation 7(3)(b) and (c) of the EIRs respectively.
10. Addressing the Applicant's contention that her request did not fall under the EIRs, the Authority referred her to regulation 2(1)(a), (c) and (e) of the EIRs which, it stated, detailed the meaning of "environmental information".
11. The Authority concluded by upholding the Applicant's request for review, with an apology for the response provided and for any inconvenience. It stated that all learnings as a result of the review would be highlighted to the relevant parties to ensure steps were taken to avoid recurrence.
12. On 18 August 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 asked the Commissioner to investigate the Authority's failings to meet its obligations under the FOI Act, stating that she was dissatisfied with the outcome of the Authority's review because:
- in her view, it was obvious that nothing [from the previous request] had been identified from the Authority's learnings/failings or had been highlighted to relevant parties, and no steps had been taken to avoid recurrence
 - the excuses given during the process, the timescales and the contact were unacceptable, and
 - she believed the Authority had tried to use the excuse that the request fell under the EIRs to defer its failings under the FOI Act.

Investigation

13. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
14. The case was allocated to an investigating officer and, on 1 October 2024, the Authority was notified in writing that the Applicant had made a valid application.
15. 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. These focused on whether the Authority had considered the request under the correct legislation, why the information was considered to be voluminous and complex (requiring a 20 working day extension), and why the Authority had failed to explain the reasons for not meeting the timescales for notifying the Applicant of the extension or the requirement for clarification.

Commissioner's analysis and findings

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

FOISA or the EIRs?

17. In [Decision 218/2007](https://www.foi.scot/decision-2182007)³, the Commissioner confirmed (at paragraph 51) that, where environmental information is concerned, there are two separate statutory frameworks for access to that information and, in terms of the legislation, an authority is required to consider the request under both FOISA and EIRs.
18. As stated above, the Authority was asked why it considered the information requested to be environmental information.
19. In response, the Authority submitted that the information requested related to decontamination works, with particular reference to information on the state of the environment such as air quality and factors affecting the environment such as noise. As such, the Authority considered this to be environmental information. The Authority confirmed that it was relying on the exemption in section 39(2) of FOISA, where the public interest lay in favour of applying the exemption.
20. For this exemption to apply, any information requested would require to be environmental information as defined in regulation 2(1) of the EIRs. 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. The information in question relates to decontamination works. As such, the Commissioner is satisfied that it would fall within paragraphs (a), (c) and (f) of the definition of environmental information in regulation 2(1) of the EIRs.
21. In this case, therefore, 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

³ <https://www.foi.scot/decision-2182007>

properly considered to be environmental information. This exemption is subject to the public interest test in section 2(1)(b) of FOISA.

22. 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.
23. Notwithstanding the above, the Authority was also asked why its review outcome had failed to formally confirm to the Applicant that her request was being considered under the EIRs.
24. In response, the Authority stated that its intention, at review, was to confirm that the request fell under the EIRs by referring the Applicant to regulation 2(1) to explain its justification for applying this legislation.
25. The Authority was also asked to explain why, in maintaining that the request fell to be considered under the EIRs, it had fully upheld the Applicant's request for review (i.e. in relation to her belief that the request fell to be considered under FOISA).
26. In its submissions, the Authority agreed that a "partially upheld" response might have been more suitable in this instance.
27. While, as set out above, the Commissioner accepts that the request fell to be considered under the EIRs, he is concerned to note that the Authority did not formally notify the Applicant that her request was being considered under that legislation, and appeared to have erroneously fully upheld her request for review. In his view, the Authority's review outcome ought to have been clearer in upholding its decision to respond to the request under the EIRs, thereby only partially upholding its original response. The Commissioner does not accept that the reference to regulation 2(1) was sufficient to make clear that the Authority's position was that the request fell to be considered under the EIRs.
28. In the circumstances, therefore, the Commissioner has no option but to find that the Authority's review outcome failed to comply with the requirements of regulation 16(3) of the EIRs.
29. In light of the above, the Commissioner will consider this case, in what follows, solely in terms of the EIRs.

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

30. Regulation 5(1) of the EIRs requires a Scottish public authority which holds environmental 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.
31. 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)).

Regulation 7 – Extension of time

32. Regulation 7(1) of the EIRs provides that a Scottish public authority may extend the 20 working day response period if the volume and complexity of the information requested makes it impracticable for the authority to comply with, or refuse, the request. When applying such an extension, a Scottish public authority shall notify the applicant as soon as possible and, in any event, no later than 20 working days after receipt of the request

(regulation 7(2)). Regulation 7(3)(b) provides that the notification shall state the authority's reasons for considering the information to be voluminous and complex.

33. The Authority was asked to explain why it considered the information requested to be voluminous and complex, to the extent that it required a further 20 working days to respond to the request. It was also asked to explain why it had not notified the Applicant of the extension within 20 working days (regulation 7(2)), and why it had not provided the Applicant with its reasons for considering the request to be voluminous and complex, as required by regulation 7(3)(b).
34. In its submissions, the Authority explained that the service collating the information had confirmed that, prior to clarification, the request would have been voluminous due to the large volume of documentation to be collated, redacted and converted to pdf. It submitted that the complexity was due to the need to contact the third parties involved to obtain consent for disclosure of the information. This, the Authority stated, was why it considered it was necessary to apply an extension.
35. The Authority submitted that, due to communication failings, the responsible officers did not receive the request from the offset. This resulted in a delay in reviewing the content, at which point it was established that the request was voluminous. Further, the Authority explained, the centralised team were down three members of staff with new management, and this also contributed to the delay.
36. When notifying the Applicant of the extension, the Authority submitted, it had confirmed that this was "due to the complexity and volume of the information requested". The Authority presumed that the Applicant would have an understanding of the amount of documentation and the complexity of the information.
37. The Authority accepted that there had been delays in service contact and allocation which, in addition to the staffing issues previously referred to, contributed to the delay in notifying the Applicant of the extension.
38. The Commissioner has fully considered the Authority's submissions on the above. It is a matter of fact that the Authority failed to notify the Applicant of the extension within the 20 working day period required by regulation 7(2) of the EIRs. However, the Commissioner notes that the Authority addressed the Applicant's dissatisfaction with its failure to meet this timescale in its review outcome. Given this, the Commissioner has recorded this failure in his case management system in line with his Interventions Procedures, the purpose of which is to promote good FOI practice across Scottish public authorities. This may be taken into account in any future enforcement action the Commissioner considers necessary to take against the Authority.
39. The Commissioner has also considered the Authority's submissions stating that it "presumed" that, by notifying the Applicant that the delay was "due to the complexity and volume of the information requested", she would have an understanding of the amount of documentation and the complexity of the information. The Commissioner considers this approach to be somewhat naïve. If this minimal explanation was all that was required, regulation 7(3)(b) would be redundant. In the Commissioner's view, notification of the extension did not explain the reasons for considering the information to be voluminous and complex, and clearly did not meet the requirements of regulation 7(3)(b).

40. The Commissioner therefore finds that the Authority failed to comply with regulation 7(3)(b) and, in doing so, it failed to issue a review outcome which was compliant with the requirements of regulation 16(3) of the EIRs.

Regulation 9 – Duty to provide advice and assistance

41. Regulation 9(2)(a) of the EIRs provides that, where a request has been formulated in too general a manner, the authority shall ask the applicant as soon as possible, and in any event no later than 20 working days after receipt of the request, to provide more particulars in relation to the request.
42. The Authority was asked to explain why it failed to seek clarification of the Applicant's request within 20 working days of its receipt.
43. In response, the Authority confirmed that there had been delays in service contact and allocation which, in addition to the staffing issues previously referred to, contributed to the delay in seeking clarification from the Applicant. It explained that it was only after further consideration of the request that the service decided it would be beneficial to seek clarification.
44. The Authority submitted that, on further review of the timeline of events, had clarification been sought from the outset, it may have been possible to respond to the request within 20 working days, without the need to extend the response deadline; however, due to the delays previously referred to, this did not happen.
45. The Commissioner has fully considered the Authority's submissions on the above. It is a matter of fact that the Authority failed to seek clarification of the request within the 20 working day period required by regulation 9(2)(a) of the EIRs. However, the Commissioner again notes that the Authority addressed the Applicant's dissatisfaction with its failure to meet this timescale in its review outcome. Given this, the Commissioner has also recorded this failure in his case management system in line with his Interventions Procedures, and this may also be taken into account in any future enforcement action he considers necessary to take against the Authority.
46. The Commissioner notes that, had the Authority sought clarification from the outset (i.e. before deciding that the request was voluminous and complex, and seeking an extension to the response deadline), it may have been possible to respond to the clarified request within 20 working days. Indeed, he considers this a likely probability, given that the Authority was able to respond to the request only two days after the Applicant had provided the necessary clarification. The Commissioner considers it would have made more sense for the Authority to have sought clarification first (which, in all likelihood, would have negated the need to apply an extension).
47. The Commissioner would urge the Authority, and indeed all Scottish public authorities, to ensure any extensions are actually necessary and, if so, are applied within 20 working days, and that similarly any requests for clarification are issued as soon as possible, and certainly within 20 working days.

Decision

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

The Commissioner finds that, by relying on section 39(2) of FOISA and considering the Applicant's request under the EIRs, the Authority complied with Part 1 of FOISA.

However, the Commissioner also finds that the Authority failed to comply with EIRs by failing to issue an EIRs-compliant review outcome by:

- 1) failing to formally notify the Applicant under what legislation her request was being considered, and
- 2) failing to comply with the requirements of regulation 7(3)(b).

The Commissioner does not require the Authority to take any action in respect of these failures 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

16 January 2025

Appendix 1: Full text of request of 20 March 2024

North Shore Development - Ardrossan

Request for the following documents:

- 1) North Ayrshire Council Construction Methods Statement issued by North Ayrshire Council to Sanctus (contractor for the decontamination works), this to include the environmental controls.
- 2) Contract of works between North Ayrshire Council and Sanctus (contractor for the decontamination works).
- 3) Air Quality and dust monitoring statistics collected during the decontamination works.
- 4) Noise data collected during the decontamination works.
- 5) North Ayrshire Council Construction Methods Statement issued by North Ayrshire Council to RJ McLeod (contractor for the enabling works), this to include the environmental controls.
- 6) Contract of works between North Ayrshire Council and RJ McLeod (contractor for the enabling works).
- 7) Copy of RJ McLeod's liability insurance certificate for the enabling works.

Documents 1), 2), 5) and 6) contain the contractual requirements following the agreed planning applications with all relevant restrictions and mitigating measures that must be put in place by the contractor.