



Scottish Information
Commissioner
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Decision Notice 023/2025

Whether request was manifestly unreasonable

Authority: Scottish Water
Case Ref: 202300645

Summary

The Applicant asked the Authority for all details of correspondence between the Authority and other specified parties. The Authority considered that responding to the request would be manifestly unreasonable. The Commissioner investigated and required the Authority to issue 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); 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 paragraphs (a), (b), (c) and (f) of definition of “environmental information”) (Interpretation); 5(1) (Duty to make environmental information available on request); 10(1), (2) and (4)(b) (Exceptions from duty to make environmental information available); 16(3) and (4) (Review by Scottish public authority); 17(1), (2)(a) and (b) (Enforcement and appeal provisions)

Background

1. On 17 February 2023, the Applicant made three separate requests for information to the Authority.

They asked for copies, or details of all correspondence with:

- (i) Cala Homes,
- (ii) the Keeper of the Register, and
- (iii) any local authority staff

in relation to the Bothwell sewer replacement with reference to a specific location. The Applicant asked that the response to each of his requests should include all correspondence of whatever nature, and include details of any meetings, minutes of meetings and telephone calls.

2. The Authority responded on 16 March 2023. It notified the Applicant that the requests were seeking environmental information and that, consequently, it had dealt with them under the EIRs. The Authority aggregated all three requests and applied regulation 10(4)(b) of the EIRs because of the volume and complexity of information falling within scope of the requests. The Authority explained that it had identified more than 470 documents that fell within the scope of the requests and it did not have the resources to read, redact and issue these documents.

The Authority also stated that an initial review of the information had identified large amounts of third party personal data, which was excepted from disclosure under regulation 11(2) of the EIRs.

3. On 17 March 2023, the Applicant wrote to the Authority requesting a review of its decision. The Applicant stated that they were dissatisfied that the Authority had combined all three requests and provided a single response. The Applicant explained that their reasons for submitting three separate requests was to “try and eliminate the normal attempts to refuse the release of information on the grounds of volume and cost”, and they had agreed to the Authority’s composite approach of acknowledging the requests to assist it, not to enable the Authority to elide from its responsibilities.

The Applicant asked the Authority to reconsider the requests, as originally framed, and provide a response to each.

4. The Authority notified the Applicant of the outcome of its review on 16 May 2023. The Authority maintained that regulation 10(4)(b) of the EIRs applied; however, it modified its reasons for considering the requests to be manifestly unreasonable. The Authority considered that language within correspondence from the Applicant, subsequent to its response on 16 March 2023, was unacceptable and it applied regulation 10(4)(b) on this basis.

5. On 25 May 2023, 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 they were dissatisfied with the outcome of the Authority's review because their requests had not been responded to within the relevant timescales and the Authority had failed to properly deal with their requirement for review.

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 1 June 2023, 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.

Commissioner's analysis and findings

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

Application of the EIRs

10. The Authority considered that the Applicant's request was for environmental information, as defined in regulation 2(1) of the EIRs and, therefore, should be dealt with under the EIRs.
11. Where information falls within the scope of regulation 2(1), 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.
12. The Applicant has not challenged the Authority's decision to handle his request under the EIRs and the Commissioner is satisfied, in the circumstances, that the information requested by the Applicant falls within the definition of environmental information set out in regulation 2(1), in particular paragraphs (a), (b), (c) and (f) of that definition.

Section 39(2) of FOISA – Environmental information

13. 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. In this case, the Commissioner accepts that the Authority was entitled to apply this exemption to the information withheld under FOISA, given his conclusion that it is properly classified as environmental information.
14. As there is a statutory right of access to environmental information available to the Applicant in this case, the Commissioner accepts, in all the circumstances, that the public interest in maintaining this exemption (and responding to the request under the EIRs) outweighs any public interest in disclosing the information under FOISA. Both regimes are intended to promote public access to information and there would appear to be no reason why (in this particular case) disclosure of the information should be more likely under FOISA than under the EIRs.

15. The Commissioner therefore concludes that the Authority was correct to apply section 39(2) of FOISA and to consider the Applicant's information request under the EIRs.

Handling of the request

16. Following the Applicant's requirement for review on 17 March 2023, later that same day at 16:02, the Authority wrote to the Applicant explaining why it had amalgamated their three requests into one.

It stated that the decision to combine the requests had no material impact on its response, due to the volume of data held in relation to the Bothwell sewer replacement.

In the Authority's opening remarks in this email, it stated;

"Thank you for your email dated 16/03/23 where you have detailed you are unhappy with the response provided for Freedom of Information request CAS-2115443-P0M1R. Should you wish to request a review of this response, please let us know by return."

A number of emails were then exchanged between the Applicant and the Authority. In one of those emails, the Authority deemed the Applicant's language and conduct improper, and it invoked its unacceptable actions policy.

17. In the Commissioner's view, the Authority clearly erred in its email to the Applicant of 17 March 2023 at 16:02. In this email, the Authority acknowledged that the Applicant had detailed their dissatisfaction with the Authority's response, but it advised them that they should email the Authority to confirm that they wanted it to carry out a review; this was unnecessary. The Applicant's email of 17 March 2023 already met the requirements for a valid request for review and therefore the Authority had an obligation, under regulation 16(3) of the EIRs, to consider the representations made by the Applicant and review the matters they had raised. The Authority was not entitled to require the Applicant to confirm again that they wanted it to conduct a review.
18. It is a matter of fact that the Authority did not carry out its duties under regulation 16(3) of the EIRs and that it failed to conduct a review.
19. Given the above failure, it is also a matter of fact that the Authority did not notify the Applicant of the outcome of its review within 20 working days, as required by regulation 16(4) of the EIRs.
20. The Commissioner finds that the Authority failed to comply with the requirements of regulation 16 of the EIRs.
21. As the Authority did subsequently notify the Applicant of the outcome of its review (on 16 May 2023) the Commissioner does not require the Authority to take any steps to remedy this particular failure. However, the Commissioner has recorded these procedural failures in his case management database, which is used to inform and monitor FOI practice by authorities.

Regulation 5(1) of the EIRs

22. 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.
23. 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) – Manifestly unreasonable

24. 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.
25. The following factors are relevant when considering whether a request is manifestly unreasonable, that is, that the request:
 - (i) would impose a significant burden on the public authority;
 - (ii) does not have a serious purpose or value;
 - (iii) is designed to cause disruption or annoyance to the public authority;
 - (iv) has the effect of harassing the public authority;
 - (v) would otherwise, in the opinion of a reasonable person, be considered to be manifestly unreasonable or disproportionate.

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.

26. In its review outcome, the Authority explained that it had refused the request under regulation 10(4)(b) of the EIRs because it considered that the Applicant's conduct was unacceptable.
27. When providing the Commissioner with a copy of the outcome of its review, on 19 May 2023, the Authority conceded that, despite the application of its Unacceptable Actions Policy, it did have a duty under EIRs to respond to the Applicant's requirement for review.

The Commissioner's view on the exception

28. The Commissioner has carefully considered the evidence presented to him by the Applicant and the Authority.
29. The Commissioner notes that, despite a number of opportunities to do so, the Authority did not provide the Commissioner with any detailed comments to support its application of regulation 10(4)(b). The Authority only provided the Commissioner with a timeline of correspondence between the Authority and the Applicant.

30. The Commissioner recognises that the Authority invoked its unacceptable actions policy in response to comments made by the Applicant. However, the Commissioner also recognises those comments (subsequently withdrawn by the Applicant) were made by the Applicant after the Authority's failure to carry out a review, and in response to the dissatisfaction the Applicant had raised. Had the Authority complied with its duties under the EIRs and reviewed its initial response in line with the dissatisfaction raised by the Applicant, it is possible that those particular comments may not have been made.
31. Having considered the evidence before him and, in the absence of any detailed submissions from the Authority, it appears to the Commissioner that the Authority has, in effect, taken a view that the Applicant is manifestly unreasonable rather than the requests made by them. The Commissioner cannot support this position.
32. In its original response, the Authority did explain that the request captured a large number of documents and that it did not have the resources to comply with the request, but it did not uphold these arguments in its review, and so the Commissioner cannot take them into account.
33. Furthermore, the Commissioner is not satisfied that the Authority was entitled to amalgamate the requests and treat them as one single request. He notes that, in correspondence with the Applicant, the Authority argued that the Applicant agreed to combine all three requests into one single request during a telephone call, and that it had confirmed this approach in an email acknowledgement to the Applicant afterwards.
34. The Commissioner has reviewed the wording in this email, and he notes that the Authority stated:
- "As agreed on our telephone call, I have logged 3 of your requests under one reference number which is above and we will respond to your request in accordance with the EIRs no later than 20 March 2023"
35. The Commissioner does not consider that this is evidence that the Applicant agreed for all three requests to be amalgamated into one single request. In his view, the email only demonstrates that the Applicant agreed that one reference number would be used for all three requests. In their application to the Commissioner, the Applicant notes that they only agreed to this approach to make the administrative burden easier for the Authority; it is clear that the Applicant did not fully understand what the ramifications of using the single reference number were (in terms of increasing the likelihood of the requests being deemed manifestly unreasonable). The Commissioner would urge the Authority to ensure that when it writes to an Applicant to confirm the points agreed during a telephone conversation, that it does so clearly and without ambiguity, in order to prevent any future disagreements or misunderstandings occurring.
36. On balance, the Commissioner finds that the Authority should have provided the Applicant with a separate response to each request, and it should have carried out a separate review of its handling of each of the three requests.
37. In all the circumstances of the case, the Commissioner is not satisfied that the Authority was entitled to apply regulation 10(4)(b) of the EIRs to the Applicant's requests.
38. As the Commissioner is not satisfied that the Authority was entitled to rely on the exception in regulation 10(4)(b) of the EIRs, he is not required to go on to consider the application of the public interest test in regulation 10(1)(b) of the EIRs.

Decision

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

He finds that the Authority

- failed to carry out a review as required by regulation 16(3) of the EIRs,
- failed to carry out a review within the time required by regulation 16(4) of the EIRs,
- 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,
- failed to deal with the request under regulation 5(1), by treating the three requests as one without adequate reasons for doing so.

The Commissioner therefore requires the Authority to respond to the Applicant's requirement for review in accordance with the requirements of the EIRs (otherwise than in terms of regulation 10(4)(b)), ensuring that it carries out a separate review for each of the three individual requests by **16 March 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.

Euan McCulloch
Head of Enforcement

30 January 2025