



Scottish Information
Commissioner
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Decision Notice 036/2025

Information relating to a high hedge application

Authority: West Dunbartonshire Council
Case Ref: 202201102

Summary

The Applicant asked the Authority for information relating to a high hedge application. The Authority provided some information but the Applicant believed the Authority held further information within the scope of the request. The Commissioner investigated and was not satisfied that adequate searches had been carried out for all information falling under the scope of the request.

He required the Authority to carry out new searches for the information requested by the Applicant and to issue the Applicant with a new 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”) (Interpretation); 5(1) (Duty to make environmental information available on request); 16 (Review by Scottish public authority); 17(1), (2)(a) and (b) (Enforcement and appeal provisions)

Background

1. On 20 April 2021, the Applicant made a request for information to the Authority. The information requested was copies of all records, correspondence, notes and associated documents relating to High Hedge Application (HHA) HH20 001 between 17 October 2020 and 20 April 2021.
2. The Authority responded on 13 May 2021, refusing the request under section 25 (Information otherwise accessible) of FOISA. The Authority stated the information was available on its E Planning Online System and provided a weblink to where the information could be accessed.
3. On 13 May 2021, the Applicant wrote to the Authority requesting a review of its decision. The Applicant stated that he disagreed with the application of the exemption in section 25 of FOISA. He argued that the Authority's website only provided basic details and not copies of any further documents relating to the HHA, and he asked the Authority to provide the information requested.
4. The Authority issued its review outcome on 29 June 2021, modifying its original decision. It disclosed further information to the Applicant but continued to withhold some information on the grounds that it was the personal data of third parties.
5. On 30 August 2022 (and following an [appeal](#)¹ to the Commissioner) the Authority issued a revised review outcome to the Applicant, which provided him with some additional information under the EIRs. It said it held no additional information (beyond that which it had already disclosed) and it withheld some information as being out of scope of the request. The Authority also explained that it had redacted some information under regulations 12(5)(f) (Interests of the Person who provided the information) and 13 (Personal Data) of the EIRs. The Authority later acknowledged in its comments to the Commissioner that it had wrongly applied the UK EIR, instead of the Scottish EIRs. It clarified that the exceptions it was relying upon were regulations 10(5)(f) and 11 (Personal information).
6. On 4 October 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 he was dissatisfied with the outcome of the Authority's revised review outcome, because he believed the Authority held more information than had been disclosed to him and he was dissatisfied with the redactions it had made.

Investigation

7. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
8. On 21 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.

¹ <https://www.foi.scot/decision-0772022>

9. The Authority was also 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.

Commissioner's analysis and findings

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

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

11. 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.
12. 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) of the EIRs requires the authority to provide that information to the requester, unless a qualification in regulations 6 to 12 applies (regulation 5(2)(b)).
13. 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.
14. 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 comments

15. In his application to the Commissioner, the Applicant expressed dissatisfaction with the revised review outcome issued in response to Decision 077/2022.
16. The Applicant submitted that the Authority repeatedly claimed, in every review it carried out, that no further information was held, yet, in each review, further information was disclosed to him. The Applicant considered that further information was still held.
17. The Applicant referred to the content of the emails that were provided to him, and to telephone conversations with Authority staff, to support his view that the Authority had not disclosed all of the information it held.
18. He submitted that, in a telephone call with his wife, an official had indicated that some of the information could be quite sensitive and that they might not have approved everything to go online.
19. The Applicant stated that he had found the schedule of documents provided by the Authority with its revised review outcome impossible to follow, and he commented that numbering each item and providing an explanation of the redactions would have been more helpful.
20. The Applicant provided the Commissioner with two specific examples of information which he believed fell under the scope of his request and which were held by the Authority, but which

had not been provided to him (while stating that the information he believed was held but had not been provided to him was not limited to these examples).

21. One of these pieces of information was the written confirmation from the high hedge applicant that he was withdrawing that application.

The Authority's comments

22. In its comments to the Commissioner, the Authority explained that when it provided its revised review outcome on 30 August 2022, it had treated the request for information as a fresh request under the EIRs and that any comments on (past) information received, or not, was irrelevant.
23. The Authority stated that no further information was available. It commented that it had searched all of its records using the search criteria previously provided to the Commissioner (and had provided all information to the Commissioner).
24. The searches referenced above were made in relation to the appeal which resulted in the Decision 077/2022. The Authority, at that time, stated that information was requested from the planning team, who provided a file of information that was reviewed and released to the Applicant as appropriate. The Authority stated that the search criteria used were the allocated FOI number, the subject matter and applicant. It added that no search criteria were captured at the time as it was a standard FOI request which was being routinely processed. The Authority stated that it did not record telephone calls and that all other information which was generated as part of the original high hedge application and subsequent FOI had been reviewed and released where appropriate.
25. The Authority disputed the Applicant's comments in relation to the telephone call that had taken place (with his wife) arguing that it was hearsay. It stated that there was no file note of the call and that calls were not recorded by the Authority. The Authority noted that the official referred to no longer worked for the Authority, and that it could not confirm what was or was not said (in the call).
26. The Authority submitted that it had provided the Applicant with written confirmation from the high hedge applicant that he had withdrawn his application in documents numbered 15 and 21.

The Commissioner's view

27. The Commissioner has reviewed the information provided by the Authority to the Applicant. This information included an email from the Authority's planning office to the high hedge applicant requesting that the application be withdrawn (and referring to the possibility of a fresh application being made in future). It also included, separately, an email (undated) from the Authority to the Applicant in this appeal which confirmed that the high hedge application had been withdrawn as of 4 March 2021.
28. The Authority stated that the specific information had been provided to the Applicant. The Commissioner's view is that, while reference to the withdrawal of the high hedge application was made in that information, and while the fact that such a withdrawal had been made was confirmed to the Applicant in this case, the actual confirmation from the high hedge applicant to the Authority was not provided.
29. Given the references contained in the above correspondence, the Commissioner considers it reasonable to conclude that the high hedge applicant did provide such information to the

Authority (given that this confirmation was requested and that the decision to withdraw was subsequently conveyed to the Applicant in this case).

30. The Commissioner acknowledges the Applicant's concerns that further information (not limited to the specific examples raised) is also held by the Authority.

Having reviewed the information that has been disclosed to the Applicant, the Commissioner considers there are various instances where communications are referenced in emails, but the communications themselves do not appear to have been provided to the Applicant or withheld under an exception.

31. The Commissioner notes that a number of emails from the Authority contain no date and this makes it difficult for the Applicant (or anyone else) to assess whether, for example, that email is one which is referred to in correspondence elsewhere.
32. The Commissioner has considered the Authority's position that no further information is held, and its submissions that there was no file note of the telephone call referenced, that it does not record telephone calls and that it searched all of its records using the search criteria provided.
33. For the Commissioner to be satisfied that no further information is held by the Authority, he must be provided with evidence of the searches that the Authority claims to have carried out.
34. The Commissioner notes that the Authority did not (in either the previous or the current appeal) provide evidence of searches, such as screenshots of the searches that were carried out, or emails from staff who were asked to conduct searches. Within the information disclosed to the Applicant, the Authority makes reference to the planning portal. The Commissioner considers that it is unclear from the authority's submissions whether searches were carried out within this portal (or indeed whether the portal is a searchable database).
35. Furthermore, the Authority did not provide the Commissioner with copies of policies which may have been relevant, such as any written policy regarding the recording of telephone calls.
36. In relation to the Authority's explanation that no search criteria were captured at the time because it was a standard FOI request that was processed routinely, the Commissioner would stress to the Authority, and others, the importance of keeping records of searches for every information request. Such records can evidence an Authority's submissions to him in the event of an appeal and prevent searches having to be re-done, thereby minimising the impact on an authority's resources and that of the Commissioner as well as, crucially, minimising delays to applicants. An authority may consider a request to be routine, but that does not mean it will not be challenged by the requester or appealed to the Commissioner's office.
37. In light of the above, the Commissioner cannot be satisfied, that the Authority has provided adequate evidence that adequate, proportionate searches have been carried out to locate all information which may fall within scope of the Applicant's request. He finds that the Authority's revised review outcome failed to fully address the Applicant's request for information, and that the Authority failed to comply with regulation 5(1) of the EIRs.
38. He requires the Authority to carry out fresh searches for both the specific information highlighted by the Applicant and any other information which may fall within scope of the Applicant's request, focusing not just on the planning file but on any individual staff email

accounts (including those of former staff) and any other relevant areas, both physical paper files and digital files and databases, where relevant information may be held.

39. As part of that process, he requires the Authority to examine the information which has already been provided to the Applicant, for references to communications which have not already been located or disclosed and then conduct searches for those specific communications.
40. The Commissioner requires the Authority to keep detailed records of the searches that it carries out (and details of who conducted the searches), including the keywords used for searching, details of the areas (departments and files) which have been searched, and screenshots and staff emails evidencing the searches. He requires the Authority to provide him with this evidence when it issues its revised review outcome.

Regulation 16 of the EIRs

41. 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)).
42. In its revised review outcome to the Applicant, the Authority incorrectly applied, as detailed above, exceptions contained in the UK legislation (the UK EIRS) instead of those contained in the Scottish legislation (the EIRs). While the Authority has clarified this error with the Commissioner, it has not communicated its mistake to the Applicant.
43. It is apparent that the Authority failed to carry out a review meeting the requirements of regulation 16 of the EIRs.
44. The Commissioner therefore requires the Authority to provide a response to the Applicant's requirement for review of 7 June 2021 in terms of regulation 16 of the EIRs, taking into account the requirements of paragraphs 38 to 40 above.

The EIRs exceptions

45. In its comments to the Commissioner, the Authority provided the correct references to the exceptions it had applied in the schedule of documents provided and stated that in its view these exceptions were still valid.
46. The Authority indicated that it had relied on two exceptions under the EIRs to withhold information. These were regulations 10(5)(f) (Interests of the person who provided the information) and 11 (Personal data). The Applicant did not challenge the withholding of personal data under regulation 11 of the EIRs. Given that, there is no need for the Commissioner to consider that exception further.
47. Regulation 10(5)(f) of the EIRs, provides that a Scottish public authority may refuse to make environmental information available to the extent that its disclosure would, or would be likely to, prejudice substantially the interests of the person who provided that information, where that person – (i) was not under, and could not have been put under, any legal obligation to supply the information; (ii) did not supply it in circumstances such that it could, apart from the EIRs, be made available, and (iii) has not consented to its disclosure.

48. The Authority provided no detailed comments to the Commissioner on its reasons for applying regulation 10(5)(f), other than to say it considered the information withheld under this regulation was not relevant to the request.
49. Furthermore, the [Commissioner's guidance on this exception](#)² makes clear that if the exception applies, it is subject to the public interest test in terms of regulation 10(1)(b) of the EIRs, which the Authority did not address.
50. The Commissioner requires the Authority, in its revised review outcome, to provide the Applicant with a new set of documents, clearly indicating on each document where information is withheld because it falls under an exception under the EIRs and also to provide him with a detailed explanation as to why the exception applies.
51. He requires it to consider its application of regulation 10(5)(f) with reference to, and in terms of the guidance, including the public interest test, and provide the Applicant with detailed reasons for withholding information under the exception.

Out of scope information

52. As detailed above, the Authority withheld some information because it considered it was not relevant to (i.e. it was out of scope of) the request.
53. The Applicant argued that any redactions made to the information provided to him should have been limited to names, addresses, email addressed, telephone numbers and signatures (i.e. personal data) and that this should not have resulted in swathes of information being redacted.
54. He stated that all information was relevant as it formed part of the application and was submitted by the high hedge applicant to be considered in support of that application. He said no information (other than personal data) should be redacted as it was all used by the officer to assist in decision-making and it should all therefore be made public, so there could be transparency in the decision-making process.
55. The Commissioner requires the Authority to reconsider all of the information it considered out of scope, in order to ensure that nothing of relevance has been wrongly withheld, and to provide a detailed explanation to the Applicant of why it considered each piece of information to be out of scope.

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.

The Authority failed to comply with the requirements of regulation 16 of the EIRs, as it failed to give the Applicant notice of the exceptions under the EIRs that it was relying on to withhold information from him.

The Authority also failed to satisfy the Commissioner that it did not hold other information relevant to the Applicant's request. As a result, the Commissioner finds that the Authority failed to comply with regulation 5(1) of the EIRs.

² <https://www.foi.scot/sites/default/files/2022-04/EIRsGuidanceRegulation105fThirdpartyinterests.pdf>

The Commissioner therefore requires the Authority to:

- carry out fresh searches and provide the Commissioner with evidence of those searches as set out in paragraphs 38 to 40,
- clearly state and explain to the Applicant which, if any, exceptions it is relying on to withhold information under the EIRs, as required by paragraphs 49 and 50 of this decision,
- reconsider all of the information it previously considered to be out of scope and either a) disclose it to the Applicant or b) provide a detailed explanation of why it considers each piece of information to be out of scope, as explained in paragraph 54,
- Issue the Applicant with a revised review outcome that addresses the requirements set out in the bullet points above.

He requires the Authority to take these steps by **31 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

13 February 2025