Scottish Information Commissioner
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Decision Notice 039/2025

Property data

Authority: Scottish Ministers
Case Ref: 202400607

Summary

The Applicant asked the Authority for information relating to all Scottish housing. The Authority originally withheld some of the information but it later argued that the request was vexatious, and, to the extent that some of the information requested was environmental information, manifestly unreasonable. The Commissioner investigated and found that the Authority had complied with FOISA and the EIRs in responding to 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); 14(1) (Vexatious or repeated requests); 17(1) (Notice that information is not held); 25(1) (Information otherwise accessible); 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) and (c) of definition of "environmental information") (Interpretation); 5(1) (Duty to make environmental information available on request); 10(1), (2), 4)(a) and (b) (Exceptions from duty to make environmental information available); 17(1), (2)(a), (b) and (f) (Enforcement and appeal provisions)

Background

1. On 17 December 2023, the Applicant made a request for information to the Authority.

   He asked for information "on all housing in Scotland: Local Authorities, Improvement Service (public body), RSL [Registered Social Landlord], Owner Occupiers, Private Rented Sector

properties as defined under the Scottish Government and Local Authority Improvement service data for the following:

(i) Unique Property Identification Number [UPRN]

(ii) House Number

(iii) Street Name

(iv) Town / Locality

(v) City

(vi) Postcode

(vii) House Landlord [RSL: Registered Social Landlord, OO: owner-occupied, PRS: private rented sector]

(viii) House Type (End, Mid, Semi, Detached, Flat, Maisonette etc)

(ix) Bedroom Sizes

(x) Fuel Type

(xi) House Property Types (Traditional / Non-Traditional)

(xii) Block information (Who owns what no names just ownership if available)

(xiii) Fuel Type

(xiv) EPC [Energy Performance Certificate] Rating

(xv) Insulation Measures (Available via Ofgem public body)

(xvi) Rural, Off Gas, Urban Territory

(xvii) Household in Fuel Poverty (national statistic no personal details or number just a person with qualifying as fuel poor, home analytics data for example)

(xviii) Household in Extreme Fuel Poverty (national statistic no personal details or number just a person with qualifying as extreme fuel poor home analytics data for example)

(xix) Census data (national statistic no personal details or number just a person with qualifying as fuel poor or qualifying as extreme fuel poor home

2. The Authority responded on 5 January 2024, seeking clarification on aspects of the Applicant's request. It also informed him that some of the data he had requested was publicly available (and it provided some weblinks) and some of the data was not held. The Authority advised the Applicant that in the case of information held by other bodies, such as Ofgem, he should contact them direct.

3. The Applicant responded to that request for clarification on 10 January 2024. He stated that the information he had requested was national data held by the Authority and gave examples of how it was reported. He clarified that he was requesting data for the whole of Scotland for each dwelling, minus any data which would identify a person. He commented that each piece of information he had requested was available and readily accessible.
On 16 January 2024, the Applicant further clarified that he considered the information he had requested would be held in the Home Analytics database.

4. The Authority responded on 2 February 2024. It stated that it had revised the list [of variables] following the Applicant's clarification, and that it had disclosed most of the data he had asked for, anonymised in accordance with data protection requirements. The Authority notified him that some of the information he had requested was not held (Section 17(1) of FOISA), some of the information was already publicly available (Section 25(1) of FOISA) and some information was being withheld as it comprised the personal data of third parties (Section 38(1)(b) of FOISA). In cases where the information was publicly accessible, the Authority referred the Applicant to the organisations that held the information he had requested.

5. On 7 February 2024, the Applicant wrote to the Authority requesting a review of its decision. The Applicant stated that he was dissatisfied with the response because he believed the Authority was wrong to say that it was unable to provide some of the information, (including UPRN, house number, street and town) and that he had not been provided with the information he asked for. The Applicant stressed that he had mentioned the Home Analytics database as one possible source of the information he had requested, not the sole source, and he expressed dissatisfaction that the Authority had limited his request in this way.

6. The Authority notified the Applicant of the outcome of its review on 5 March 2024. It confirmed its original response with modifications. The Authority acknowledged that an incomplete spreadsheet had been provided to the Applicant in error, it apologised for this and provided him with the correct spreadsheet. The Authority also stated that while the Applicant had requested a line-by-line dataset for every dwelling in Scotland, the data was not available in that format and had been grouped to postcode level and anonymised to protect personal data. The Authority acknowledged noted that this represented a change to the format requested, but it stated that this was necessary to avoid disclosing personal data.

7. On 25 April 2024, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant stated he was dissatisfied with the outcome of the Authority's review because he believed the Authority held the complete dataset and that he should be provided with it.

Investigation

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

9. On 30 April 2024, the Authority was notified in writing that the Applicant had made a valid application and the case was subsequently allocated to an investigating officer.

10. 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 about its decision to refuse the request under various exemptions.

Commissioner's analysis and findings

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

12. During the investigation the Authority revised its position. It acknowledged that it had provided some information to the Applicant to postcode level, not to individual property level as he had requested. It also accepted that the information to which it had applied section 25(1) of FOISA was not otherwise accessible at individual property level. The Authority withdrew its reliance on section 25(1) of FOISA (Information otherwise accessible) as the information was not available in the way the Applicant had requested.

13. The Authority submitted that it now believed that some of the information was environmental under the definitions in regulation 2(1)(a), (b) and (c) of the EIRs. It considered the following information to be environmental: house type (viii), fuel type (x), house property types (traditional/non-traditional) (xi), EPC Rating (xiv), insulation measures (xv) and rural, off gas, urban territory (xvi). It informed the Applicant that it would respond to the request for those variables in terms of the EIRs.

14. The Authority also confirmed that it was relying on section 17(1) (information not held) of FOISA in relation to some of the information requested, namely; bedroom sizes (ix), block information (xii) and census data (xix).

15. Furthermore, the Authority retrospectively applied section 14(1) (vexatious) of FOISA to the information relating to individual dwelling variables where information was held (in full or in part) under FOISA. It also applied regulation 10(4)(b) (manifestly unreasonable) of the EIRS to the individual dwelling data variables it considered to relate to environmental information.

16. Given the Authority's change of position, the Commissioner finds that the Authority was not entitled to apply section 25(1) to some of the information requested by the Applicant when it directed him to information which did not provide what he had asked for and that, in doing so, it failed to deal with the request in accordance with section 1(1) of FOISA.

FOISA or the EIRs

17. The relationship between FOISA and the EIRs was considered at length in Decision 218/2007. Broadly, in the light of that decision, the Commissioner's general position is as follows:

    (i) The definition of what constitutes environmental information should not be viewed narrowly.

    (ii) There are two separate statutory frameworks for access to environmental information and an authority is required to consider any request for environmental information under both FOISA and the EIRs.

    (iii) Any request for environmental information therefore must be handled under the EIRs.

    (iv) In responding to a request for environmental information under FOISA, an authority may claim the exemption in section 39(2).

    (v) If the authority does not choose to claim the section 39(2) exemption, it must respond to the request fully under FOISA: by providing the information; withholding it under another exemption in Part 2; or claiming that it is not obliged to comply with the request by virtue of another provision in Part 1 (or a combination of these).

(vi) Where the Commissioner considers a request for environmental information has not been handled under the EIRs, he is entitled (and indeed obliged) to consider how it should have been handled under that regime.

18. During the investigation, the Authority stated that it believed six variables fell under the scope of the EIRs because they met the definition of environmental information under paragraphs (a), (b) and (c) of the definition in regulation 2(1) of the EIRs, and it notified the Applicant of its view. As noted above, these variables were:

(viii) House type (End, Mid, Semi, Detached, Flat, Maisonette etc)

(x) Fuel type

(xi) House property type (Traditional/non-traditional)

(xiv) EPC Rating

(xv) Insultation measures

(xvi) Rural, Off Gas, Urban Territory

The Authority submitted that these variables related to built structures which impacted on the landscape, their construction and/or the energy consumption and performance of the dwellings.

19. Paragraph 6 of the Commissioner's briefing entitled "What is environmental information?"[1] states:

"No types of information are excluded from the potential ambit of environmental information. Environmental information may be found in or extend beyond what is not specifically an environmental topic. Court cases have confirmed that environmental information, and the scope of the Directive, should be interpreted broadly."

20. Regulation 2(1)(a) defines environmental information as including the state of the elements of the environment, such as land, a term which is interpreted broadly. The Commissioner's guidance on the EIRs states that the definition of "land" includes built structures.

21. Regulation 2(1)(b) includes both "energy" and "emissions … and other releases into the environment" and regulation 2(1)(c) of the EIRs defines environmental information as "measures (including administrative measures), such as…programmes…and activities affecting or likely to affect the elements and factors referred to in paragraphs (a) and (b) as well as measures or activities designed to protect those elements."

22. The Commissioner has recognised in previous decisions that environmental information does encompass built structures inasmuch as they are, or may be, affected by the state of the elements of the environment referred to in paragraph (a) or, through those elements, by any of the matters referred to in paragraphs (b) and (c).

It should be noted too that The Aarhus Convention: An Implementation Guide[2] , which describes "built structures" as man-made constructions, indicates that the definition is not

[1] https://www.foi.scot/sites/default/files/2022-03/EIRBriefingsDefinition.pdf

[2] https://unece.org/DAM/env/pp/Publications/Aarhus_Implementation_Guide_interactive_eng.pdf

limited to large buildings and objects such as dams or bridges, but also covers small constructions (page 55).

23. The Commissioner is satisfied that the information requested by these six variables is environmental information, for the reasons set out above.

24. Where the information falling within the scope of a request comprises both "environmental" and "non-environmental" information, then the specific component information must be processed in accordance with the appropriate regime. Environmental information falling within the scope of the request, therefore, must be processed in accordance with both FOISA and the EIRs, while any non-environmental information should be processed in accordance with FOISA alone.

25. Given that the Authority failed to identify this information as being environmental when it responded to the Applicant's request and requirement for review, the Commissioner must find that the Authority failed (to the extent that the information was environmental) to deal with the Applicant's request for that information in accordance with regulation 5(1) of the EIRs.

Section 39(2) of FOISA – Environmental information

26. 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.

27. In this case, as stated above, the Authority responded to the requirement for review solely under FOISA.

28. The Commissioner finds that the Authority would have been entitled to apply this exemption to some of the information requested, given his conclusion that some of the information requested was properly classified as environmental information. Indeed, he notes that the Authority did seek to apply this exemption during his investigation.

29. As there is a separate 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 parts of the request under the EIRs) outweighs any public interest in disclosing the information under FOISA.

Information not held

30. During the investigation, the Authority submitted that it did not hold information requested by variables (ix), (xi), (xii) and (xix). It considered variable (xi) (House Property Types (Traditional / Non-Traditional) to be environmental information and therefore subject to the EIRs) and the other three variables: (ix) (Bedroom Sizes), (xii) (Block information) and (xix) (Census data) to be non-environmental information, which fell under FOISA.

31. The Authority confirmed to the Applicant that this information was not held and it gave him notice of this under section 17(1) of FOISA and regulation 10(4)(a) of the EIR.

32. In its submissions to the Commissioner, the Authority provided some background on the Home Analytics (HA) database, which it stated was held on its behalf by the Energy Savings Trust (EST). The Authority submitted that the HA database was not publicly available but was accessible to the Authority itself and local authorities. The Authority explained that this was an address-level dataset derived from multiple sources.

33. The Authority submitted that the information, if held, would be held centrally by EST on its behalf within combined datasets known as Home Analytics Scotland. It stated that the case handler had commissioned EST to identify and provide all relevant information falling within scope of the request which EST extracted from its databases.

34. The Applicant argued that all of the information he had requested was readily available to the Authority.

Section 17(1) of FOISA

35. As noted above, the Authority argued that it did not hold variables (ix), (xii) and (xix).

36. Section 17(1) of FOISA states that where a Scottish public authority receives a request for information which it does not hold, it must give the applicant notice in writing that it does not hold the information. In its original response of 2 February 2024, the Authority notified the Applicant that it did not hold all of the information he had requested, but it did not specify the variables that were not held. The Authority did not give the Applicant details of the variables that were not held until 7 August 2024, after the Commissioner had commenced his investigation.

37. In its submissions, the Authority acknowledged that it should have more clearly described to the Applicant the information it did not hold when it responded to his information request. The Authority also apologised to the Applicant for this oversight. The Authority explained that it did not hold this information because there was no business requirement for it to be held.

38. The Authority provided details of staff members who had been asked to search for specific variables, their job titles and areas of expertise, the areas searched and detailed submissions on why it believed it did not hold those variables. It explained that those individuals and the case handler (who also worked in the subject area and had knowledge of the sources and information held) were best placed to know if the information existed in other databases held by the Authority.

39. The Commissioner has considered the arguments put forward by the Authority and the Applicant, and he is satisfied that the Authority does not hold information for variables (ix), (xii) and (xix). He accepts that the Authority notified the Applicant that some of the information he requested was not held, but he finds that it failed to identify which variables were not held and, in doing so, it breached section 17(1) of FOISA.

Section 10(4)(a) of the EIRs

40. As noted above, the Authority has argued that it does not hold any information falling within the scope of variable (xi), and it has applied regulation 10(4)(a) to this information.

41. Under the EIRs, a public authority may refuse to make environmental information available if one or more of the exceptions in regulation 10 apply and, in all the circumstances of the case, the public interest in maintaining the exception or exceptions outweighs the public interest in making the information available.

42. Regulation 10(4)(a) of the EIRs provides that a Scottish public authority may refuse to make environmental information available to the extent that it does not hold that information when an applicant's request is received. The exception in regulation 10(4)(a) is subject to the public interest test in regulation 10(1)(b) of the EIRs and can only apply if, in all the circumstances of the case, the public interest in maintaining the exception or exceptions outweighs the public interest in making the information available.

43. In its comments on variable (xi), the Authority argued that it did not hold information on house property type to individual address level as there was no business requirement for it to hold that information. The Commissioner has considered these comments along with the searches carried out by the Authority (outlined above in paragraph 33), and he is satisfied that the Authority does not hold the information (variable (xi)) requested by the Applicant. Consequently, he does not consider there to be any conceivable public interest in requiring that any information be made available.

44. The Commissioner therefore concludes that, in all the circumstances of this case, the public interest in making the requested information available is outweighed by that in maintaining the exception in regulation 10(4)(a) of the EIRs.

Section 14(1) of FOISA – Vexatious or repeated requests

45. Section 14(1) of FOISA states that section 1(1) (which confers the general entitlement to information held by such authorities) does not oblige a Scottish public authority to comply with a request for information if the request is vexatious. Section 14(1) does not create an exemption, but its effect is to render inapplicable the general right of access to information contained in section 1(1). Accordingly, section 14(1) is not subject to the public interest test in section 2(1)(b) of FOISA.

46. FOISA does not define "vexatious" or "manifestly unreasonable". However, the Commissioner's general approach is that the following factors are relevant when considering whether a request is vexatious or manifestly unreasonable:

    (i) it would impose a significant burden on the public body

    (ii) it does not have a serious purpose or value

    (iii) it is designed to cause disruption or annoyance to the public authority

    (iv) it has the effect of harassing the public authority, or

    (v) it would otherwise, in the opinion of a reasonable person, be considered to be manifestly unreasonable or disproportionate.

47. 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. Section 14(1) is concerned with the effect of a request on the Authority and its staff, but the Commissioner's guidance[3] is clear that it should be interpreted in the context of the importance of the right of access to information provided by section 1(1) of FOISA and the risk which may be presented to that right by disproportionate use of the vexatious provision.

48. The guidance goes on to say that a request will impose a "significant burden" on a public authority where complying with it would require a disproportionate amount of time, and the diversion of an unreasonable proportion of its financial and human resources, away from other statutory functions. The authority should be able to demonstrate why other statutory functions take priority over its statutory duties under FOISA or why its "core" functions are of a higher priority than the statutory requirement to respond to information requests.

[3] https://www.foi.scot/sites/default/files/2023-07/BriefingSection14VexatiousorRepeatedRequests.pdf

49. Generally, the authority should consider the impact of the request on its overall resources, rather than simply the part of the organisation most immediately affected. It should consider the impact of the request and identify the key functions and/or tasks from which resources would require to be diverted to deal with it.

50. The guidance also states that if expense in dealing with a request is the only consideration involved, the authority should consider the excessive costs provision in section 12 of FOISA.

The Authority's submissions on section 14(1)

51. The Authority submitted that it was relying on section 14(1) to refuse the request for the variables at individual property level, where it held information, on the grounds that to respond in the level of detail required would be manifestly unreasonable or disproportionate. It argued that complying with the request would impose a substantial and significant burden on it and that the request was therefore vexatious.

52. The Authority noted that for some variables it did hold collected data to address level. However, it submitted that the information it held on fuel poverty status was held to property level, and it was derived from other variables and assumptions around income and heat demand, rather than being collected from individual properties.

53. The Authority submitted that it held data which it could extrapolate for properties across Scotland based on data from some existing household data, but that this would not be an accurate representation of every property in Scotland. It stated that the variables where it held limited data were House Landlord (vii), Fuel Type (xiii), EPC rating (xiv) and Insulation measures (xv).

54. The Authority commented that it had undertaken a detailed assessment of the work required and it provided the Commissioner with details of that assessment.

55. The Authority acknowledged that the data variables which it did hold were held centrally by the EST and could be identified in minimal time. However, it argued that around 2.7m individual dwellings in Scotland were captured by the request. The Authority submitted that before responding to the request, the information held for every individual dwelling would have to be reviewed and redactions undertaken, if required, to ensure that personal information was not disclosed (i.e. to make appropriate redactions under section 38(1)(b) of FOISA).

56. The Authority submitted that information about a house is often linked to an owner or resident, and that such data could therefore also be personal data about that individual. It stated that because the request was for data to individual dwelling level, redactions would be needed to withhold personal information within most, if not all, of the entries.

57. The Authority did not consider that redactions would be required consistently across all the variables.

    For example, it submitted that it may be able to disclose more variables for a dwelling within a large town or city than for a dwelling in a small rural area and that greater consideration would be needed of whether the information could indirectly identify an individual where the returns for a particular variable were small. The Authority argued that it could only determine if redactions to remove the risk of direct or indirect identification were required by reviewing all 2.7m entries individually.

58. The Authority submitted that the consideration of personal data, including indirect identification (when particular information is taken together with other information which is already in the public domain), could be complex. The Authority made submissions both in terms of the cost and the burden in time and diversion from other duties.

59. It argued that if it took an average of 15 seconds to review the data variables for each of the 2.7m dwellings, that would take in excess of 11,250 hours in total to consider the request.

60. It submitted that the hourly rate of the lowest grade of staff likely to be needed to carry out that task, was more than £15. As £15 was the maximum amount that could be used as an hourly rate under FOISA, the Authority used the £15 hourly rate to give an estimated cost of responding to the request in excess of £168,750.

61. It argued that the total time necessary for the exercise could be approximately 300 weeks and that this would mean diverting a suitably qualified member of staff from their normal duties full time for more than 5 years. It noted that this did not include the additional time required for senior officials and Ministers to review the decision reached in each case.

62. Moreover, the Authority considered that even after determining whether an exemption would apply, the cost and resource burden of undertaking the further work required to physically redact and provide the information would, on its own, be unreasonable.

63. It concluded that, for the above reasons, the request would impose a significant burden on it.

64. During the investigation, the Authority was asked to provide further explanation and sample data in the form the Applicant had requested, in order to provide further clarity on the Authority's concerns. The Authority provided further submissions and a sample of 50 randomly selected records from the HA database, showing the variables which had been requested and were available.

65. The Authority commented that in many cases the data would not identify individuals once address data was excluded. However, in its view that was not true for every case (and the Authority added that address data did not always relate to an identifiable individual and was therefore not always personal data).

66. The Authority noted that it had already provided the Applicant with an anonymised dataset which gave a number of dwellings by characteristic and postcode district. It stated that, while the average number of dwellings per postcode district was around 6,000, in some cases the number was fewer than 10.

67. It highlighted an example from the sample data of one record relating to a particular detached dwelling which was situated in a very remote rural area and about which further information was also provided. The Authority argued that, together with postcode data previously shared with the Applicant, it would be possible to identify an individual dwelling and therefore address information.

68. The Authority noted that some variables were more likely to result in records potentially identifying individuals. For example, very rural dwellings or dwellings which were also less common property types, such as detached or end-terraced, were more likely to be identifiable. The Authority argued that even looking at only those less common variables would be very time consuming. For example, it stated that there were around 200,000 dwellings classed as "remote rural" and "very remote rural" and around 800,000 dwellings classed as detached or end terraced.

69. The Authority submitted that it considered the request to be vexatious in terms of parts (i) and (v) of the factors listed in paragraph 46 which would be relevant in considering a request to be vexatious. It stated, with reference to the Commissioner's guidance on section 14(1) of FOISA, that fulfilling the request would impose a considerable resource burden on it and divert an unreasonable proportion of its financial and human resources. That burden would primarily be experienced in reviewing the information to determine whether the information should be provided or withheld. It concluded that reviewing information in relation to 2.7m properties would require a disproportionate amount of time and the diversion of an unreasonable proportion of the authority's financial and human resources from other statutory functions.

70. The Authority referred to Decision 145/2013[4], where the Commissioner upheld the Authority's arguments relating to significant burden. It argued that its reasoning in this appeal was in line with its reasoning in that decision, but considered the present request was more onerous in terms of its burden on resources than in the previous appeal.

71. It submitted that because the primary burden would be in reviewing the information to determine whether it should be provided or withheld under an exemption, and because that cost could not be charged when considering section 12(1) of FOISA (excessive cost), it had concluded section 14(1) of FOISA was the most appropriate section to apply to the withheld information.

The Applicant's view on section 14(1)

72. The Applicant believed his request was simple and straightforward and did not believe it was vexatious. The Applicant stressed that he did not want, and did not consider that he was requesting, any data which would identify an individual.

The Commissioner's view on section 14(1)

73. The Commissioner notes that, while the Authority's primary arguments related to its view that the request was vexatious or manifestly unreasonable, this was based on its position that some of the information would comprise personal data, and it was the process it would have to follow to identify the personal data which made the request vexatious.

74. The Commissioner has considered the UK Information Commissioner's Office (ICO) guidance on what comprises personal information in relation to properties.

    The ICO guidance[5] states that:

    "… data about a house is not, by itself, personal data.

    Context is important here. Information about a house is often linked to an owner or resident and consequently the data about the house will be personal data about that individual."

75. The guidance continues with an example of a situation where such information may become personal data:

[4] https://www.foi.scot/decision-1452013

[5] https://ico.org.uk/for-organisations/uk-gdpr-guidance-and-resources/personal-information-what-is-it/what-is-personal-data/what-is-the-meaning-of-relates-to/#:~:text=Information%20about%20a%20house%20is,personal%20data%20about%20that%20individual.&text=Information%20about%20the%20market%20value,values%20in%20a%20geographical%20area.

"Information about the market value of a particular house may be used for statistical purposes to identify trends in the house values in a geographical area. The house is not selected because the data controller wishes to know anything about the occupants, but because it is a four bedroom detached house in a medium-sized town. As soon as data about a house is either:

- linked to a particular individual, for example, to provide particular information about that individual (for example, his address); or
- used in deliberations and decisions concerning an individual (even without a link to the individual's name, for example, the amount of electricity used at the house is used to determine the bill the individual householder is required to pay),

then that data will be personal data."

76. The Commissioner is not required to determine whether the information requested is personal data in this case, he simply has to be satisfied that it is possible that some of it may be personal data, before going on to consider the provision applied by the Authority.

77. He acknowledges the Applicant's view that he was not requesting personal data. However, the ICO guidance makes clear that personal data will not always be disclosed directly, in the form of obvious markers such as names, but may also be disclosed indirectly. The Commissioner has carefully considered all relevant factors including the subject matter of the request, the submissions made by the Applicant and the Authority, and the ICO guidance. He is satisfied that some, at least, of the information requested may amount to personal data. He will therefore now go on to consider his view on section 14(1).

78. The Commissioner has carefully considered all the submissions made and the information requested. The Authority's argument is, effectively, that the thinking time in this case (i.e. the time taken to consider this request, and whether the information in each particular case amounts to personal data) makes the request vexatious.

79. The Commissioner's briefing on section 14 of FOISA indicates that a request will impose a significant burden on a public authority where dealing with it would require a disproportionate amount of time and the diversion of an unreasonable proportion of its financial and human resources away from other statutory functions.

80. The Commissioner notes that the time and expense claimed by the Authority in responding to the request is predominantly related to its consideration of whether any exemptions are applicable to the information. He does not consider this, generally, was the sort of situation which section 14(1) of FOISA was intended to address.

81. However, he accepts that there may, rarely, be cases where requests are so burdensome as to be manifestly unreasonable and therefore vexatious (and where section 12(1) is not appropriate, as the Authority has argued in this appeal), although he does not consider that this will be a common occurrence. In relation to that, he considers excessive thinking time will only be an indicator of vexatiousness in extreme circumstances and any future such finding by the Commissioner is likely to be the exception, rather than the rule.

82. The Commissioner accepts that in the particular circumstances of this case, it would not have been appropriate for the Authority to claim that the cost of complying with the request would be excessive in terms of section 12 of FOISA. This is because the costs which would be incurred in deciding whether information was exempt from disclosure could not be considered by the Authority in estimating costs.

83. However, it is legitimate for the Authority to consider the time and expense incurred in analysing whether any exemptions are applicable to the information in the context of deciding whether, in exceptional cases, a significant burden would be imposed on it as a consequence.

84. As set out above, the Commissioner is satisfied that some of the data sets relating to individual dwellings could allow for living individuals to be identified, either directly or indirectly, and that they could therefore contain personal data.

85. In all the circumstances of this case, the Commissioner is satisfied that reviewing 2.7m individual datasets would take a significant amount of time. He accepts the Authority's arguments relating to the diversion of staff away from other duties and the detrimental impact that would have on those other duties. Overall, he is persuaded that the Authority has demonstrated that disproportionate resources would have to be diverted to respond to the request.

86. Accordingly, he is satisfied that compliance with the request (in the respects identified by the Authority) would impose a significant burden and that the Authority is not required to respond to the request, given that, in line with section 14(1) of FOISA, the request was vexatious in those respects.

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

87. 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.

The Authority's submissions - regulation 10(4)(b)

88. The Authority submitted that providing the environmental information to individual dwelling level would require it to undertake the same work as set out in relation to section 14(1) of FOISA, above.

    It stated that, in practice, the review of entries at individual property level would be undertaken as part of the process of considering the information under FOISA and the EIRs simultaneously. The Authority noted that it was not claiming that a further review would be undertaken to solely address the environmental elements of the request but it argued that consideration would need to be given to the specific data variables captured under the EIRs when assessing whether the information requested could be disclosed.

89. The Authority noted that, as above, the time taken to identify the information held centrally by EST would be minimal but, prior to responding to the request, the information which was held for the relevant data variables would need to be reviewed to identify and redact exempt information.

90. The Authority considered that in this case the appropriate exception under the EIRs would be regulation 11(2) (personal information). It referred to the submissions it had made under section 14(1) of FOISA, in relation to the 2.7 million properties in Scotland, and argued that it considered the environmental request would be manifestly unreasonable due to the time and

expense incurred in complying with the request and that any reasonable person would consider it to be excessive.

The Applicant's submissions – regulation 10(4)(b)

91. The Applicant believed the information was readily available and that he had not requested and was not seeking personal data.

The Commissioner's view on regulation 10(4)(b)

92. The EIRs implement Directive 2003/4/EC[6] on public access to environmental information.

93. The EIRs do not define the term "manifestly unreasonable", and neither does the Directive. However, the Aarhus Convention Implementation Guide, named after the Convention on which the Directive was based, makes it clear that volume and complexity alone do not make a request "manifestly unreasonable".

94. To an extent, the EIRs already make provision for a degree of complexity. Under regulation 7 a public authority is allowed to extend the maximum 20 working days for responding to a request for environmental information to 40 working days if the volume and complexity of the information requested makes it impracticable to comply with the request (or to decide to refuse the request) within 20 working days.

95. As with a "vexatious request" under FOISA, there may be circumstances where the burden of responding alone justifies deeming a request to be "manifestly unreasonable."

96. Unlike FOISA, there is no cost limit to the duty to comply with a request for environmental information, but there may be cases where:

    (i) the time and expense involved in complying with a request for environmental information means that any reasonable person would regard them as excessive; and

    (ii) an extension of an additional 20 working days (possible under regulation 7) is not sufficient to make dealing with the request manageable.

97. The Commissioner has published a number of decisions on whether a request for environmental information is "manifestly unreasonable".
In applying this regulation, the Commissioner will take into account the same kinds of considerations as in reaching a decision as to whether a request is vexatious.

98. The Commissioner has considered all the above submissions in relation to this exception. His view is that, in light of the Authority's calculations on the time to assess the information, an additional 20 days would not be sufficient to complete the assessment it would need to carry out, and that a reasonable person would consider the time and expense of complying with the request to be excessive. He is satisfied, in all the circumstances, that the exception applies.

99. The regulation at 10(4)(b) of the EIRs is subject to the public interest test. Given that the Commissioner considers that the regulation applies, he must now go on to consider the public interest.

[6] https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:041:0026:0032:EN:PDF

Public interest test – Regulation 10(4)(b)

100. The Authority recognised that there was some public interest in information about Home Analytics and energy in Scotland. However, it considered that this was outweighed by the public interest in ensuring the efficient and effective use of public resources by not incurring excessive costs when complying with information requests.

101. The Applicant submitted that disclosure of the information was in the public interest as his business aimed to support local authorities and registered social landlords to deliver Net Zero and fuel poverty measures which were legal requirements. He wanted to bring in a share of £7 billion of funding available under eco- and insulation schemes which, he argued, would benefit Scotland's people and communities and therefore also the Authority itself.

The Commissioner's view on the public interest – regulation 10(4)(b)

102. The Commissioner acknowledges the Applicant's arguments about helping unlock funding for green and fuel poverty measures. However, he also considered the Authority's arguments about the public interest in the efficient and effective use of public resources.

103. Given that the Commissioner has already accepted the Authority's arguments in relation to the review process which would need to be carried out before providing information, he accepts that, in these exceptional circumstances, the public interest favours the application of regulation 10(4)(b) and the Authority correctly applied the exception.

104. Whilst a particular request to an authority for information may be considered to be vexatious, or manifestly unreasonable, as in this case, it must be remembered that this does not, and should not, affect an applicant's ability to submit other information requests in future. Any such future information requests must be considered by an authority on their own merits.

Decision

The Commissioner finds that the Authority partially complied 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.

He finds that the Authority wrongly applied section 25(1) of FOISA to some of the information requested by the Applicant and, by doing so, it failed to comply with section 1(1) of FOISA.

By failing to identify elements of the requested information as environmental and, to that extent, deal with the request under the EIRs, the Authority failed to comply with regulation 5(1) of the EIRs.

He also finds that the Authority failed to comply with section 17(1) of FOISA, and 10(4)(a) of the EIRS, by failing to identify the specific information that it did not hold.

The Commissioner is satisfied that the Authority was entitled to respond to the request made by the Applicant, in part, in terms of section 14(1) of FOISA and regulation 10(4)(b) of the EIRs.

By failing to inform the Applicant, however, that it was relying on section 14(1) of FOISA and regulation 10(4)(b) of the EIRs at the time of the request, or requirement for review, the Authority failed to comply with section 1 of FOISA and regulation 5(1) of the EIRs.

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

14 February 2025