



Scottish Information
Commissioner
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Decision Notice 050/2025

Proposal to establish compensation habitat

Authority: Crown Estate Scotland
Case Ref: 202400895

Summary

The Applicant asked the Authority for all information relating to a proposal to create a compensation habitat for a windfarm. The Authority disclosed some information but withheld some information as internal communications. The Commissioner investigated and found that the Authority was entitled to withhold information as internal communications, but that it had failed to identify all information in scope until during the investigation.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2) and (6) (General entitlement); 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 the definition of “environmental information”) (Interpretation); 5(1) and (2)(b) (Duty to make environmental information available on request); 10(1), (2), and (4)(e) (Exceptions from duty to make environmental information available); 17(1), (2)(a), (b) and (f) (Enforcement and appeal provisions)

Background

1. On 3 April 2024, the Applicant made a request for information to the Authority. He asked for all information held relating to the proposal to install a sandwich tern compensation habitat on the west coast of Loch Ryan.
2. For background, this compensation habitat was proposed as a mitigation for the potential impact on bird numbers of a windfarm in Norfolk .
3. The Authority responded on 25 May 2024. It disclosed some of the requested information and withheld other information under the exceptions in regulations 10(5)(f) and 11(2) of the EIRs.
4. On 27 May 2024, the Applicant wrote to the Authority requesting a review of its decision. He stated that he was dissatisfied with the decision because he considered that the public interest favoured disclosure of the information.
5. The Authority notified the Applicant of the outcome of its review on 19 June 2024, which overturned its previous reliance upon regulation 10(5)(f) of the EIRs and identified further information which it disclosed to the Applicant. It withheld some information under the exceptions in regulations 10(4)(e) and 11(2) of the EIRs.
6. On 29 June 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 stated that he was dissatisfied with the outcome of the Authority's review because he was not satisfied that all the information requested had been disclosed and because he did not consider the exception under regulation 10(4)(e) of the EIRs had been correctly applied.

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 22 July 2024, the Authority was notified in writing that the Applicant had made a valid application. The Authority was asked to send the Commissioner the information withheld from the Applicant. The Authority provided the information, and the case was allocated to an investigating officer.
9. 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 related to the searches carried out, how it had established the information falling in scope of the request and the application of the exception in 10(4)(e) of the EIRs.
10. During the investigation, the Applicant confirmed that he did not require a decision on the information withheld under the exception in regulation 11(2) of the EIRs, except insofar as it specifically mentioned either his name or a specified farm.
11. Having reviewed the withheld information, the Commissioner is satisfied that none of the information withheld under the exception regulation 11(2) of the EIRs meets this description. He will not, therefore, consider the application of regulation 11(2) further in his decision.

Commissioner's analysis and findings

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

Application of the EIRs

13. Having considered the withheld material and the terms of the request, the Commissioner accepts the decision of the Authority to deal with the request under the EIRs rather than under FOISA.
14. The Commissioner is satisfied that the information covered by the request is environmental information, as defined in regulation 2(1) of the EIRs. He would also note that he can see no detriment to the Applicant by considering his request under the EIRs rather than FOISA, nor has the Applicant disputed the Authority's decision to handle his request under the EIRs.

Section 39(2) of FOISA – Environmental information

15. 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.
16. In this case, the Commissioner accepts that the Authority was entitled to apply the exemption to the information withheld under FOISA, given his conclusion that it is properly classified as environmental information.
17. 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.
18. The Commissioner therefore concludes that the Authority was correct to apply section 39(2) of FOISA and consider the Applicant's information request under the EIRs.
19. In the circumstances, the Commissioner will consider this case, in what follows, solely in terms of the EIRs.

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

20. 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 by any applicant. This obligation relates to the information held by an authority when it receives a request. Under the EIRs, a public authority may refuse to make environmental information available if one or more of the exceptions in regulation 10 apply.
21. 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.

22. 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, at the time it received the request).

Searches

23. The Applicant argued that a substantial amount of detail was omitted from the Authority's initial response, which was only identified during the further searches carried out for the Authority's review. He suggested that this demonstrated weaknesses in the searches that the Authority carried out.
24. The Applicant identified references in [an Equinor publication relating to the windfarm](#)¹ to specific correspondence in January 2023 that had not been included in the Authority's response. He also considered some of the information disclosed referred to different projects, and that he would have expected more information on indicative sites to have been identified.
25. The Authority explained that it and Bidwells (a real estate advisor that acts as a "managing agent" for the Authority) carried out searches of the Authority's electronic record system using the reference number assigned to the project and several related terms: "Equinor New Energy", "Equinor", "Sandwich Tern" and "Loch Ryan."
26. The Authority stated that information was held in Outlook emails, SharePoint online and online on its external-facing website. The Authority confirmed that its searches covered these areas and that Bidwells had also provided it with a copy of its file for the project, from which the Authority identified relevant information.
27. The Authority explained that it had also asked staff involved in the project (including staff who led on offshore wind and coastal agreements in the Authority and coastal issues in Bidwells) to check for any documents that had not yet been filed.
28. Regarding the correspondence of January 2023 referred to by the Applicant, the Authority confirmed that it held no such correspondence. It explained that it had carried out specific searches of its email inboxes in addition to searches of its files to confirm this, and that it also had Bidwells check its records.
29. The Authority noted that the Equinor publication suggested that the January 2023 correspondence related to ownership of the foreshore. It explained that this was discussed as part of an email exchange dated 13 December 2022, which had been disclosed to the Applicant (subject to personal data redactions) in response to his information request. It suggested that, notwithstanding the difference in dates, this might be what the Equinor publication referred to.
30. The Authority confirmed that the information disclosed related to the proposal by Equinor to install a Sandwich Tern compensation habitat on the West Coast of Loch Ryan near Kirkcolm, Dumfries and Galloway. It also confirmed that it held no further information relating to the discussion of potential sites.

¹ <https://infrastructure.planninginspectorate.gov.uk/wp-content/ipc/uploads/projects/EN010109/EN010109-002272-13.7%20Habitats%20Regulation%20Assessment%20Derogation%20and%20Compensatory%20Measures%20Update%20Revision%20E%20Clean.pdf>

31. The Commissioner has carefully considered the submissions from both parties, together with the information identified and the supporting evidence and explanation of searches. Having done so, he is satisfied that the searches carried out by the Authority would have been capable of identifying any relevant information.
32. The Commissioner therefore concludes, on balance, that the Authority does not (and did not, on receipt of the request) hold further information falling within the scope of the request, beyond that already identified by these searches.
33. While the Applicant believed and expected more information to be held by the Authority, the Commissioner is satisfied that this was not the case.

Information in scope

34. Within the information identified by the searches, the Authority considered some of the information to be outwith scope or duplication of information disclosed.
35. Having reviewed this information, the Commissioner accepts that some of it falls outwith the scope of the request or simply contains information already disclosed to the Applicant. However, other information appeared to fall in in scope of the request. The Commissioner therefore asked the Authority to explain why it did not consider this information fell within scope.
36. For some of this information, the Authority agreed that it fell within scope and that it had been mistakenly withheld. It subsequently disclosed this information to the Applicant. It explained that other information did not relate to the project itself, but instead to staffing issues. It stated that it therefore did not consider this information fell in scope of the request.
37. The Commissioner has carefully considered the specific terms of the request, which sought “all information” relating to the project to install a Sandwich Tern compensation habitat on the West Coast of Loch Ryan.
38. The Commissioner considers resourcing, including staffing, to be a key issue for almost any significant project. In this case, the information withheld by the Authority as falling outwith the scope of the request relates to the staffing of the project.
39. In the circumstances, the Commissioner finds that this information relates to the project and should have been identified as falling in scope of the request by the time of the Authority’s review outcome at the latest. As the Authority failed to identify all the information falling in scope of the request, he must find that it failed to comply with regulation 5(1) of the EIRs.
40. The Authority indicated that some of the information relating to staffing issues was personal information, and, if deemed to fall within scope of the request, should be withheld under the exception in regulation 11(2) of the EIRs. As rehearsed earlier, the Commissioner will not consider the application of the exception in regulation 11(2) of the EIRs further in his decision.

Regulation 10(4)(e) – Internal communications

41. Regulation 10(4)(e) allows authorities to refuse to disclose internal communications. This is a class-based exception, meaning that there is no need to consider whether disclosure of the communication would cause harm before applying the exception.
42. For information to fall within the scope of the exception in regulation 10(4)(e) of the EIRs, it need only be established that the information is an internal communication.

43. As with all exceptions in regulation 10 of the EIRs, it is subject to the public interest test in regulation 10(1)(b) and, in line with regulation 10(1)(a), must be interpreted in a restrictive way with a presumption in favour of disclosure.
44. The Authority withheld some information in a single document under the exception in regulation 10(4)(e) of the EIRs. Having reviewed that information, the Commissioner is satisfied that it comprises internal communications and the cited exception is relevant.
45. The Applicant indicated to the Commissioner that the information withheld under the exception in regulation 10(4)(e) of the EIRs appeared to be a map. Given that some maps had already been disclosed to him, it was not clear why this particular map could not be disclosed.
46. The Commissioner has considered the format of redaction applied to the document provided to the Applicant: a green rectangle covers the withheld information. He understands, therefore, why the Applicant believed the withheld information comprised a map or diagram. However, having viewed the withheld information, the Commissioner can confirm that it comprises an email exchange consisting of text alone – there is no map, diagram or picture.
47. As the exception in regulation 10(4)(e) of the EIRs is subject to the public interest test in regulation 10(1)(b), the Commissioner must, therefore, go on to consider whether, in all of the circumstances of this case, the public interest in disclosing the information is outweighed by the public interest in maintaining the exception.

The public interest test - regulation 10(4)(e)

The Authority's submissions about the public interest

48. The Authority explained that the withheld information related to an internal discussion of possible connections between several projects. This discussion contained speculation, that was later established to be inaccurate, and consideration of the options open to persons outwith the Authority. It stated that it considered the discussion to be a “sensitive issue”.
49. The Authority recognised the general public interest in transparency and the requirement in regulation 10(2) of the EIRs to operate a presumption in favour of disclosure. However, in attributing weight to the public interest in transparency, it considered that disclosure of the information in question would not inform the public of the substance of the proposal but would instead only highlight speculation that was turned out to be inaccurate. It submitted that disclosure would, therefore, not contribute to any meaningful scrutiny of its actions or decisions in relation to the project, so would contribute only very minimally, if at all, to improving accountability and transparency.
50. The Authority stated that it had to balance the arguments in favour of disclosure of the information against what it considered to be the “strong public interest” in favour of withholding the information. In particular, it highlighted the need to allow its staff to be able to consider all of the possible implications, to test the possible consequences of its actions and to have a private space to have those discussions without any “chilling effect” arising from concern about their discussion on sensitive matters being disclosed into the public domain. It submitted that its staff must be able to discuss these matters frankly, and without inhibition or fear that their conversations would enter the public domain.
51. The Authority submitted that disclosure of the information into the public domain would:
 - cause inhibition for staff who need to have the space for full and frank discussions internally, without worrying that this information would be made public

- discourage capturing discussions in a recorded format, which was not a culture it would wish to create and could also lead to inefficiencies
 - contribute to misinformation about developments and/or mislead the public into thinking irrelevant considerations were used to make decisions.
52. On balance, the Authority considered that there was a greater public interest in protecting a safe space to discuss such matters, which was vital to ensuring that the right outcomes were reached, that misinformation was not relied on, and that incorrect information could be verified, challenged and discussed internally without it being made public.
53. In conclusion, the Authority submitted that on the basis that disclosure would cause harm contrary to the public interest, and would not bring significant benefit to the public, it determined that the public interest in withholding the information requested favoured upholding the exception.

The Applicant's submissions about the public interest

54. The Applicant explained that his request related to an unprecedented proposal to build a compensation habitat hundreds of miles (and in another nation of the UK) from the development it was intended to compensate for. He stated that he was sceptical of the developer's claim that this land was the best place in the UK to rehome a bird colony being displaced or killed.
55. The Applicant submitted that this was a major development, predicted to provide power for hundreds of thousands of households and highlighted there was some uncertainty about the ownership of the land in the area.
56. The Applicant argued that disclosure of the withheld information would help reassure the public that the law and all correct procedures were followed in this major infrastructure project and was required to demonstrate that the process was transparent.

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

57. The Commissioner has fully considered the public interest submissions of both the Applicant and the Authority, alongside the withheld information (which he has accepted comprises internal communications for the purposes of this exception).
58. The Commissioner is unable to explain fully all his reasoning in the following, as to do so may reveal the content of the withheld information. However, as far as he can without revealing the content of information that is withheld, the Commissioner will explain his reasons below.
59. The Commissioner notes the Authority's concerns about misinterpretation of the information, were it disclosed. However, [the Commissioner's guidance on the public interest test](https://www.foi.scot/sites/default/files/2022-03/PublicInterestTestFOISA.pdf)² is clear that if a public authority is concerned that information might not be easily understood, or would be misinterpreted, there is nothing to stop the authority from explaining the information.
60. The Commissioner considers that, in certain circumstances, there may still be a significant public interest in the disclosure of misunderstood, outdated or otherwise inaccurate information. However, regardless of its accuracy, the withheld information contains a

² <https://www.foi.scot/sites/default/files/2022-03/PublicInterestTestFOISA.pdf>

discussion of commercial options and sensitivities, expressed in a frank fashion and based on its understanding of the situation at that time.

61. The Commissioner agrees that the Applicant has a legitimate interest in obtaining information about this proposal for a major infrastructure project. He considers that there is a clear public interest in understanding the considerations and discussions that the Authority held, especially in relation to a project with potentially significant economic and environmental impact.
62. The Commissioner recognises that there is a public interest in ensuring that advice can be imparted freely and frankly and that options can be considered on a fully informed basis. He also accepts that disclosure of the withheld information could discourage staff in the Authority from seeking or providing internal advice and that this could inhibit the frankness and openness of parties involved in seeking or providing advice, if they had concerns that their advice would be made public.
63. The Commissioner also accepts that the information is less likely to have been expressed or recorded as it was if it had not been for the private space in which it was communicated. If, for this reason, the Authority were unable to obtain full advice in respect of its actions, that would not be in the public interest.
64. The Commissioner has considered the above factors, bearing in mind the requirement to apply a presumption in favour of disclosure (regulation 10(2)(b) of the EIRs).
65. On balance, having examined the withheld information and the submissions from the Applicant and the Authority, the Commissioner is not satisfied that, at the time of the Authority's review outcome, the public interest arguments in favour of disclosure were sufficiently strong to outweigh the public interest in maintaining the exception.
66. In all the circumstances, the Commissioner considers there was a greater public interest, in this case, in protecting the Authority's ability to assess commercial options and sensitivities and to consider and challenge all angles of an issue, including through speculation that may later prove to be inaccurate.
67. Consequently, the Commissioner finds that the Authority was entitled to withhold the information in question under the exception in regulation 10(4)(e) of the EIRs.

Decision

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

The Commissioner finds that the Authority complied with the EIRs by correctly withholding information under the exception in regulation 10(4)(e) of the EIRs.

However, the Authority failed to comply with regulation 5(1) the EIRs, by failing to identify all information in scope of the request until during the investigation

Given that the Commissioner is satisfied the Authority has now identified all information in scope of the request, he does not require it to take any action in response to this failure in response to the Applicant's application.

Appeal

Should either the Applicant or the Authority wish to appeal against this decision, they have the right to appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days after the date of intimation of this decision.

Euan McCulloch
Head of Enforcement

25 February 2024