Scottish Information Commissioner
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Decision Notice 058/2025

Communications regarding a consultation

Authority: Dumfries and Galloway Council
Case Ref: 202300087

Summary

The Applicant asked the Authority for information regarding a specific consultation. The Authority withheld the information requested under various exceptions in the EIRs. Following an investigation, the Commissioner concluded that the Authority had failed to satisfy him that it had identified all relevant information falling within the scope of the request. He required the Authority to issue a revised review outcome.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 39(2) (Health, safety and the environment); 47(1) and (2) (Application for decision by Commissioner).

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (definition of "the Act", "applicant", "the Commissioner," and paragraphs (a) and (c) of the definition of "environmental information") (Interpretation); 5(1) (Duty to make environmental information available on request); 17(1), (2)(a), (b) and (f) (Enforcement and appeal provisions).

Background

1. On 24 November 2022, the Applicant made a request for information to the Authority. He asked for all responses and associated communications pertaining to a survey which concluded in October 2022.

2. On the same day, the Authority, asked the Applicant to confirm which survey he was asking about. The Applicant confirmed that his request related to the "consultation request by [the Authority's] Countryside Access officer regarding Portpatrick Harbour Slipway".

3. The Authority responded on 21 December 2022. It responded in terms of the EIRs and withheld the information requested under the exceptions in regulations 10(5)(b), 10(5)(d) and 11(2).

4. On 21 December 2022, 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 this information should be disclosed in the interests of openness and transparency.

5. The Authority notified the Applicant of the outcome of its review on 20 January 2023, which upheld its reliance upon the exceptions in regulations 10(5)(b) and 11(2) of the EIRs to withhold the information requested.

6. On 21 January 2023, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. By virtue of regulation 17 of the EIRs, Part 4 of FOISA applies to the enforcement of the EIRs as it applies to the enforcement of FOISA, subject to specified modifications. The Applicant stated that he was dissatisfied with the outcome of the Authority's review because he considered the public interest favoured disclosure.

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 23 January 2023, and in line with section 49(3)(a) of FOISA, the Commissioner gave the Authority notice in writing of the application and invited its comments. The Authority was also asked to send the Commissioner the information withheld from the Applicant.

9. The Authority provided the withheld information and its comments. The Authority clarified that it had relied on the same exceptions at review stage to withhold the information requested as it had in its initial response (i.e. 10(5)(b), 10(5)(d) and 11(2) of the EIRs). In addition to these exceptions, it stated that it also wished to rely upon the exception in regulation 10(5)(f).

10. The case was subsequently allocated to an investigating officer.

11. During the investigation, further comments were sought from the Authority in relation to specific questions. These questions related to the Authority's interpretation of the request, the searches it carried out in response to the request and the exceptions applied to withhold the information requested.

12. The Authority advised that, given the change in circumstances since the date of the review, it was willing to disclose some of the withheld information to the Applicant. It also provided brief comments in response to the specific questions referred to above.

Commissioner's analysis and findings

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

Application of the EIRs

14. Where information falls within the scope of the definition of "environmental information" in regulation 2(1) of the EIRs, a person has a right to access it (and the public authority a corresponding obligation to respond) under the EIRs, subject to various restrictions and exceptions contained in the EIRs.

15. The Commissioner is satisfied that the information requested falls within the definition of environmental information in regulation 2(1) of the EIRs (in particular paragraphs (a) and (c) of that definition). He notes that the Applicant did not challenge the Authority's decision to deal with the request as one for environmental information.

Section 39(2) of FOISA – Environmental information

16. The exemption in section 39(2) of FOISA provides, in effect, that environmental information (as defined by regulation 2(1) of the EIRs) is exempt from disclosure under FOISA, thereby allowing any such information to be considered solely in terms of the EIRs. In this case, the Commissioner accepts that the Authority was entitled to apply this exemption to the information withheld under FOISA, given his conclusion that it is properly classified as environmental information.

17. The Commissioner therefore concludes that the Authority was correct to apply section 39(2) of FOISA and to consider the Applicant's information request under the EIRs. In what follows, he will therefore consider this case solely in terms of the EIRs.

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

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

19. On receipt of a request for environmental information, the authority must ascertain what information it holds falling within the scope of the request. Having done so, regulation 5(1) requires the authority to make the information available, unless a qualification in regulation 6 to 12 applies (regulation 5(2)(b)).

20. In considering whether a Scottish public authority has complied with the requirements of FOISA or the EIRs in any given case, the Commissioner must be satisfied that the authority has carried out adequate, proportionate searches in the circumstances, taking account of the terms of the request and all other relevant circumstances.

21. The Commissioner will consider the scope, quality, thoroughness and results of those searches, applying the civil standard of proof (the balance of probabilities). Where appropriate, he will also consider any reasons offered by the public authority to explain why it does not, or could not reasonably be expected to, hold the information.

22. In all cases, it falls to the public authority to persuade the Commissioner, with reference to adequate, relevant descriptions and evidence, that it does not hold the information (or holds no more information than it has identified and located in response to the request).

The scope of the request

23. In this case, the Applicant requested "responses and associated communications". However, the information provided by the Authority to the Commissioner was composed solely of responses to the survey, with no "associated communications" (e.g. cover letters, queries about the survey or internal correspondence) identified.

24. When asked how it had interpreted the request, the Authority simply quoted the original request – it failed to provide any further explanation.

25. In this case, given that no "associated communications" were identified in response to the request, the Commissioner cannot, in the absence of an adequate explanation of how the Authority interpreted the request, conclude that the Authority correctly interpreted the request.

Searches

26. In this case, the Authority did not provide the Commissioner with a description, or adequate evidence, of the searches it carried out.

27. The Authority noted that it had not received any correspondence to dispute whether it had identified all of the information falling within the scope of the request, but it was satisfied that all information had been identified.

28. The Commissioner accepts that the Applicant has not explicitly challenged the adequacy of the Authority's searches. However, given the information identified by the Authority was withheld in its entirety, he does not consider it would have been possible for the Applicant to have challenged any potential gaps in the information identified and located by the Authority.

29. In the circumstances, the Commissioner cannot, based on the submissions he has received regarding the interpretation of the request and the searches carried out, conclude that the Authority identified all relevant information falling within the scope of the request. He therefore finds that the Authority failed to comply with regulation 5(1) of the EIRs.

30. The Commissioner requires the Authority to fully reconsider the Applicant's request and issue him with a revised review outcome (in terms of regulation 16 of the EIRs). In doing so, the Authority must ensure it has identified the correct scope of the request and carry out fresh searches (which must be adequate and proportionate) for the information requested.

31. As rehearsed earlier, the Authority has stated that it is prepared to disclose some of the withheld information on the basis that circumstances have changed since the date of the review outcome. The Commissioner welcomes this reconsideration.

32. In the circumstances, the Commissioner therefore requires the Authority's revised review outcome to consider the circumstances as at the date of that revised review outcome , not at the date of the initial review outcome (i.e. in 17 April 2025, not 20 January 2023).

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.

Specifically, the Commissioner finds that the Authority failed by comply with regulation 5(1) of the EIRs, by failing to satisfy him that it had accurately interpreted the request and that it had identified and located all information relevant to the request.

The Commissioner therefore requires the Authority (in terms of regulation 16 of the EIRs) to fully reconsider the request, carry out adequate, proportionate searches for the information requested,

reach a decision on the basis of those searches (taking account of the circumstances at the date of the revised review outcome) and notify the Applicant of the outcome, by **Thursday 17 April 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

4 March 2025