



Scottish Information
Commissioner
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Decision Notice 063/2025

Plans for roof and footpath repairs at a specified address

Authority: Clackmannanshire Council

Case Ref: 202201314

Summary

The Applicant asked the Authority for information relating to roof and footpath repairs at a specified address. The Authority refused to provide the information, due to claiming either that it did not hold it or that to release it would harm commercial interests. The Commissioner investigated and found that the Authority had considered the request under the wrong legislation. The requested information was environmental, and the Authority should have considered the request under the EIRs. The Commissioner required the Authority to respond to the request under the EIRs.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2) and (6) (General entitlement); 47(1) and (2) (Application for decision by Commissioner)

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (definition of “the Act”, “the applicant”, “the Commissioner” and paragraphs (a), (c) and (f) of definition of “environmental information”) (Interpretation); 5(1) (Duty to make available environmental information on request); 16 (Review by Scottish public authority); 17(1), (2)(a), (b) and (f) (Enforcement and appeal provisions)

Background

1. On 16 May 2022, the Applicant made three separate requests for information to the Authority. He requested:
 - a) Action taken by the Authority and its representatives on the ongoing roofing issues at a specified address, including minutes of meetings, and any work done.
 - b) In respect of the ongoing roof repair at a specified address:
 - (i) Has the specification for the necessary work on the roof been done and when?
 - (ii) If it has been done, has the work deemed necessary been approved for tender?
 - (iii) If it has been approved for tender, is it advertised on the appropriate portal?
 - (iv) To provide all documents and information relating to the above at (b)(i) to (iii).
 - c) All relevant information pertaining to the attempts to close the footpath around the specified address/street. He referred to correspondence from a named Councillor, which stated that the Councillor had been in touch with a senior service manager who was going to “close the footpath to ensure pedestrian safety”.
2. The Authority responded on 14 June 2022. In response to request a) the Authority notified the Applicant that as the majority of office-based staff were working from home, there were no public recorded notes of meetings which took place via Microsoft Teams (MS Teams). In response to request b) the Authority provided some information on the proposed work, including the tender process. In response to request c), the Authority notified the Applicant that it was unable to identify any records regarding this matter. It commented that it understood officers had attended the location in November, but footpath closure was not deemed necessary.
3. On 12 July 2022, the Applicant wrote to the Authority requesting a review of its decision. The Applicant expressed dissatisfaction with the Authority’s response to each of his individual requests. The Applicant stated that the Authority’s responses to requests a) and b) were incomplete and it had not provided him with all of the information captured by these requests. The Applicant also challenged the Authority’s response to request c) and asked it to provide him with all relevant documentation captured by that request.
4. The Applicant did not receive a response to his requirement for review.
5. On 25 August 2022 (and following a separate appeal to the Commissioner), the Authority provided the Applicant with a review of its original response. The Authority upheld its original view that it did not hold information falling within the scope of requests a) and c) and it cited section 17 of FOISA. In relation to request b), the Authority notified the Applicant that it was withholding information under section 33(1)(b) of FOISA.
6. On 18 November 2022, 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 did not accept that the Authority held no information falling within the scope of requests a) and c). Furthermore, he considered that at least some of the information falling within the scope of request b) and withheld under section 33(1)(b) of FOISA, should be disclosed.

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 11 January 2023, and in line with section 49(3)(a) of FOISA, the Authority was notified in writing that the Applicant had made a valid application, and it was invited to comment on the Application. The Authority was also asked to provide the Commissioner with the withheld information.
9. The Authority provided its comments and the withheld information, and the case was subsequently allocated to an investigating officer.

Commissioner's analysis and findings

10. The Commissioner has considered the submissions made by the Applicant and the Authority.

FOISA or the EIRs

11. The relationship between FOISA and the EIRs was considered at length in [Decision 218/2007](#)¹. Broadly, in the light of that decision, the Commissioner's general position is:
 - 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.
12. The information relates to measures and activities (paragraph (c) of the definition of environmental information in regulation 2(1) of the EIRs) that affect the state of the elements contained in paragraph (a) of regulation 2(1), specifically the land (paths). The information also relates to the impact of the elements in paragraph (a) on a built structure (the roof), which is part of the built environment that falls under the definition of paragraph (f).

¹ <https://www.foi.scot/decision-2182007>

13. The Commissioner is therefore satisfied that the Applicant is seeking environmental information, as defined in regulation 2(1) of the EIRS (paragraphs (a), (c) and (f)), as it relates to the arrangements for roof repairs and footpath closures, in a public area.
14. Given that the information requested is properly considered to be environmental information, and as the Authority failed to recognise and respond to the request as a request for environmental information, the Commissioner must find that it failed, in this respect, to respond in accordance with regulation 5(1) of the EIRs.

Regulation 16 of the EIRs

15. 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)).
16. As noted above, the Authority failed to respond to the Applicant's requirement for review in accord with statutory timescales and it required the Commissioner's intervention to prompt the Authority to issue a review outcome, on 25 August 2022, when that outcome was due by 10 August 2022.
17. It is apparent that the Authority failed to respond to the Applicant's request of 16 May 2022, in terms of the EIRs, and therefore failed to comply with regulation 5(1) of the EIRs. It is also apparent that the Authority failed to carry out a review meeting the requirements of regulation 16 of the EIRs.
18. The Commissioner therefore requires the Authority to provide a response to the Applicant's requirement for review of 12 July 2022, in terms of regulation 16 of the EIRs. Given the Authority's claim that it does not hold information falling within the scope of requests a) and c), and bearing in mind that its conduct of searches is a key element of the Commissioner's ongoing Level 3 intervention with the Authority, the Commissioner also requires the Authority to carry out new searches for the information captured by requests a), b) and c) and to provide him with evidence of those searches (including any relevant screen shots and details of keywords used, etc.)
19. The Commissioner's decision below states a compliance date of 28 April 2025, in line with the timescales he is required to follow. This is the latest day on which the Authority must issue a response; the deadline does not prevent the Authority from issuing one sooner.

Decision

The Commissioner finds the Authority failed to comply with the requirements of regulations 5(1) and 16 of the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the Applicant's information request and requirement for review.

The Commissioner requires the Authority to:

- carry out new searches for the information requested by the Applicant and provide the Commissioner with evidence of those searches (as detailed above in paragraph 18), and
- provide the Applicant with a response to his requirement for review, in terms of regulation 16 of the EIRs.

He requires the Authority to undertake both of these actions by **28 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

14 March 2025