Scottish Information Commissioner
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Decision Notice 105/2025

Subsidies for deer management

Applicant: The Applicant
Authority: Scottish Forestry
Case Ref: 202401246

Summary

The Applicant asked the Authority for various information on subsidies awarded for deer management. The Authority disclosed some information and withheld other information under exceptions in the EIRs. During the investigation, the Authority disclosed the information requested, except that relating to part (ii) of the request as it considered complying with it would be manifestly unreasonable. The Commissioner investigated and found that the Authority had failed to fully comply with the EIRs in responding to the Applicant's request, but that it was entitled to refuse to comply with part (ii) of the request on the basis it was manifestly unreasonable.

Relevant statutory provisions

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

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (definition of "the Act", "applicant" and "the Commissioner") (Interpretation); 5(1) (Duty to make environmental information available on request); 10(1), (2), (4)(a) and (4)(b) (Exceptions from duty to make environmental information available); 11(2) (Personal data); 17(1), (2)(a), (b) and (f) (Enforcement and appeal provisions)

Background

1. On 29 January 2024, the Applicant made a request for information to the Authority. He asked for:

(i) Data detailing the subsidies awarded to all companies relating to erecting and maintaining deer fences, and any other subsidies relating to deer management from 2018/19 to 2022/23

(ii) How many of these businesses were inspected during this timeframe, detailing any breaches discovered in relation to deer fence subsidies or deer management.

2. The Authority responded on 26 February 2024, in terms of the EIRs. In response to part (i) of the request, it disclosed summary tables for contract commitment values, by year, for all deer fencing, including the erection of the fence; marking to prevent bird strikes; upgrading stock to deer fence; gates; tree shelters; and deer control funded through the WIG Species Conservation – Reducing Deer Impact option. It explained that this information represented all relevant grants made by the Authority and noted that other public bodies (e.g. NatureScot) may award grants and/or subsidies in relation to deer management.

3. The Authority otherwise responded in the following terms:

- it applied the exception in regulation 10(4)(a) of the EIRs to some of the information requested because the "necessary variables are held in individual records, but our computer systems do not allow us to collate them into presentable information"
- it applied the exception in regulation 10(4)(b) of the EIRs to part (ii) of the request, due to the high number of records covered and the consequent high burden of collating and presenting the information
- it applied regulation 11(2) of the EIRs to grant recipients where they were individuals or sole traders as it considered that information personal data.

4. On 25 March 2024, the Applicant wrote to the Authority requesting a review of its decision. He stated that he was dissatisfied with the Authority's decision because he considered:

- it did hold the information needed to define the incorporation status of applicants
- it could respond to his request in a way that was not manifestly unreasonable
- the Authority had applied the exception in regulation 11(2) "too liberally".

5. The Authority notified the Applicant of the outcome of its review on 23 April 2024, which fully upheld its original decision without modification.

6. On 17 September 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 for the reasons set out in his requirement for review.

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 6 November 2024, the Authority was notified in writing that the Applicant had made a valid application. The case was subsequently 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. The Authority was also asked to send the Commissioner the information it withheld from the Applicant. The Authority provided the information and its comments.

10. On 19 December 2024, the Authority provided the Applicant with the spreadsheet information that it had withheld under regulation 11(2) of the EIRs. It acknowledged that this exception did not apply to this information.

11. On 23 January 2025, the Authority again wrote to the Applicant and provided some further information. It disclosed a spreadsheet with information on inspections, including the date undertaken, the type of inspection (administrative or compliance) and if the inspection was deferred. As a result, it confirmed that it was no longer relying on the exception in regulation 10(4)(a) of the EIRs.

12. While the Authority had disclosed the information it had previously withheld under regulations 10(4)(a) and 11(2) of the EIRs, it confirmed it wished to continue to rely on the exception in regulation 10(4)(b) for part (ii) of the Applicant's request

13. For part (ii) of his request, the Applicant asked if (the Authority could advise whether any breaches were found upon any inspections without providing further details. The Authority was asked to consider this suggestion. The Authority explained that this information was not collated separately and could not be easily identified and provided. The Applicant confirmed that he still required the Commissioner to issue a Decision Notice for his application.

Commissioner's analysis and findings

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

Application of the EIRs

15. It is clear from the terms of the request that the information sought by the Applicant is properly considered to be environmental information, as defined in regulation 2(1) of the EIRs.

16. The Applicant has not disputed the Authority's decision to handle his request under the EIRs, and the Commissioner will consider the information in what follows solely in terms of the EIRs.

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

17. Regulation 5(1) of the EIRs requires a Scottish public authority which holds environmental information to make it available when requested to do so by any Applicant. This obligation relates to information that is held by the authority when it receives a request.

18. On receipt of a request for environmental information, therefore, the authority must ascertain what information it holds falling within the scope of the request. Having done so, regulation 5(1) requires the authority to provide that information to the requester, unless a qualification in regulations 6 to 12 applies (regulation 5(2)(b)). Under the EIRs, a public authority may refuse to make environmental information available if one or more of the exceptions in regulation 10 applies.

Information disclosed during the investigation

19. As stated above, the Authority accepted it was not entitled to rely on regulations 10(4)(a) or 11(2) of the EIRs to withhold any of the information requested. During the investigation, it disclosed to the Applicant the information it had withheld under these provisions.

20. This information should have been disclosed to the Applicant, at the latest, by the date of the Authority's review outcome. In this respect, the Commissioner must therefore find that the Authority failed to comply with regulation 5(1) of the EIRs in responding to the Applicant's request.

21. However, as the Authority has now disclosed this information to the Applicant, the Commissioner does not require the Authority to take any action in response to these failures.

Regulation 10(4)(b) – Manifestly unreasonable

22. The Authority maintained that to comply with part (ii) of the Applicant's request would be manifestly unreasonable in terms of regulation 10(4)(b) of the EIRs.

23. Regulation 10(4)(b) provides that 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.

24. The EIRs do not define the term "manifestly unreasonable", and neither does the Directive on which the EIRs were based (Directive 2003/4/EC[1] on public access to environmental information and repealing Directive 90/313/EEC). 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".[2]

25. The Commissioner's general approach is that the following factors are relevant when considering whether a request is manifestly unreasonable. These are that the request:

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

    (ii) does not have a serious purpose or value

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

    (iv) has the effect of harassing the public authority

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

26. 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.

[1] https://eur-lex.europa.eu/eli/dir/2003/4/oj/eng

[2] https://unece.org/environment-policy/publications/aarhus-convention-implementation-guide-second-edition

The Applicant's submissions

27. The Applicant did not agree that the exception in regulation 10(4)(b) of the EIRs applied as he did not consider that to provide the information requested would be manifestly unreasonable.

The Authority's submissions

28. The Authority explained that its case management system was primarily an electronic system, consisting of several component parts. There was not one electronic system for data storage or case management and the system mostly consisted of electronic versions of paper documents (Word, Excel or PDF files) rather than being a database of user input data.

29. The Authority stated that applications for grants are made through the Rural Payments and Inspections Division (RPID) Rural Payments and Services system, but this system only serves as the application portal and official record. For "post-contract case management", the Authority uses its own system to manage projects through to claim stage.

30. The Authority explained that file records are held across different electronic data record systems, including conventional network folder locations. Minimal standardised field data, predominantly limited to applicant information and grant option, along with some declarations, is collected through the application process. Additional standardised field data is created through the application assessment and contract management phases of a project, but little is in relation to claim inspection, and none is created in relation to contract breaches. This significantly limits the range of queries that are possible across all the applications, but the Authority can and does make all this information available for individual projects on request.

31. Other than the data now provided on claim inspection dates, type, officer and deferral status, the Authority confirmed that there Is no searchable repository of information holding information on contract breaches or inspections. These records are only held as electronic documents, stored in electronic folders relating to individual projects. Information on breaches and inspections can therefore be held across electronic documents (e.g. scanned images of paper field survey forms, photographs and Word, Excel or PDF documents that are held in a variety of locations for each project).

32. The Authority stated that to identify whether an inspection identified a breach would involve a member of staff reviewing manually all the documentation associated with each case. It explained that it is unable to extract this information across all cases by searching or querying its systems. This is not a factor or statistic that was collated or reported on and so is not collated separately.

33. The Authority referred to the factors in the Commissioner's guidance[3] on the exception at 10(4)(b) of the EIRs for determining whether a request is manifestly unreasonable. It considered the following factors relevant in this case:

- the request would impose a significant burden on the public authority.
- the request would otherwise, in the opinion of a reasonable person, be considered to be manifestly unreasonable or disproportionate.

34. In coming to this conclusion, the Authority estimated that it would take 334 hours to complete the work to identify the information that was within scope of this part of the request. This

[3] https://www.foi.scot/sites/default/files/2023-07/BriefingRegulation104bManifestlyUnreasonableRequests.pdf

would have to be undertaken by specialist staff who are able to review the "sometimes complex documentation associated with each inspection". The need to use specialist staff would divert them away from the other statutory work of the Authority, including carrying out inspections to ensure compliance with the grants schemes that are the subject of this request.

35. The Authority stated that 2,003 inspections have been conducted during the period covered by the request. Each of these cases would need reviewed individually to determine whether a breach or non-compliance issue had been identified. Some of the cases were straightforward and have little associated documentation, but others were more complex with other documentation to review. It is not always obvious, particularly for more complex cases, where in the documentation a breach or non-compliance may be recorded, so careful consideration would be required for each case.

36. The Authority provided a "conservative estimate", based on a sample, that it would take an average of ten minutes to review each inspection to determine if a breach or non-compliance had occurred. This equated to approximately 334 hours of time (equivalent to almost 48 days of one FTE member of staff) and an estimated cost of over £5,000 (using the maximum hourly rate of £15 allowed under FOISA) to comply with part (ii) of the request. It considered this the appropriate hourly rate, given that the information is most efficiently considered by a specialist with an understanding of the schemes and systems.

37. The Authority noted that this estimate only covered the "capital claim" element of the inspections – not all the other possible scenarios where breaches or inspections might happen. It submitted that further work in addition to that described above would be required to allow it to respond to part (ii) of the request.

38. The Authority noted that its original estimate of an hour per case (set out in its initial response) was based on a more complex case. However, it accepted that there will be many cases that are simpler and take far less time to consider – which would significantly reduce the average time per case. However, the time that would be required to comply with part (ii) of the Applicant's request would still be such that even extending the deadline under the EIRs would not be enough to make the request manageable.

39. The Authority therefore maintained that part (ii) of the Applicant's request was manifestly unreasonable in terms of regulation 10(4)(b) of the EIRs.

The Commissioner's view

40. Having considered the terms of the request and the number of inspections falling within scope, the Commissioner accepts that there is a significant volume of information falling within the scope of part (ii) of the request that the Authority would have to manually review.

41. Having carefully considered the revised estimate provided by the Authority, the Commissioner accepts it is a reasonable assessment of the time required to process the information falling within the scope of the request. Complying with the request would therefore impose a significant burden on the Authority, given the time, cost and diversion of resources that would be involved.

42. There is no cost limit for determining what is deemed to be an excessive cost of compliance under the EIRs, as there is in FOISA. Under FOISA, public authorities do not have to comply with a request if the cost of compliance exceeds £600. Even so, the Commissioner recognises that there may be cases where the time and expense involved in complying with

a request for environmental information means that any reasonable person would regard them as excessive.

43. In this case, the Commissioner accepts that the cost of complying with the request would be significant, incurring staff time costs well above the £600 limit at which a request considered under FOISA could be refused.

44. The Commissioner cannot see any other way in which the Authority could satisfy the request and accepts that responding would be disproportionate and would impose a significant burden on the Authority.

45. In the circumstances, the Commissioner is satisfied, on balance, that responding to this request, would impose a significant burden on the Authority, which would, in the circumstances, be manifestly unreasonable. Having reached this conclusion, the Commissioner is required to consider the public interest test in regulation 10(1)(b) of the EIRs.

EIRs: the public interest test

46. The exception in regulation 10(4)(b) is subject to the public interest test in regulation 10(1)(b) of the EIRs. This means that, although the Commissioner is satisfied that the Applicant's request is manifestly unreasonable, he must still require the Authority to respond to that request if the public interest in making the information available outweighs that in maintaining the exception.

The Applicant's submissions on the public interest

47. The Applicant suggested it was not in the public interest for the method of collecting the information to act as a barrier to the disclosure of the information under the EIRs.

The Authority's submissions on the public interest

48. The Authority recognised the public interest in disclosing relevant information as part of open and transparent government, and it further recognised the particular public interest in ensuring that grant money is allocated and used appropriately for the purposes intended.

49. The Authority noted that work was underway on a significant project to develop new public registers, which would allow for the greater routine sharing of documentation. This would allow members of the public greater access to the range of documents (e.g. associated with a woodland creation scheme). These are due to have initial roll out in 2025. It also noted that it makes information available for individual projects on request.

50. However, the Authority considered the above public interest was outweighed by the public interest in the effective and efficient use of public resources by not incurring excessive costs when complying with information requests.

The Commissioner's view on the public interest

51. In the Commissioner's view, there is an inherent public interest in disclosure of information to ensure an authority is transparent and accountable. In this case, disclosure would allow public scrutiny of the Authority's actions, particularly on matters relating to whether it is properly discharging its functions.

52. Against this, the Commissioner has considered the strong public interest in ensuring an authority can carry out its statutory functions without unreasonable or disproportionate disruption.

53. The Commissioner has already accepted that providing the information requested in this case would incur significant costs to the Authority in staff time and resources and, to a certain extent, divert resources away from its other functions.

54. While public authorities are encouraged to act in a transparent and accountable way, which benefits the public as a whole, the Commissioner also recognises that responding to requests which require them to devote excessive or disproportionate amounts of time can only be at the expense of other areas of work.

55. While the Commissioner acknowledges the Authority's duty to respond to part (ii) of the Applicant's request, he notes it has a similar responsibility to respond to other requests it receives, as well as carrying out its other statutory functions, and there is a public interest in ensuring resources are not diverted away from this disproportionately.

56. The Commissioner recognises that there is a public interest in protecting the integrity of the EIRs, but it is not the intention of the legislation to require public authorities to devote excessive or disproportionate amounts of resource to a particular request.

57. On balance, the Commissioner accepts that, in all the circumstances of this case, the public interest arguments in favour of making the information captured by this request available are outweighed by the public interest in maintaining the exception in regulation 10(4)(b) of the EIRs. He therefore finds that the Authority was entitled to rely on this exception for part (ii) of the Applicant's request.

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 by relying on the exception in regulation 10(4)(b) of the EIRs for part (ii) of the Applicant's request, the Authority complied with the EIRs.

However, the Commissioner finds that Authority failed to comply with regulation 5(1) of the EIRs by wrongly withholding information under regulations 10(4)(a) and 11(2) of the EIRs.

Given that the Authority has now disclosed to the Applicant the information it wrongly withheld under the above provisions, the Commissioner does not require the Authority to take any action in respect of these failures 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

29 April 2025