



Scottish Information
Commissioner
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Decision Notice 139/2025

Garages to Homes

Authority: Scottish Borders Council
Case Ref: 202300641

Summary

The Applicant asked the Authority for information relating to the concept of “Garages to Homes”. The Authority provided the Applicant with some information and informed him it did not hold further information. The Commissioner investigated and found that the Authority had not provided sufficient evidence of searches. He required the Authority to carry out further searches and 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” and “the Commissioner”) (Interpretation); 5(1) (Duty to make environmental information available on request); 10(4)(a) (Information not held); 11(2) (Personal data); 17(1) and (2)(a), (b), (c) and (f) (Enforcement and appeal provisions).

Background

1. On 21 August 2022, the Applicant made a request for information to the Authority. He asked for any information relating to the concept of “Garages to Homes”, which he explained referred to the practice of converting areas where garages were situated into areas which housed residential units.

2. The Authority responded on 8 September 2022 and explained that it was withholding the information under section 39(2) of FOISA, and was, instead, responding under the EIRs. The Authority provided the Applicant with information falling within the scope of his request, but it withheld some of the information under regulation 11(2) (Personal data) of the EIRs.
3. On 15 October 2022, the Applicant wrote to the Authority requesting a review of its decision. The Applicant stated that he was dissatisfied with the decision because he believed that further information was held. In particular, the Applicant contended that other meetings (on the subject of “Garages to Homes”) had taken place, but he had not been provided with any minutes, recordings or summaries of those meetings.
4. The Authority notified the Applicant of the outcome of its review on 25 November 2022. It informed him that it had carried out additional searches and had identified further emails which it disclosed, with personal data redacted under regulation 11(2) of the EIRs. The Authority also notified the Applicant that it did not hold any minutes, actions or notes of meetings and it was applying 10(4)(a) (Information not held) of the EIRs to this information.
5. On 24 May 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 believed that further information was held. The Applicant did not challenge the Authority’s reliance on regulation 11(2) of the EIRs.

Investigation

6. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
7. On 15 June 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.
8. The case was subsequently allocated to an investigating officer.

Commissioner’s analysis and findings

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

Application of the EIRs

10. 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.
11. The Commissioner is satisfied that the information requested falls within the definition of environmental information in regulation 2(1) of the EIRs (particularly paragraphs (a), (c) and (f) of that definition).

12. The Applicant did not challenge the Authority's decision to deal with the request as one for environmental information. In what follows, the Commissioner will consider this case solely in terms of the EIRs.

Section 39(2) of FOISA – Environmental information

13. 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.
14. 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.
15. 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.

The Authority's attempt to recall its initial response

16. On 16 September 2022 (following its disclosure of information to the Applicant in its response of 8 September 2022) the Authority emailed the Applicant in an attempt to recall its response of 8 September 2022. The Authority stated that this response contained commercially sensitive information which should not have been disclosed. The Authority asked the Applicant to delete the response from his inbox and deleted items folder and from anywhere else that he might have saved it. The Authority also requested that if it had been shared with the public in any way, he should remove this without delay. The Authority asked the Applicant to confirm once these actions had been carried out, and it apologised for any inconvenience caused. The Authority stated that a new response would be issued to him as soon as possible.
17. On receipt of this email, the Applicant sought advice from the Commissioner's office and was advised that under FOISA (or the EIRs) disclosure of information was disclosure to the public as a whole and the Authority was unable to recall it.
18. There is no direct provision under FOISA or the EIRs for the recall of a response once it is issued. There is certainly nothing in either set of legislation empowering a Scottish public authority to require the deletion, destruction or return of information once disclosed. Here, however, where the Authority simply requested deletion (albeit quite firmly), the Commissioner is unable to make a formal finding on the Applicant's dissatisfaction with Authority's attempt to recall its response. However, the Commissioner would remind authorities to be careful when disclosing information, as the moment information is disclosed under FOISA or the EIRs, it is in the public domain and cannot easily be contained.

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

19. 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 information that is held by the authority when it receives a request.
20. 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.

Regulation 10(4)(a) – Information not held

21. 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 it received the request.
22. In considering whether a Scottish public authority holds the requested information 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.
23. 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.

The Applicant's comments

24. The Applicant submitted that he believed that further information was held which had not been disclosed to him. As an example, he stated that he had been informed (by an officer within the Authority) that minutes of two specific meetings existed, but these had not been provided.
25. Furthermore, the Applicant commented that (in his view) it was clear that various departments within the Authority were apparently working to progress the concept of "Garages to Home", particularly in relation to support for funding bids to carry out a feasibility study and pilot. The Applicant commented that information relating to this, while it had been referenced both within and outwith the response, had not been provided to him.
26. The Applicant provided further examples of information which he believed was held but had not been provided, including quarterly Registered Social Landlord (RSL) meetings involving the Authority at which "Garages to Homes" had been discussed. (The Applicant stated that it was clear that "Garages to Homes" was discussed during at least one of these meetings.)
27. Furthermore, the Applicant stated that other references in documents he had seen showed Scottish Borders Housing Association (SBHA) commenting on the Authority's position on certain topics, but that no information had been released to show how these opinions were formulated or passed on to SBHA.
28. Moreover, the Applicant argued that Berwickshire Housing Association (BHA) was a partner with SBHA in relation to the feasibility study and pilot, yet no documents had been released which related directly to BHA.

He commented that it was curious that there was no such information relating to BHA, given that it was planning to develop half of “Garages to Homes” initial 100 units.

29. The Applicant stated that during a telephone call with the Authority he was advised that a representative from BHA was present at one of the two meetings, that BHA was a joint partner with SBHA in progressing “Garages to Homes” and that BHA was to be a joint beneficiary of at least two funding bids.
30. The Applicant submitted that more than 1200 people in the local area had signed a petition against the progression of the “Garages to Homes” concept and that it was in the public interest for the information to be released.

The Authority’s comments

31. In response to the Commissioner’s request for comments, the Authority provided a copy of the minute of the review group meeting which discussed the Applicant’s requirement for review.
32. The minute of this meeting, which took place on 28 October 2022, stated that the staff attending the review group meeting were asked if they held any information relating to the first meeting (which took place on 3 February 2022) in the form of notes, actions, minutes etc. and were tasked to see if any information was held within departments and officers were asked to contact those not present to check recorded information.
33. In relation to the second meeting highlighted by the Applicant (which took place on 27 July 2022), staff at the review group meeting were asked if there were any recorded actions or notes from the meeting. The minutes of the review group stated that those attending advised there was no recorded information held by them and that no formal minutes were taken. However, officers were to contact any staff members who were at the second meeting referenced (but not present at the review group meeting) to check if any notes were held. Furthermore, the minutes stated that the group highlighted and acknowledged that this was not standard practice for meetings held internally and externally.
34. According to the minutes, staff were also asked to search for any other information held in relation to the request from any other meetings held within the Authority. Officers agreed to carry out further searches and forward to FOI staff any information held for consideration.
35. The review group then considered whether there was any further information held by departments which fell within scope of the request as there was evidence to suggest various Authority departments had provided input into a community fund bid. One staff member indicated they might hold some information and that they would locate it and forward on.
36. During the review group meeting, the chairperson reminded staff that when responding to an information request, a full search should be carried out in the first instance and the request should be looked at to ensure that the search was wide enough to capture all information.

The Commissioner’s view on regulation 10(4)(a)

37. The Commissioner considers that the Authority appears to have taken positive steps to address the Applicant’s request by holding a review group meeting.
38. However, he notes that the only comments he has received from the Authority are the minutes of this review group meeting.

The Commissioner's view is that, without evidence of adequate searches (such as details of search terms used, which staff members were contacted as part of efforts to ascertain whether the Authority held further information, and what, if any paper searches were carried out) he cannot be satisfied, on the balance of probabilities, that no further information is held.

39. The Commissioner's review of the information provided to the Applicant so far suggests that it is possible further information may be held. For example, given BHA's involvement in the "Garages to Homes" concept, the Commissioner considers it not unreasonable to suggest that other information could be held relating to it.
40. As a further example, in an email of 26 April 2021, timed at 12:31 there is a reference to "Garages to Homes" being discussed at the last RSL meeting. However, it does not appear that information relating to this meeting has been provided to the Applicant.
41. The Commissioner requires the Authority to carry out fresh searches for information, to issue the Applicant with a revised review outcome and to provide the Commissioner with evidence of these searches, including; details of the search terms used, a list of the information sources that were searched, details of the staff who conducted the searches, screen shots of the search results and email responses from staff to evidence that the searches took place.
42. If further information is located as a result of these searches, the Authority is required either to disclose it to the Applicant or to withhold it under an exception.

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. While the Authority does appear to have conducted searches, the Commissioner does not consider the searches to be adequate, and he finds that the Authority has therefore failed to comply with regulation 5(1) of the EIRs.

The Commissioner therefore requires the Authority to carry out further searches and issue the Applicant with a revised review outcome, and to provide the Commissioner with evidence of these searches, by **21 July 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.

Jennifer Ross
Deputy Head of Enforcement

05 June 2025