



Scottish Information
Commissioner
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Decision Notice 141/2025

Whiteshore Cockles on North Uist

Authority: Comhairle nan Eilean Siar
Case Ref: 202401588

Summary

The Applicant asked the Authority for any communications, documents or other material which related to Whiteshore Cockles on North Uist from January 2024 to 16 October 2024. The Authority withheld the information under Section 30(c) and Section 38(1)(b) of FOISA and argued that disclosure would prejudice substantially the effective conduct of public affairs or release personal data.

The Commissioner investigated and found that the nature of the information withheld was, in substance Environmental and, as such, the Commissioner required a new review to be conducted under the EIRs and to consider only information falling within the requested timescale.

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”, “applicant”, “the Commissioner” and paragraphs (a), (c) and (f) of the definition of “environmental information”) (Interpretation); 5(1) (Duty to make environmental information available on request); 16 (Review by Scottish public authority); 17(1), (2)(a) (b) and (f) (Enforcement and appeal provisions).

The full text of each of the statutory provisions cited above is reproduced in Appendix 1 to this decision. The Appendix forms part of this decision.

Background

1. On 16 October 2024, the Applicant made a request for information to the Authority. He asked for any communications, documents or other material relating to Whiteshore Cockles on North Uist spanning 1 January 2024 to the present date.
2. The Authority responded on 13 November 2024. The Authority withheld the requested information under Section 30(c) of FOISA, arguing that disclosure would prejudice substantially the effective conduct of public affairs. The Authority stated that disclosure would 'interfere with their day to day functions', and that it posed a real risk of 'this leading to inappropriate levels of public scrutiny' to the Authority's operations and also 'Whiteshore Cockles private business'. The Authority also concluded that it was not in the public interest to disclose the information.
3. On 13 November 2024, the Applicant wrote to the Authority requesting a review of its decision. The Applicant stated that he was dissatisfied with the decision because the matter related to a company with a history of polluting the environment, which had received more than £6000.00 of taxpayer money and had attracted complaints from local residents, largely about the smell. He also commented that the company had been accused of breaching a ban on fish burial, of which the Authority is the primary regulator. As such, he believed it was in the interest of the public to understand the robustness of the Authority's regulatory process.
4. The Authority notified the Applicant of the outcome of its review on 2 December 2024. It limited the scope of its review to its application of the public interest (PI) test citing the Applicants dissatisfaction around how it applied the PI test rather than its reliance on section 30(c) of FOISA. Having done so, the Authority acknowledged that disclosure would inform the public of waste-management practices involving salmon morts. However, it considered there to be a greater public interest in maintaining an effective relationship with the operator, so as to ensure that no situation arose where there was a danger to public health or safety of the environment and to ensure that the Authority could continue to carry out its regulatory activities without an inappropriate level of scrutiny. On balance, it concluded that the public interest favoured non-disclosure of the information.
5. On 3 December 2024, 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 application of the public interest test to his request for information.

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. Prior to formally writing to the Authority to inform it of the valid application that had been received, contact was made with the Authority to enquire as to whether consideration had been given to whether this information request should have been responded to in line with the EIRs. In its response, the Authority commented that nothing in the wording of the request engaged the EIRs and it was only knowledge of the activities of that business that might be relevant. The Authority went on to explain that as the person who processed the request did not know what those activities were, they had no reason to believe that the EIRs should apply.

8. On 13 January 2025, 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 the application and to answer specific questions. These related to why the Authority considered disclosure of the requested information would prejudice substantially the effective conduct of public affairs, as well as where it considered the balance of the public interest to lie. The Authority was also asked to comment on whether it considered any of the withheld information to fall within scope of the EIRs.
10. The Authority provided the Commissioner with its submissions.
11. Within these submissions the Authority reiterated its reliance on section 30(c) for most of the withheld information, explaining that it was relying on the arguments set out in its formal review response and had nothing further to add in relation to this. The Authority commented that it was also applying the exemption in section 38(1)(b) of FOISA to some information as this appeared to constitute personal data.
12. As mentioned earlier, the Authority explained why it did not consider the request for information to be for environmental information and therefore its approach under FOISA and subsequent public interest test arguments remained the same. It accepted that whilst there may be public interest in its regulatory powers relating to environmental health issues, this interest did not outweigh that in maintaining a good relationship with the company.

Commissioner's analysis and findings

13. The Commissioner has considered all of the withheld information and the relevant submissions, or parts of submissions, made to him by both the Applicant and the Authority. He is satisfied that no matter of relevance has been overlooked.

FOISA or the EIRs?

14. 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 as follows:
 - (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).

¹ [Decision 218/2007 | Scottish Information Commissioner](#)

- (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.
15. During the investigation, the Commissioner asked the Authority to comment on why they believed the request should not be handled under the EIRs and was responded to solely under FOISA. As narrated above, the Authority explained that as there was nothing in the wording of the request that in itself engaged the EIRs and it was only the activities of that business that might be relevant, which the person who processed the request did not have knowledge of, there was no reason to believe the EIRs should apply. It appears that the Authority did not then seek to understand the nature of the information being withheld, which all appears to relate, quite specifically, to the environmental.
 16. “Environmental information” is defined in regulation 2(1) of the EIRs. Where information falls within the scope of this definition a person has a right to access it under the EIRs, subject to regulations 10 and 11 of the EIRs.
 17. Having considered the subject matter of the request, which relates to information held by the Authority about a company whose business is the processing of fish farm mortalities and its regulatory role in relation to that, together with the withheld information, the Commissioner is satisfied that this is “environmental” information. The Commissioner accepts that this is information which relates to a measure affecting or likely to affect the elements and factors referred to in paragraphs (a) and (b) of the definition in regulation 2(1) of the EIRs, and therefore to fall within paragraph (c) of that definition. Furthermore, the Commissioner is satisfied that the requested information is also likely to fall within scope of paragraph (f) of the definition in regulation 2(1) in as much as it relates to the effect on human health and safety by the state of the elements referred to in paragraph (a) or, through those elements, by matters referred to in paragraphs (b) and (c). Consequently, he considers the information to comprise, in its entirety environmental information.
 18. Given that the information requested is environmental information, the Authority had a duty to consider it in terms of regulation 5(1) of the EIRs. In failing to do so, it failed to comply with regulation 5(1). (The Commissioner, incidentally, is at a loss to understand how even the most cursory examination of the withheld information – far more cursory than would have been appropriate for the application of the exemption claimed – failed to reveal the nature of that information as environmental.)

Section 39(2) of FOISA – environmental information

19. 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.
20. In this case, as stated above, the Authority did not agree that the request should be considered under the EIRs and responded under FOISA.

21. The Commissioner finds that the Authority would have been entitled to apply the exemption in section 39(2) of FOISA to the request, given his conclusion that the information requested was properly classified as environmental information.
22. As there is a separate statutory right of access to environmental information available to the Applicant, the Commissioner also accepts that, in this case, the public interest in maintaining this exemption and in handling the request in line with the requirements of the EIRs would outweigh any public interest in disclosing the information under FOISA.

Regulation 16 of the EIRs

23. 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)).
24. Although the Authority responded to the Applicant's requirement for review on 2 December 2024, this was only in terms of handling the request entirely under FOISA and not the EIRs.
25. It is apparent that the Authority failed to respond to the Applicant's request of 16 October 2024 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.
26. The Commissioner therefore requires the Authority to provide a response to the Applicant's requirement for review of 2 December 2024, in terms of regulation 16 of EIRs.
27. The Commissioner's decision below states a compliance date of 24 July 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 that the Authority failed to comply with the requirements of regulation 5(1) of the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the Applicant's information request and request for review.

The Commissioner requires the Authority to provide a response to the Applicant's requirement for review, in terms of the regulation 16 of the EIRs, by **24 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.

Euan McCulloch
Head of Enforcement

9 June 2025