



Scottish Information
Commissioner
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Decision Notice 158/2025

Wildlife survey report

Authority: East Dunbartonshire Council
Case Ref: 202300475

Summary

The Applicant asked the Authority for the copy of a report which resulted from a specific wildlife survey. The Authority stated that it did not hold the information requested at the time of the request. The Commissioner investigated and found that the Authority did not hold the information requested at the time of the request.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2) and (6) (General entitlement); 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(1), (2) and (4)(a) (Exceptions from the duty to make environmental information available); 17(1), (2)(a),(b) and (f) (Enforcement and appeal provisions).

Background

1. The Applicant made an information request to the Authority on 4 October 2022. He asked for a copy of a report which resulted from a specific wildlife survey.
2. The Authority responded to the information request on 27 October 2022 in terms of FOISA. It advised the Applicant that it considered his request to be repeated in terms of section 14(2) of FOISA.
3. On the same date, the Applicant wrote to the Authority requiring a review of its decision.

4. The Applicant did not receive a response to his requirement for review.
5. The Applicant wrote to the Commissioner on 15 December 2022, stating that he was dissatisfied with the Authority's failure to respond and applying to the Commissioner for a decision in terms of section 47(1) of FOISA. The enforcement provisions of FOISA apply to the enforcement of the EIRs, subject to specified modifications – see regulation 17.
6. The Commissioner investigated and issued [Decision 006/2023](#)¹, which required the Authority to respond to the Applicant's requirement for review.
7. The Authority notified the Applicant of the outcome of its review on 16 March 2023 in terms of the EIRs. It advised the Applicant that it did not hold the information requested at the time of the request. However, it noted that it now held the information requested and that it had been provided to the Applicant in response to a separate information request.
8. On 18 April 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 Authority's claim that it did not hold the information requested at the time of his request and with how it had handled his request.

Investigation

9. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
10. On 20 April 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 provided its comments, and the case was subsequently allocated to an investigating officer.
11. During the investigation, the Authority was asked to provide further information on why it considered it did not hold the information requested at the time of the Applicant's request. The Authority failed to provide the Commissioner with the information requested.
12. The Commissioner therefore issued an information notice, under section 50(1)(a) of FOISA, requiring the Authority to provide him with the further information he had requested. The Authority complied with the information notice.

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

¹ <https://www.foi.scot/sites/default/files/2023-02/Decision006-2023.pdf>

corresponding obligation to respond) under the EIRs, subject to various restrictions and exceptions contained in the EIRs.

15. Having considered the nature of the information requested, the Commissioner accepts the decision of the Authority to revise its position, at review stage, to deal with the request under the EIRs rather than under FOISA.
16. The Commissioner is satisfied that the information requested falls within the definition of environmental information in regulation 2(1) of the EIRs (in particular paragraph (a) of that definition).

Section 39(2) – Environmental information

17. 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.
18. In this case, the Commissioner accepts that the Authority would have been entitled to apply the exemption to the request, given his conclusion that the information requested is properly classified as environmental information.
19. 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 in handling the request in line with the requirements of the EIRs outweighs any public interest in disclosing the information under FOISA.
20. While the Applicant did not challenge the Authority's decision at review stage to handle his request in terms of the EIRs, he noted that the Authority had switched from initially responding to his request under FOISA to responding under the EIRs at review stage, without acknowledging, or explaining the reasons for, this change.
21. Given that it responded solely in terms of the EIRs at review stage, the Authority technically should have applied the exemption in section 39(2) of FOISA to allow it to consider the request solely in terms of the EIRs.
22. As stated above, the Commissioner accepts that the Authority would have been entitled to apply the exemption. Had it done so, this would have necessitated an explanation for why it was no longer responding in terms of FOISA and why it considered it appropriate instead to respond solely in terms of the EIRs.
23. In this respect, the Commissioner must find that the Authority technically failed to comply with Part 1 of FOISA (specifically, section 1(1)), by not either applying the exemption in section 39(2) of FOISA (to allow it to consider the request solely in terms of the EIRs) or dealing with the request under both regimes.
24. However, the Commissioner does not require the Authority to take any action in response to this failure, as he is satisfied that the Authority would have been entitled to apply the exemption to the request.
25. In the circumstances, therefore, the Commissioner will consider this case, in what follows, solely in terms of the EIRs.

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

26. 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.

27. 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

28. Regulation 10(4)(a) of the EIRs states that a Scottish public authority may refuse to make information available to the extent that it does not hold that information when it receives the request.
29. The standard of proof to determine whether a Scottish public authority holds the information is the civil standard of the balance of probabilities. In determining where the balance lies, the Commissioner considers the scope, quality, thoroughness and results of the searches carried out by the public authority.
30. The Commissioner also considers, where appropriate, any reasons offered by the public authority to explain why it does not hold the information. While it may be relevant as part of this exercise to explore expectations about what information the authority should hold, ultimately the Commissioner's role is to determine what relevant information is (or was, at the time the request was received) held by the public authority.

Submissions by the Applicant

31. The Applicant provided a letter from the contractor that carried out the survey, which he considered to support the view the information was held at the time of the request. This letter states that the report was provided in 2022, followed by an updated report in 2023.
32. The Applicant also commented that he had been verbally informed by a contractor involved in this survey that the information would have been provided within a few weeks of the survey being completed.

Submissions by the Authority

33. The Authority maintained that it did not hold the information requested at the time it received the Applicant's request. It argued that, given it had disclosed the information requested once it was held in response to a later request, it had no reason to refuse to disclose the same information at the time it received the Applicant's request.
34. The Authority explained that, due to the passage of time and the departure of an employee, it no longer held the original emails in which documents relating to the survey were received. However, in response to the information notice issued by the Commissioner, it provided him with a timeline based on when these documents were saved to its document storage system.
35. While the Authority explained that it did hold some draft reports that predated the request, it claimed these did not fall within the scope of the Applicant's request as they did not "meet the criteria of the assessment." However, the Authority provided the Commissioner with no explanation of what criteria, or what assessment, it was referring to.

The Commissioner's view

36. The Commissioner has carefully considered the submissions from both parties. He would reiterate that his role in this case is limited to considering whether the Authority actually held the information requested at the time the Applicant's request was received.
37. The Commissioner notes that the letter the Applicant provided merely states that draft results of the survey were provided to the Authority in 2022. It does not specify whether these results were provided prior to his request of 4 October 2022.
38. The Commissioner also notes the remarks the Applicant reported were made by the contractor. While the contractor may have expected the survey results to be provided within "a few weeks" of the survey being completed, the Commissioner has seen no evidence to suggest that the survey results were, in fact, provided to the Authority prior to the Applicant's request being received.
39. As stated above, the Authority acknowledged that it held some draft reports prior to receiving the Applicant's request. However, the Commissioner notes that these draft reports predate the survey and explicitly state they would be updated following the results of a survey. He therefore does not consider these draft reports fall within the scope of the Applicant's request.
40. While the Applicant believed and expected the information requested to be held by the Authority at the time of his request, the Commissioner is satisfied that this was not the case.
41. In all of the circumstances, the Commissioner is satisfied, on the balance of probabilities, that the Authority did not, on receipt of the request, hold recorded information which would fulfil the Applicant's request.
42. The Commissioner therefore concludes that the Authority was correct to give the Applicant notice, in terms of regulation 10(4)(a) of the EIRs, that it did not hold the information requested.

The public interest test

43. The exception in regulation 10(4)(a) of the EIRs is subject to the public interest test in regulation 10(1)(b) and so can only apply if, in all the circumstances of the case, the public interest in maintaining the exception outweighs that in making the information available.
44. The question of whether a public authority holds information is a factual one, determined on the balance of probabilities. If a public authority does not hold the information, then there is no meaningful public interest test that can be undertaken.
45. In this case, for the reasons set out above, the Commissioner is satisfied that the Authority did not hold the information requested on receipt of the request. Consequently, he accepts that there is no conceivable public interest in requiring the disclosure of such information and finds that the public interest in making information available is outweighed by that in maintaining the exception.
46. As stated above, the information requested in this case has been disclosed to the Applicant in response to a later information request.

Other matters

47. The Applicant also raised dissatisfaction with the Authority initially deeming his request repeated in terms of section 14(2) of FOISA.

48. As rehearsed earlier, the Authority revised the position in its initial response (which was in terms of FOISA) and instead responded at review stage solely in terms of the EIRs by applying the exception in regulation 10(4)(a) of the EIRs. There is no repeated request provision in the EIRs, and it is a position the Authority appeared to abandon at review stage by responding solely in terms of the EIRs.
49. The purpose of the review stage in FOISA or EIRs is to provide authorities with the opportunity to reconsider their handling of an initial information request, in order to ensure that they are satisfied that the request has been dealt with fully in accordance with FOISA or the EIRs (as appropriate), prior to an application being made to the Commissioner (if necessary).
50. The Commissioner will therefore not comment further on the Applicant's dissatisfaction in this respect.

Decision

The Commissioner finds that the Authority technically failed to comply with Part 1 (and, in particular, section 1(1)) of the Freedom of the Information (Scotland) Act 2002 (FOISA) but complied with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by the Applicant.

The Commissioner is satisfied that the Authority was correct to apply the exception in regulation 10(4)(a) of the EIRs, given that it did not hold the information requested by the applicant at the time it received his request.

However, the Authority failed to apply the exemption in section 39(2) of FOISA, to allow it to respond to the Applicant's request solely in terms of the EIRs, or follow the appropriate alternative of dealing with the request under both regimes.

As the Commissioner is satisfied that the information requested was environmental information and that the Authority would have been entitled to apply the exemption in section 39(2) of FOISA, he does not require the Authority to take any action in response to this failure 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

25 June 2025