



Scottish Information
Commissioner
www.foi.scot

Decision Notice 177/2025

Ironside Farrarr Report

Applicant: Anonymous
Authority: Midlothian Council
Case Ref: 202500480

Summary

The Applicant asked the Authority for a copy of a specified report exploring the re-opening of steps leading down to Ironmills Bridge, Dalkeith. The Authority considered the request under FOISA and withheld the report on the basis that disclosure would, or would be likely to, prejudice substantially the effective conduct of public affairs. 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); 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”, “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).

Background

1. On 15 December 2024, the Applicant made a request for information to the Authority. She asked for a specified report exploring the re-opening of steps leading down to Ironmills Bridge, Dalkeith.
2. The Authority responded on 15 January 2025 under FOISA. It withheld the report under the exemption in section 36(1) of FOISA.
3. On 17 January 2025, the Applicant wrote to the Authority requesting a review of its decision. She stated that she was dissatisfied with the decision because she disagreed that the exemption in section 36(1) of FOISA applied and because the Authority had not considered the public interest test.
4. The Applicant did not receive a response to her requirement for review.
5. The Applicant wrote to the Commissioner on 19 March 2025, stating that she 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. This resulted in the Commissioner issuing [Decision 088/2025](#)¹ on 11 April 2025, which found that the Authority failed to respond to the Applicant's requirement for review within the timescales laid down by section 21(1) of FOISA and regulation 16(4) of the EIRs. As the Authority had responded to the Applicant's requirement for review on 26 March 2025, the Commissioner did not require the Authority to take any action in relation to Decision 088/2025.
7. As stated above, the Authority notified the Applicant of the outcome of its review on 26 March 2025. It informed the Applicant that it had withdrawn its reliance on the exception in section 36(1) of FOISA and that it had instead withheld the report under the exemption in section 30(c) on the basis that disclosure would, or would be likely to, prejudice substantially the effective conduct of public affairs.
8. On 27 March 2025, 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 she was dissatisfied with the outcome of the Authority's review because she did not accept that the entire report was sensitive and because there was a strong public interest in disclosure.

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 3 April 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 this information to the Commissioner, and the case was subsequently allocated to an investigating officer.
11. 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

¹ <https://www.foi.scot/decision-0882025>

on this application and to answer specific questions, including why it did not consider the requested information to be environmental information.

12. The Commissioner's decision notice will not consider the Authority's failure to respond to the Applicant's requirement for review within the timescales laid down by section 21(1) of FOISA and regulation 16(4) of the EIRs as these failures were addressed in Decision 088/2025.

Commissioner's analysis and findings

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

FOISA or the EIRs

14. The relationship between FOISA and the EIRs was considered at length in [Decision 218/2007](#)². Broadly, in light of that decision, the Commissioner's general position includes the following:
 - (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.
15. "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.
16. The Applicant requested that the Authority provide her with a copy of the report prepared in early 2024 by Ironside Farrar regarding the possibility of re-opening the steps down to Ironmills Bridge, Dalkeith. She noted that the steps had been closed for over a decade and said that local residents had been denied easy walking access to Ironmills Park and the historic Ironmills Bridge.
17. As stated above, the Commissioner therefore asked the Authority to explain why it did not consider the request, given its subject matter, sought environmental information. The

² <https://www.foi.scot/decision-2182007>

Authority responded that while the request could have been treated as “competent” under the EIRs, it considered it competent in terms of FOISA.

18. Given the subject matter of the request, and having considered the withheld information, it is clear to the Commissioner that the requested information is environmental information, as defined by regulation 2(1) of the EIRs (particularly paragraphs (a), (c) and (f)).
19. 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).

Section 39(2) of FOISA – environmental information

20. The exemption in section 39(2) of FOISA provides, in effect, that environmental information (as defined in 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.
21. In this case, as stated above, the Authority responded to the Applicant’s request solely under FOISA.
22. 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.
23. 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 outweighs any public interest in disclosing the information under FOISA.

Regulation 16 of the EIRs

24. 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 (regulation 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)).
25. Although the Authority responded to the Applicant’s requirement for review on 26 March 2025, this was only in terms of handling the request solely in terms of FOISA and not the EIRs.
26. It is apparent that the Authority failed to respond to the Applicant’s request of 15 December 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.
27. The Commissioner therefore requires the Authority to provide a response to the Applicant’s requirement for review of 17 January 2025, in terms of regulation 16 of the EIRs.
28. The Commissioner’s decision below states a compliance date of 25 August 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 **25 August 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.

Cal Richardson
Deputy Head of Enforcement

9 July 2025