



Scottish Information
Commissioner
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Decision Notice 098/2025

Single Building Assessment for a specified property

Authority: Scottish Ministers

Case Ref: 202200987

Summary

The Applicant asked the Authority for all information related to the Single Building Assessment carried out for a specified property, and the minutes and communications between the Authority and the builder or architect of the property. The Authority withheld the information related to the Single Building Assessment because it was incomplete and stated that it held no minutes or communications with the builder or architect.

During the investigation, the Authority disclosed some information and changed its position in relation to other information and in relation to its interpretation of the request.

The Commissioner investigated and found that the Authority had failed to comply with the EIRs in responding to the request. He required the Authority to carry out adequate searches and provide the Applicant with a properly considered 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); 17(1), (2)(a) and (b) (Enforcement and appeal provisions)

Background

1. The Cladding Remediation Programme¹ was set up with the aim of protecting homeowners and residents of buildings with potentially unsafe cladding in Scotland. A Single Building Assessment (SBA) is carried out as part of this programme to assess any risk caused by a building's external wall system and identify if any work is needed to eliminate or mitigate these risks.
2. On 13 July 2022, the Applicant made a request for information to the Authority. For a named property, he asked for
 - (i) all information related to the Single Building Assessment to date, and
 - (ii) minutes and all communications that have taken place with the builder or architect.
3. The Authority responded on 9 August 2022. In relation to part (i) of the request, the Authority withheld the SBA stating that the information was excepted under regulation 12(4)(d) of the EIRs because there was no finalised document. In relation to part (ii) of the request, the Authority withheld information under regulation 12(5)(e) of the EIRs, on the grounds that the information was commercial or industrial and disclosure would adversely affect the confidentiality of that information.
4. On 13 August 2022, the Applicant wrote to the Authority requesting a review of its decision. The Applicant expressed his dissatisfaction that the information had been withheld from him.
5. The Authority notified the Applicant of the outcome of its review on 2 September 2022. The Authority apologised for referencing incorrect legislation in its original response. It explained that numbers of the exceptions it had cited in its original response related to the UK version of the EIRs. It confirmed that under the Scottish legislation the exceptions it had originally intended to apply were those specified in regulations 10(4)(d) and 10(5)(e) respectively.
6. The Authority explained that the SBA report was not in a finished state. It was being trialled and developed as part of the SBA pilot and as such, was the subject of a technical review. The Authority confirmed that it maintained its reliance on regulation 10(4)(d) for part (i) of the request. In relation to part (ii) of the Applicant's request, the Authority withdrew its reliance on regulation 10(5)(e), stating that it had been applied in error because it does not hold the information. The Authority applied regulation 10(4)(a) of the EIRs to part (ii) of the request and explained that it was not required to provide information that it did not hold.
7. On 5 September 2022, 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 was dissatisfied with the outcome of the Authority's review because he did not agree that information falling within scope of part (i) of his request should be withheld. In later correspondence the Applicant stated that he was also challenging the Authority's response to part (ii) of his request, on the grounds that information did exist (and was held).

¹ <https://www.gov.scot/publications/cladding-remediation-programme-factsheet/pages/overview/>

Investigation

8. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
9. On 11 October 2022, 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 was also asked to send the Commissioner the information withheld from the Applicant.
10. The case was subsequently allocated to an investigating officer.

The Authority's change of position during the investigation

11. On 8 September 2022, the Applicant received a copy of the SBA (part (i) of the request) from the property factor. The Authority stated that this SBA was issued by a contractor to the property factor for distribution to homeowners.
12. During the investigation the Authority changed its position on the SBA, withdrawing its reliance on regulation 10(4)(d) of the EIRs. The Authority submitted that, at the time of the Applicant's request, although officials were aware that work to complete the assessment was in the course of completion, it did not hold copies of a draft SBA. It also submitted that,

"An earlier draft of an assessment report was shared with homeowners erroneously referring to an 'interim report' released to [the Authority] in December 2021. [The Authority] relayed this error to the Fire Engineering firm and they have issued an updated report removing the misleading information and have released the updated report to homeowners."
13. In the initial submissions, the Authority explained that it had interpreted the request too narrowly and did not consider whether any further information was held in relation to the SBA. The Authority stated that it had subsequently carried out additional searches and had identified further information falling within scope of the request.
14. On 23 December 2022, the Authority issued an updated review outcome to the Applicant which stated that as a result of the final SBA report being produced and shared with owners, it was able to disclose "the remaining information". The Authority disclosed eight documents. Some information within these documents was withheld under regulation 10(5)(e) of the EIRs because it was confidential commercial information, and other information was withheld under regulation 11(2) of the EIRs because it was personal data. The Authority also stated that, in relation to the information withheld under regulation 10(5)(e), the public interest favoured withholding the information.
15. Following this disclosure, the Applicant was not satisfied that the Authority had disclosed all of the information falling within the scope of his request. He did not accept the Authority's decision to redact information under regulation 10(5)(e) and 11(2) of the EIRs and he asked the Commissioner to investigate these points.
16. The Authority was asked to provide the information it was withholding from the Applicant (which had not previously been provided) and was asked specific questions related to the exceptions it sought to rely on in withholding that information, and about its interpretation and handling of the request.

17. The Authority subsequently provided the Commissioner with seven of the eight documents it had disclosed to the Applicant in December 2022, with information redacted under regulations 10(5)(e) or 11(2) of the EIRs. The Authority had disclosed the eighth document in full in December 2022, and had also disclosed another document in full prior to providing the withheld information.

Commissioner's analysis and findings

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

Application of the EIRs

19. In its response, the Authority considered the Applicant's request under the EIRs, having concluded that the information requested was environmental information (as defined in regulation 2(1) of the EIRs).
20. Where information falls within the scope of this definition, a person has a right to access it (and the public authority has a corresponding obligation to respond) under the EIRs, subject to the various restrictions and exceptions contained in the EIRs.
21. The Applicant has not disputed the Authority's decision to handle his request under the EIRs and the Commissioner is satisfied, in the circumstances, that the information requested by the Applicant falls within the definition of environmental information set out in regulation 2(1).

Section 39(2) of FOISA – Environmental information

22. 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.
23. In this case, the Commissioner accepts that the Authority was entitled to apply the exemption in section 39(2) of FOISA, given his conclusion that the information requested is properly considered to be environmental information. This exemption is subject to the public interest test in section 2(1)(b) of FOISA.
24. As there is a separate statutory right of access to environmental information available to the Applicant in this case, the Commissioner accepts 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.
25. 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.

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

26. 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.
27. 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)).

28. In his request, the Applicant asked for all information related to (i) the SBA (to date) and (ii) minutes and all communications that have taken place with the builder/architect.

Has the Authority identified all of the information it holds?

29. On 9 December 2024, the Authority explained that, following its narrow interpretation of the request, it had carried out fresh searches of its electronic records management system (eRDM) to establish what, if any, information it held that fell within its wider interpretation of the request. It explained who had carried out those searches and how those searches were carried out.
30. The Authority explained that the search terms it used in December 2022 were “[street name] Single Building Assessment”, “[street name] Architect” and “[street name] Builders” and it submitted that these searches returned no results. The Authority submitted that the inclusion of the street name in the search terms was specific and should have ensured that anything of relevance was returned by the searches. Notwithstanding, the Authority explained that it had carried out further global searches of its eRDM system (and the case file), using more specific search terms.
31. Following the latest searches, the Authority explained that over 700 results were returned but a large number were excluded as being outwith the relevant date range (June 2017, when the SBA process in relation to that location began and 13 July 2022 when the request was received) or because the parent folder was unrelated to the request (i.e. the subject matter of the file was unrelated to building standards).
32. The Authority submitted that a small amount of information discovered during these further searches was within scope of the request and would urgently be considered for disclosure. Whilst the newly identified information was being considered, on 9 December 2024, the Authority disclosed some additional information from documents 3 and 5 (which it had previously withheld) to the Applicant.
33. On 23 January 2025, the Authority disclosed three further documents to the Applicant but withheld other information that it had identified in the December 2024 searches under regulations 10(5)(a), 10(5)(e) and 11(2) of the EIRs.

The Applicant's comments

34. The Applicant commented that he had asked for comprehensive documentation related to the SBA and all communications with the builder or architect. He had concerns that the Authority had not disclosed all relevant information within scope of his request. He believed that additional documentation existed.
35. Following the Authority's disclosures, the Applicant commented that he was still concerned that he hadn't been given all of the information that he asked for, and he was still concerned that the Authority was withholding information it was not entitled to withhold. He submitted that the Authority had not explained how it had considered the public interest in withholding information.
36. The Applicant commented that it had been over five years since his house sale was withdrawn at the last minute due to the cladding issue and since then, none of the homeowners in the building had been able to sell their properties. It was his view that the actions of the Authority, including the pilot SBA that his property was involved in, have significantly contributed to the delay in remediating or otherwise resolving the issue.

He noted his concerns about a lack of transparency around any dealings that the Authority may, or may not, have had with the architect and the builder and he submitted that it was necessary to uncover all the facts because, in his view, the Authority were accountable for the delay in addressing the issue and it was essential that the Authority learned from any mistakes that had been made in that time.

The Commissioner's view

37. The Commissioner has significant concerns regarding the Authority's searches for information falling within scope of the request.
38. Since the original review outcome was issued, the Authority has carried out a number of subsequent searches (it is not wholly clear how many) and additional information has been disclosed to the Applicant on three separate occasions.
39. The Authority has repeatedly failed to locate and retrieve all the information it held at the time of the request, meaning that the Commissioner cannot possibly conclude that all of the searches carried out by the Authority to date have identified all relevant information. He must find that the Authority has provided an incomplete response to the Applicant's request and in doing so, has failed to comply with regulation 5(1) of the EIRs.
40. Given this, the Commissioner requires the Authority to reconsider the Applicant's request and issue him with a revised review outcome.
41. The Authority should ensure, when providing this new review outcome, that it carries out thorough and proportionate searches for all of the information captured by part (i) and part (ii) of the Applicant's information request, and that records of these searches are retained.

Interpretation of the request

42. The Authority explained that it had originally interpreted the Applicant's request as seeking a copy of the SBA for the named property. The Authority acknowledged that this interpretation was too narrow and that the request was seeking "all information" relating to the SBA that was held at the point that the request was made. It recognised that this was not limited to the SBA report, but also included correspondence about the SBA, to include any correspondence while the SBA was in the process of being produced. The Authority stated that it now considered the request to specifically include any communications or minutes of meetings with the builder or architect.

The Commissioner's view on the Authority's interpretation of the request

43. The Commissioner is baffled by the Authority's initial difficulty in interpreting the Applicant's request. On the face of it, the request is not complex. The request had two parts. The first part asked for "all information related to the SBA", to date (the date of the request). It should not be a difficult task to interpret what information the Applicant was seeking in request (i); he was seeking all information related to, and including, the SBA Report itself, whether in draft form or not.
44. The Commissioner notes that in the Authority's submissions to him on 9 December 2024, it appeared to have applied a timescale to part (i) (or possibly all) of the request. The Authority stated that it had excluded a large number of search results because they were "outwith the relevant date range" and as such results prior to June 2017 had been excluded because the SBA process began in June 2017. The Commissioner would caution the Authority on this approach.

The Applicant applied no such timescale to his request and the Commissioner considers it possible that some communications falling under the scope of part (ii) of the request may have taken place prior to June 2017. He would ask the Authority to ensure that its searches identify all relevant information falling within the scope of parts (i) and (ii) of the request.

45. The Commissioner is also concerned about the Authority's approach to part (ii) of the request. Part (ii) of the request does not specify that the minutes and communications must be in relation to the SBA, however the Authority appears to have interpreted part (ii) of the request as if it was linked to part (i); It is not. Part (ii) of the request simply asks for minutes and all communications that have taken place with the builder or architect.
46. In meeting the requirements of paragraph 40, the Authority should ensure that it has correctly understood the scope of the Applicant's request and that it is clear which information it holds, if any, in relation to each part of the request, separately.

Engagement with the Commissioner during the appeal

47. The Commissioner has concerns about the Authority's handling of this appeal. He notes that the Authority has not maintained consistent document numbers in relation to the information that has been disclosed and withheld. This makes it exceptionally difficult to keep track of information that has been disclosed in full, partially disclosed, or withheld because there is no consistent reference to the relevant documents.
48. Additionally, the schedule supplied with the withheld information, was not consistent with the information that had been withheld, or which had been considered, and it appears that some information which was previously disclosed in December 2022, was marked up for redaction in December 2024. For example, the signature on page 9 of Document 3 (being Document 3 as at 23 December 2024). Furthermore, the Authority listed some of the information that had previously been disclosed in full in the withheld information schedule but not other information that had been disclosed in full prior to providing the withheld information to the Commissioner.
49. The Authority has extensive experience in dealing with the Commissioner and sending the information that is the subject of the investigation. The Authority will be extremely familiar with the Commissioner's [guidance on this](#)². Given this, the Commissioner is disappointed that so many basic errors appeared to have been made in this case.
50. The Commissioner is dissatisfied that the Authority took six weeks to consider the information that it had identified in December 2024, prior to disclosing some of this to the Applicant. He notes that the Authority had informed him (in its letter of 9 December 2024) that,

"Further information has been identified as a result of these additional searches. We will now need to consider this information for release, work that will be done as a matter of urgency."

The Commissioner does not consider 6 weeks to be evidence of an urgent approach.

51. Again, the Authority is well aware of the timescales ordinarily applicable to requests for environmental information and the duty under regulation 5(2) to comply with a request as soon as possible within those timescales.

² <https://www.foi.scot/sites/default/files/2023-03/InvestigationsGuideforSPAs2023.pdf>

While the Commissioner recognises that this information had been identified during the appeal process rather than an initial request or requirement for review, he would nonetheless expect the Authority to apply the same urgency to the matter.

Issuing a revised review outcome during an investigation

52. The Commissioner notes that during this investigation the Authority changed its position and twice (on 23 December 2022 and 23 January 2025) notified the Applicant that it was “issuing a new review outcome”.

The Commissioner would note that while authorities can change their position and disclose additional information once an appeal has been made to his office, there is no provision in either FOISA or the EIRs for the Authority to issue a new review, other than when directed to do so by the Commissioner. The updates provided to the Applicant in this case do not qualify as a new review outcome in terms of section 21(4) of FOISA, and the Commissioner would advise the Authority not to describe them as such.

53. The Commissioner would remind all authorities to make this clear when informing an Applicant of an updated position after the original review outcome has been issued.

Other matters

54. The Commissioner has not fully considered the Authority’s use of exceptions to withhold information because the Authority’s response to the request is not clear.
55. Notwithstanding, the Authority should be aware that it appears to the Commissioner, certainly in the absence of evidence of substance to the contrary, that the risk of wilful fire-raising (as a consequence of disclosure) is minimal, and very careful consideration is required before information is withheld on this basis.
56. Furthermore, the Commissioner has additional concerns about the withholding of contractors quotes without sufficient arguments, or third-party consultation, to support their confidentiality.

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.

The Authority failed to comply with regulation 5(1) of the EIRs by failing to identify, locate, retrieve and properly consider all of the information that fell within scope of both parts of the request.

The Commissioner therefore requires the Authority to

- carry out thorough and comprehensive searches for the information falling within scope of both part (i) and part (ii) of the Applicant's request and provide evidence that the searches have been carried out to the Commissioner's satisfaction,
- reach a decision on the basis of those searches and notify the Applicant of the outcome (in terms of regulation 16 of the EIRs). This should include all information previously disclosed to the Applicant such that he has one complete response.

by **13 June 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.

David Hamilton
Scottish Information Commissioner

28 April 2025