



Scottish Information
Commissioner
www.foi.scot

Decision Notice 195/2025

Documentation for a hydroelectric scheme

Authority: Scottish Environment Protection Agency
Case Ref: 202500676

Summary

The Applicant asked the Authority for information relating to a hydroelectric scheme. The Authority provided some information, advised that some information was already available on its website and informed the Applicant that it did not hold other information. The Commissioner investigated and found that some information was already available on the Authority's website. However, he found that the Authority had not carried out adequate searches for the other information requested by the Applicant. He required the Authority to carry out fresh searches for the other information requested and to provide the Applicant with a revised review outcome.

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 "environmental information") (Interpretation); 5(1) and (2)(b) (Duty to make environmental information available on request); 6(1)(b) (Form and format of information); 10(4)(a) (Exceptions from duty to make information available); 17(1), (2)(a), (b) and (f) (Enforcement and appeal provisions).

Background

1. On 18 February 2025, the Applicant made a request for information to the Authority. She asked for the "full and verifiable documentation" for the Controlled Activities Regulations (CAR) licence associated with the hydroelectric scheme operated in Glenachulish, which was

approved in February 2016 and was presently held by LEG Power Lochaber Limited (LEG). She specified that she was seeking copies of “all relevant records, including but not limited to”:

- (i) The full CAR licence as originally issued in February 2016, including any subsequent variations, conditions, amendments or renewals.
- (ii) Any associated compliance reports, monitoring data or enforcement actions taken in relation to this licence.
- (iii) The specific reason why this CAR licence is not currently accessible on the Authority’s Public Register.

2. The Authority responded on 19 March 2025 in the following terms:

- in response to part (i) of the Applicant’s request, it disclosed four documents (subject to redactions under the exception in regulation 11(2) of the EIRs)
- in response to part (ii) of the Applicant’s request, it confirmed that it did not hold any compliance reports and had not taken any enforcement actions against LEG. It therefore issued the Applicant with a notice, in terms of regulation 10(4)(a) of the EIRs, for this information.
- in response to part (ii) of the Applicant’s request, it confirmed that it held some monitoring data which it disclosed (subject to redactions under the exception in regulation 11(2) of the EIRs)
- in response to part (iii) of the Applicant’s request, it explained that the licence was not currently accessible via the Public Register due to the December 2020 cyber-attack against the Authority. It provided a link to an explanation on this matter on its website and stated that this information was therefore excepted from disclosure under regulation 6(1)(b) of the EIRs.

3. On 25 March 2025, the Applicant wrote to the Authority requesting a review of its decision. She stated that she was dissatisfied with the decision because she considered the Authority held more information than it had identified and disclosed to her. Specifically, she expected there to be:

- records of monitoring, complaints or internal assessments relating to the scheme
- internal notes, inspections, complaints or regulatory communications
- internal review notes or assessments of landowner consent, operator competence or environmental risk
- internal discussions or correspondence relating to the transfer, variation or ongoing regulation of the site.

4. The Applicant also considered that the exception in regulation 6(1)(b) of the EIRs had been misapplied.

5. The Authority notified the Applicant of the outcome of its review on 24 April 2025. It upheld the application of the exceptions in regulations 6(1)(b) and 10(4)(a) of the EIRs. However, it acknowledged that it had failed to emphasise that the Applicant’s request was not limited to parts (i)-(iii) and failed to continue to search for any further information on that basis. It advised that:

- it had subsequently responded to the Applicant's separate request for documents reviewed in the processing of the application
 - it had considered the request for internal documents to be a new request and would respond to this separately
 - it had considered the request for complaints to be a new request and would respond to this separately.
6. On 1 May 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 for the following reasons:
- she did not believe that the Authority had identified all information falling within the scope of her request
 - she considered the Authority has misapplied the exceptions in regulations 6(1)(b) and 10(4)(a) of the EIRs to her request.

Investigation

7. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
8. On 22 May 2025, the Authority was notified in writing that the Applicant had made a valid application. The case was subsequently 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 this application and to answer specific questions. These related to the searches carried out.
10. The Applicant raised matters in her application to the Commissioner that do not fall within the Commissioner's remit. The Commissioner will therefore not consider these matters in his decision notice. His remit is limited to considering whether the Authority complied with the EIRs in responding to the Applicant's request.

Commissioner's analysis and findings

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

Application of the EIRs

12. Having considered the terms of the request, the Commissioner is satisfied that the information sought by the Applicant is properly considered to be environmental information, as defined in regulation 2(1) of the EIRs.

13. The Applicant has not disputed the Authority's decision to handle the request under the EIRs, and the Commissioner will consider the information in what follows solely in terms of the EIRs.

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

14. 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 the information held by an authority when it receives a request.
15. 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.
16. The standard of proof to determine whether a Scottish public authority holds 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.
17. The Commissioner also considers, where appropriate, any reason 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 as to what information the authority should hold, ultimately the Commissioner's role is to determine what relevant information is actually held by the public authority (or was, at the time it received the request).

The Applicant's submissions

18. The Applicant considered that the Authority had failed to conduct a full search for information that would fulfil her request despite her having made clear that her request was "not limited to" questions (i)-(iii) of her request.
19. As set out in her requirement for review (at paragraph 5), the Applicant expected that the Authority held specific types of information that it had failed to identify and disclose to her.

The Authority's submissions

20. In its review outcome, the Authority confirmed to the Applicant that it had not identified her request as being for "all relevant records. It suggested that it might have identified other information had it correctly identified the scope of her request. It advised the Applicant that it would set up new requests for specific categories of relevant records that the Applicant had mentioned in her requirement for review.
21. During the investigation, the Authority provided details of the searches it had undertaken in response to the Applicant's request.
22. In response to the Applicant's concern that it had not conducted a full search for information that would fulfil her request despite her having made clear that her request was "not limited to" questions (i)-(iii) of her request, the Authority acknowledged that it "could have been clearer" when advising the Applicant to ensure that:
 - she knew the Authority's searches "would be specific to the questions asked"
 - she could advise the Authority what, if any, additional information was required.

The Commissioner's view

23. The Commissioner acknowledges that the scope of the Applicant's request, which is explicitly not limited to parts (i)-(iii) only, is very broad. He can identify no reason to consider internal documents, documents used in assessing the application or complaints to be outwith the scope of documents relating to this site. It is therefore unclear why the Authority treated the Applicant's requirement for review in relation to these potential gaps as new requests for information.
24. While the Authority provided the Commissioner with evidence of the searches it undertook in response to the request, it has provided him with no evidence that it has, at any stage of this request, attempted to identify relevant records that do not fall within parts (i)-(iii) of the Applicant's request – despite her express statement in her original request that her request was not limited to these specific questions.
25. Although the Applicant highlighted concerns with the Authority's searches with reference to specific missing categories of information, the Commissioner notes the possibility that the Authority holds other relevant information falling within the scope of the Applicant's request that may not easily be classified as being encompassed by the specific categories she identified. Any such relevant records would also be covered by the Applicant's request.
26. As the Authority has only provided the Commissioner with evidence of searches it undertook for subsets of the information requested by the Applicant, he cannot find that the Authority has interpreted the Applicant's request correctly and, therefore, he cannot be satisfied that the Authority's searches would have identified all of the information requested.
27. The Commissioner therefore finds that the Authority has failed to comply with regulation 5(1) of the EIRs in this respect. As he has found that the Authority's overall approach to searches was inadequate, the Commissioner has not gone on to consider whether the Authority was entitled to rely on the exception in regulation 10(4)(a) of the EIRs in relation to an element of part (ii) of the Applicant's request.

Regulation 6(1)(b) – Information otherwise accessible

28. In response to part (iii) of the Applicant's request, the Authority provided the Applicant with a link to an explanation [published on its website](#)¹. It therefore considered that the information requested was excepted from disclosure under regulation 6(1)(b) of the EIRs.
29. Regulation 6(1)(b) of the EIRs states that, where an applicant requests that information is made available in a particular form or format, a Scottish public authority shall comply with that request unless the information is already publicly available and easily accessible to the applicant in another form or format.
30. In order to determine whether the Authority dealt with the Applicant's request correctly, therefore, the Commissioner must be satisfied as to whether, at the time it responded to the Applicant's request and requirement for review, the information held by the Authority (and which fell within the scope of the request) was both publicly available and easily accessible to the Applicant.

The Applicant's submissions

31. The Applicant submitted that "the presence of any general online statement (e.g. relating to the cyberattack or register unavailability)" did not specifically address part (iii) of her request.

¹ <https://www.sepa.org.uk/regulations/authorisations-and-permits/public-register/>

She argued that the exception in regulation 6(1)(b) of the EIRs should only apply where “the actual environmental information is already publicly available in full and in a usable form”.

The Authority’s submissions

32. As the webpage that the Authority linked the Applicant to mentioned both a historical cyber-attack on the Authority’s systems and legal considerations as reasons for documents not being available on the Public Register, the Authority was asked to clarify how these different reasons satisfied the Applicant’s request (which related to a particular licence).
33. The Authority acknowledged that the information provided may not have been as clear as it could have been. However, it argued that the wording of its initial response to part (iii) of the Applicant’s request made it clear that the December 2020 cyber- attack was the specific reason why the information related to the licence specified by the Applicant in her request was not available on the Public Register.
34. The Authority explained that it had conducted searches to inform its response to part (iii) of the Applicant’s request. As part of its initial response, it consulted the Registry team who said there were no reasons beyond those detailed on the Public Register webpage. At review stage, it also consulted with the Legal Manager who elaborated on the background to the cyber-attack and what was published on the Public Register webpage. It noted that the Legal Manager’s response formed part of the review outcome issued to the Applicant.
35. The Authority also confirmed that it did not routinely record information (either in the metadata of specific documents or in a central record) that confirmed for what particular reason a specific document was not available on the Public Register.

The Commissioner’s view

36. The Commissioner has carefully considered the terms of part (iii) of the Applicant’s request, which asked for:
 - (iii) The specific reason why this CAR licence is not currently accessible on the Authority’s Public Register.
37. The Commissioner acknowledges that the Applicant is not fully satisfied with the explanation provided by the Authority in its initial response and review outcome or with the information already publicly available on the webpage the Authority linked her to. However, given the specific terms of part (iii) of the Applicant’s request – which sought the specific reason why the specified CAR licence was not available on the Authority’s Public Register – the Commissioner is satisfied that the Authority’s response fulfilled this part of her request.
38. In this case, the Commissioner has received no indication that the Applicant cannot access the webpage in question (which is readily available online). However, if the full information requested is not already publicly available and easily accessible to the Applicant, and the Authority holds further information, the Authority must disclose this further information to the Applicant (or withhold it under an appropriate exception).
39. Given that the Applicant’s request also stated that she was “seeking copies of all relevant records”, the Commissioner has therefore considered whether the Authority holds further information that would satisfy part (iii) of the Applicant’s request.
40. The Commissioner has carefully considered the submissions from both parties, particularly those relating to how the Authority established what information it held for part (iii) of the Applicant’s request.

41. Having done so, the Commissioner is satisfied that the Authority took adequate and proportionate steps in the circumstances to establish if the information was held and he is satisfied, on balance, that it does not (and did not, on receipt of the request) hold further information that would satisfy part (iii) of the Applicant's request.
42. Given the specific terms of part (iii) of the Applicant's request, the Commissioner does not consider the inadequacy of the Authority's broader searches to substantially impact the searches for the specific information that would satisfy this part of the Applicant's request.
43. The Commissioner therefore concludes, on balance, that the Authority does not (and did not, on receipt of the request) hold further information falling within the scope of the request, beyond the explanation already provided and the information already publicly available on the webpage it linked the Applicant to.
44. While the Applicant believed and expected more information to be held by the Authority, the Commissioner is satisfied that this was not the case. Whether a public authority should hold information which it does not hold is not a matter for the Commissioner to decide.
45. Consequently, the Commissioner is satisfied that the Authority was entitled to apply the exception in regulation 6(1)(b) of the EIRs to part (iii) of the Applicant's request.

Next steps

46. The Commissioner therefore requires the Authority (for all parts of the Applicant's request except part (iii)) to carry out adequate, proportionate, searches for the information requested reach a decision on the basis of those searches and notify the Applicant of the outcome (in terms of regulation 16 of the EIRs). In doing so, the Authority must:
 - consider carefully the terms of the request and ensure that its interpretation of the request is reasonable and fully addresses the request
 - take adequate and proportionate steps to establish what information is held, using appropriate search terms, having regard to the specific information the Applicant believes the Authority holds but has failed to provide and searching all locations and mediums where relevant information may be held
 - retain evidence of those searches in the event of a further appeal to the Commissioner.
47. The Commissioner would also like to stress the importance of ensuring that the terms of any information request received by a Scottish public authority are clear before proceeding to respond. He would urge the Authority, and indeed all Scottish public authorities, to take steps to clarify with applicants any matter which is open to interpretation, prior to proceeding with a request.
48. In this case, if the Authority was uncertain as to whether the Applicant genuinely sought all documents relating to the site or only the specific information listed in parts (i)-(iii) of her request – or was unclear upon the her definition of “full and verifiable documentation” – it was open (and remains open) to the Authority to contact the Applicant to seek clarification.

Decision

The Commissioner finds that the Authority partially complied with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by the Applicant.

The Commissioner finds that, in respect of part (iii) of the Applicant's request, the Authority complied with the EIRs by relying on the exception in regulation 6(1)(b).

However, the Commissioner finds that, in respect of all other elements of the Applicant's request, the Authority failed to comply with the EIRs by failing to accurately interpret the Applicant's request and, therefore, failing to carry out adequate, proportionate searches for the information requested.

The Commissioner therefore requires the Authority (for all parts of the Applicant's request except part (iii)) to carry out adequate, proportionate, searches for the information requested reach a decision on the basis of those searches and notify the Applicant of the outcome (in terms of regulation 16 of the EIRs) by, **29 September 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

14 August 2025