



Scottish Information
Commissioner
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Decision Notice 203/2025

Gadloch drainage system

Applicant: The Applicant

Authority: East Dunbartonshire Council

Case Ref: 202500609

Summary

The Applicant asked the Authority for information about a drainage outfall from the Gadloch to the Park Burn. The Authority disclosed some information but withheld other information as it considered it to be legally privileged, and the public interest favoured withholding it. 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” and “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 23 January 2025, the Applicant made a request for information to the Authority. He referred to a statement made in paragraph 6.2 of the [Lenzie Community Council Minutes](http://www.lenziecommunitycouncil.org.uk/minutes-november-20th-2024/)¹ (of 20 November 2024) and requested:

“...information recorded in whatever format, held, sent or received by the [Authority] identifying the “drainage outfall from the Gadloch to the Park Burn” and information supporting the claim “this drainage system will not tolerate any engineering work above it”.
2. The Authority responded on 20 February 2025. It disclosed some information and withheld other information under the exemption in section 36(1) of FOISA, on the basis it was legally privileged and the public interest favoured withholding it.
3. On 24 February 2025, the Applicant wrote to the Authority requesting a review of its decision. He stated that he was dissatisfied with the decision for the following reasons:
 - the information provided by the Authority contained no information identifying the location of the tunnel and drainage outfall from the Gadloch to the Park Burn and no information supporting the claim the tunnel was in a poor condition, that the drainage system will not tolerate any engineering work above it or that these issues could not be mitigated. He considered that paragraph 3.23 of a [specific feasibility study](https://www.eastdunbarton.gov.uk/media/5szdlmzz/proposed-new-lenzie-academy-outcome-of-feasibility-study.pdf)² confirmed that the Authority held such information.
 - he saw no reason why the exemption in section 36(1) of FOISA should apply to any of the information requested and the Authority had failed to state what specific information it had withheld under this exemption
 - the Authority had failed to provide advice and assistance in relation to his request
 - the Authority had failed to seek clarification of his request if it was unsure about what information had been requested
 - the Authority had failed to respond to his request in terms of the EIRs in addition to responding in terms of FOISA.
4. The Applicant did not receive a response to his requirement for review.
5. The Applicant wrote to the Commissioner on 15 April 2025, 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. This resulted in the Commissioner issuing [Decision 111/2025](https://www.foi.scot/decision-1112025)³ on 8 May 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 18 April 2025, the Commissioner did not require the Authority to take any action in relation to Decision 111/2025.

¹ <http://www.lenziecommunitycouncil.org.uk/minutes-november-20th-2024/>

² <https://www.eastdunbarton.gov.uk/media/5szdlmzz/proposed-new-lenzie-academy-outcome-of-feasibility-study.pdf>

³ <https://www.foi.scot/decision-1112025>

7. As stated above, the Authority notified the Applicant of the outcome of its review on 18 April 2025. It informed the Applicant that it was maintaining reliance on section 36(1) of FOISA to withhold information from him.
8. On 2 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 he was dissatisfied with the outcome of the Authority's review for the same reasons as set out in his requirement for review. He considered the Authority's review outcome failed to address the dissatisfaction he expressed in his requirement for review.

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

Commissioner's analysis and findings

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

FOISA or the EIRs

13. The relationship between FOISA and the EIRs was considered at length in [Decision 218/2007](#)⁴. Broadly, in the light of that Decision, the Commissioner's general position is as follows:
 - The definition of what constitutes environmental information should not be viewed narrowly.
 - 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.
 - Any request for environmental information therefore must be handled under the EIRs.
 - In responding to a request for environmental information under FOISA, an authority may claim the exemption in section 39(2).

⁴ <https://www.foi.scot/decision-2182007>

- 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).
 - 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.
14. “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.
 15. As stated above, the Commissioner asked the Authority to explain why it did not consider the request, given its subject matter, sought environmental information. The Authority responded that it accepted it should have considered the request in terms of the EIRs as the drainage issues in question were “expected to have an impact on the environment and ultimately this request relates to potential large scale building work”.
 16. 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)).
 17. Given that the Commissioner is satisfied 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

18. 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.
19. 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.
20. As there is a separate statutory right of access to environmental information available to the Applicant, the Commissioner also finds 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

21. 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)).
22. Although the Authority responded to the Applicant's requirement for review on 18 April 2025, this was as a result of the Authority considering the request solely in terms of FOISA and not the EIRs.

23. It is apparent that the Authority failed to respond to the Applicant's request of 23 January 2025 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.
24. The Commissioner therefore requires the Authority to provide a response to the Applicant's requirement for review of 24 February 2025, in terms of regulation 16 of EIRs. In doing so, he requires the Authority to give proper regard to the specific matters of dissatisfaction expressed by the Applicant in his requirement for review (which are summarised in paragraph 3). Specifically, the Authority must:
- consider carefully the terms of the request and ensure that its interpretation of the request is reasonable and that it had identified information falling within scope of the request
 - take adequate and proportionate steps to establish what information is held, using appropriate search terms and searching all locations and mediums where relevant information may be held. These searches should take into account the reasons the Applicant has expressed for believing the Authority holds further information falling within the scope of his request
 - clearly identify any information that is being withheld (to include any information that it was withholding under FOISA) and justify and explain why that information is being withheld.

Decision

The Commissioner finds that the Authority failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 and with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in dealing with the information request made by the Applicant.

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 **13 October 2025**. In doing so, he requires the Authority to have regard to the conditions set out in paragraph 24 above.

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

28 August 2025