



Scottish Information
Commissioner
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Decision Notice 205/2025

Consideration of statutory guidance on developer contributions and infrastructure delivery

Authority: Scottish Ministers
Case Ref: 202500599

Summary

The Applicant asked the Authority for information relating to the Authority's decision to direct City of Edinburgh Council not to adopt supplementary guidance relating to City Plan 2030. The Authority provided some information but withheld other information on the basis it was internal communications, and the public interest favoured withholding the information. The Commissioner investigated and found that the Authority had correctly withheld most of the information, but that certain information was wrongly withheld. He required the Authority to disclose the wrongly withheld information.

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 "environmental information") (Interpretation); 5(1) (Duty to make environmental information available on request); 10(1), (2) and (4)(e) (Exceptions from duty to make environmental 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. They asked for:
 - (i) Correspondence, documents or consultation responses from, or submitted to, the Planning, Architecture and Regeneration Directorate by any other Scottish Government department or directorate, public authority or local authority providing their consideration of the City of Edinburgh Council's (the Council) proposed Supplementary Guidance on Developer Contributions and Infrastructure Delivery for City Plan 2030.
 - (ii) Any internal Planning, Architecture and Regeneration Directorate correspondence or documents, between officials, including but not limited to emails, notes and minutes of meetings, comments and draft documents including track changes, detailing their consideration of the Council's proposed Supplementary Guidance on Developer Contributions and Infrastructure Delivery for City Plan 2030 and why it could not be adopted.
2. For background, the Supplementary Guidance referred to would form part of the Edinburgh City Plan 2030 and describes the Council's approach to securing, either through the planning system or through payments from developers, infrastructure for developments.
3. The Authority responded on 17 March 2025. It disclosed some information to the Applicant and withheld other information under the exceptions in regulations 6(1)(b), 10(4)(e) and 11(2) of the EIRs.
4. On 18 March 2025, the Applicant wrote to the Authority requesting a review of its decision. They stated that they were dissatisfied with the decision because they considered the personal information of senior officials had been incorrectly withheld under the exception in regulation 11(2) of the EIRs and the public interest favoured disclosure of the information withheld under the exception in 10(4)(e).
5. The Authority notified the Applicant of the outcome of its review on 11 April 2025. It disclosed some further information to the Applicant and continued to withhold some information under the exceptions in regulations 10(4)(e) and 11(2) of the EIRs.
6. On 22 April 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 they were dissatisfied with the outcome of the Authority's review because the public interest favoured disclosure of the information withheld under the exception in regulation 10(4)(e) of the EIRs.

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 Authority was asked to send the Commissioner the information withheld

from the Applicant. The Authority provided the information, and the case was 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 related to the sensitivity of the information withheld under the exception in regulation 10(4)(e) of the EIRs and its consideration of the public interest test.
10. During the investigation, the Authority reassessed the sensitivity of two documents and decided to disclose them to the Applicant.
11. The Applicant confirmed that they did not require a decision in relation to the documents the Authority disclosed during the investigation or the information the Authority continued to withhold under the exception in regulation 11(2) of the EIRs. The Commissioner will therefore not consider these documents or the exception in regulation 11(2) of the EIRs further in his decision.

Commissioner's analysis and findings

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

FOISA or EIRs?

13. 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.
14. The information requested appears to fall clearly within the scope of the definition of environmental information contained in regulation 2(1) of the EIRs.
15. 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 falls within the definition of environmental information set out in regulation 2(1).

Section 39(2) of FOISA – environmental information

16. 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.
17. In this case, therefore, 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.
18. 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 responding to the request under the EIRs) outweighs any public interest in disclosing the information under FOISA.
19. Both regimes are intended to promote public access to information and there would appear to be no reason why (in this particular case) disclosure of the information should be more likely under FOISA than under the EIRs.

20. 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

21. 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.
22. 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) of the EIRs requires the authority to provide that information to the requester, unless a qualification in regulations 6 to 12 applies (regulation 5(2)(b)).
23. Under the EIRs, a Scottish public authority may refuse to make environmental information available if one or more of the exceptions in regulation 10 applies.

Regulation 10(4)(e) of the EIRs – Internal communications

24. Regulation 10(4)(e) allows authorities to refuse to disclose internal communications. This is a class-based exception, meaning that there is no need to consider whether disclosure of the communication would cause harm before applying the exception.
25. For information to fall within the scope of the exception in regulation 10(4)(e) of the EIRs, it need only be established that the information is an internal communication.
26. As with all of the exceptions under regulation 10, a Scottish public authority applying this exception must interpret it in a restrictive way and apply a presumption in favour of disclosure (regulation 10(2)). Even where the exception applies, the information must be disclosed unless, in all the circumstances, the public interest in making the information available is outweighed by that in maintaining the exception (regulation 10(1)(b)).
27. Having considered the withheld information under this exception, the Commissioner is satisfied that this information forms internal communications and is therefore subject to the exception in regulation 10(4)(e) of the EIRs. The Applicant has not suggested that any of the withheld information is other than an internal communication.
28. The Commissioner notes that a small proportion of the withheld information contains email chains that include emails sent outwith the Authority. However, these specific emails do not relate to the Authority's consideration of the proposed supplementary guidance by the Council. He is therefore satisfied that this information falls outwith the scope of the Applicant's request and that all of the information that is in scope forms internal communications for the purposes of the exception in regulation 10(4)(e) of the EIRs.
29. As the exception in regulation 10(4)(e) of the EIRs is subject to the public interest test in regulation 10(1)(b), the Commissioner must, therefore, go on to consider whether, in all of the circumstances of this case, the public interest in disclosing the information is outweighed by the public interest in maintaining the exception.

The public interest test

The Authority's views on the public interest

30. The Authority recognised that there is some public interest in disclosure of the information requested as part of open, transparent and accountable government and to inform public

debate. It also acknowledged that there is public interest in City Plan 2030 which will impact the inhabitants of Edinburgh amid an ongoing housing emergency.

31. However, the Authority concluded that there is a greater public interest in high quality policy and decision-making to address the housing emergency and in the properly considered implementation and development of policies and decisions which is a theme that underpins the withheld information.
32. The Authority said that the withheld information contained free and frank comments expressed by officials and was advice that formed part of the information sent to the Minister of Public Finance to make a determination. It said that the ability of officials to provide such advice and comment should be protected as it ultimately allowed for debate and refining of options to be presented to the Minister to inform their decision making.
33. If this advice were to be made public at this stage, the Authority argued that it would detrimentally impact future decision making as officials would be much less likely to be so candid in the future. Officials would be reluctant to set out such clear and frank advice and associated analysis of the potential consequences of actions taken as fully and in such candid terms if they thought that this advice would be disclosed into the public domain.
34. In this case, the Authority considered that the maintenance of the private space for Ministers and officials outweighed the benefits to open government and public understanding that would arise from disclosure of the withheld information. Upholding the exception allows Ministers and officials to discuss complex and contentious issues fully and properly prior to formal views being made public and provides an opportunity for Ministers to share concerns privately, which leads to better policy decisions and effective Government.
35. If this advice were disclosed prematurely, the Authority argued that there was potential that it could impact the ongoing consideration being undertaken by the Council on action it takes consequent to the Authority's decision. It said that information taken out of context could undermine the Authority's position and potentially compromise its ability to have constructive future relationships with the Council. It also submitted that disclosure of the withheld information would also be likely to result in the provision of advice for Ministers that was less detailed if officials did not have a protected space to provide comprehensive briefs for consideration, which would diminish the quality of the advice provided to Ministers.
36. On balance, the Authority considered that the public interest in maintaining the exception outweighs that in disclosure, given the overriding public interest in maintaining the confidentiality of advice that is presented to Ministers and the public interest in allowing for full and detailed internal consideration of the issues at hand.
37. The Authority highlighted that some of the withheld information comprised legal advice as it related to communications with, or references to such communications, legal advisers acting in their professional capacity, with the Authority as the client, in which legal advice was being sought and provided. It argued that disclosure of this information would breach legal professional privilege by divulging information about the points being considered by lawyers, the extent of their comments and the issues being flagged up for further consideration.
38. The Authority recognised that there is a public interest in the disclosure of the withheld legal advice for reasons of transparency and openness. However, it considered that there is a very strong public interest in maintaining the exception relating to legal professional privilege to ensure confidentiality of communications for the following reasons:

- it remains important in all cases that lawyers can provide free and frank legal advice which considers and discusses all issues and options without fear that the advice may be disclosed and, as a result, potentially taken out of context
 - there is a public interest in ensuring that the Authority's position on any issue is not undermined by the disclosure of legal advice
 - legal advisers need to be able to present the full picture to their clients – the nature of legal advice is that it often sets out the possible arguments both for and against a particular view, weighing up their relative merits.
39. The Authority therefore submitted that there is a strong public interest in protecting the confidentiality of this information to ensure that it can discuss and take policy decisions in full possession of thorough and candid legal advice. This ensures that the Authority can take decisions in a fully informed legal context, having received legal advice in confidence as any other client would.
40. On balance, the Authority considered that the public interest in maintaining the exception outweighed that in disclosure, given the overriding public interest in maintaining the confidentiality of communications between lawyers and their clients and the public interest in allowing for full and detailed internal consideration of the issues at hand.

The Applicant's views on the public interest

41. The Applicant emphasised that the information requested concerned the exercise by the Authority of a statutory function under the Town and Country Planning (Scotland) Act 1997. They said that the information requested informed a legally binding decision by the Authority to prevent the Council from adopting guidance that “has significant implications for the future development of housing and critical public infrastructure across Edinburgh over the next 10 years”. They argued that the information requested was therefore “something which is of serious concern and benefit to the public”.
42. The Applicant noted that Council officials had stated in a recent report to the Council's Planning Committee that the Authority had not raised any issues with the content of the guidance. They argued it was important that the full content of the Authority's deliberations and advice were made public to understand whether the Authority did in fact think there were no issues with the guidance or whether the direction was based on concerns regarding the underlying content of the guidance. If concerns were expressed regarding the content of the guidance, they submitted that it was also in the public interest to know whether any such concerns influenced the Authority's final decision.
43. The Applicant argued that the Ministerial submission dated 30 January 2025 – which contained advice on, among other things, “Risks to Delivery” – should be disclosed in full. They considered that the public was entitled to know how the Authority arrived at a decision of “fundamental importance” to the delivery of Edinburgh's development strategy over the next decade and what “Risks to Delivery” the Authority took into account when making its final decision.
44. The Applicant highlighted that the Authority and Council had both declared a housing emergency. They considered that the guidance, and the Authority's decision related to it, had serious implications for development viability in Edinburgh and for the length and severity of the housing emergency.

45. Referring again to the internal report to the Authority dated 30 January 2025, the Applicant said that – in addition to the “Risks to Delivery” section – two other sections (entitled “Financial Considerations and “New Deal for Business Implications”) had been redacted in full. They considered disclosure of this information necessary to understand to what extent the Authority took account of the advice of its officials regarding how to address the housing emergency.
46. The Applicant noted that the Council had recently begun a new and separate consultation related to the guidance that was based on the Authority’s decision and the guidance previously submitted to the Authority. It argued that it was “vitally important” in the public interest that the advice to the Authority was made public as soon as possible in order that any future Council decisions were properly informed.

The Commissioner’s view

47. Regulation 10(2)(b) of the EIRs builds in an explicit presumption in favour of disclosure, which makes it clear that where arguments are evenly balanced for withholding and disclosing the information, the information must be disclosed.
48. The starting position is, therefore, that there is a public interest in disclosure of environmental information (as expressed in the EIRs and associated EU Directive) and that only if there is a stronger competing public interest in withholding the information should exceptions be applied.
49. The Commissioner has carefully considered the submissions of the Applicant and the Authority together with the withheld information (which he has accepted comprises an internal communication for the purposes of the exception in regulation 10(4)(e) of the EIRs).
50. The Commissioner accepts that there is a public interest in ensuring that officials of the Authority have a private space in which they can discuss and consider issues and make informed decisions. As in many previous decisions, he recognises the importance of such a private space for good decision-making.
51. Regarding the information that the Authority identified as being subject to legal advice privilege, the Commissioner notes, as he did in previous decisions involving both FOISA and the EIRs, that the courts have long recognised the strong public interest in maintaining the right to confidentiality of communications between legal adviser and client on administration of justice grounds.
52. Many of the arguments in favour of maintaining confidentiality of communications were discussed in a House of Lords case, Three Rivers District Council and others v Governor and Company of the Bank of England (2004) UKHL 48¹ and in the Department for Business, Enterprise and Regulatory Reform v Information Commissioner and O’Brien [2009] EWHC 164(QB)². The Commissioner will apply the same reasoning to communications attracting legal professional privilege generally. More generally, he considers there to be a strong public interest, also recognised by the courts, in the maintenance of confidences.
53. On the other hand, the Commissioner recognises the general public interest in transparency and accountability. In this case, he considers that the Applicant has made compelling arguments on how disclosure of the withheld information would be in the public interest –

¹ <http://www.bailii.org/uk/cases/UKHL/2004/48.html>

² <https://www.bailii.org/ew/cases/EWHC/QB/2009/164.html>

particularly given the statutory framework within which the Authority made its decision, the context of the housing emergency and the potential implications of the Authority's decision.

54. Having carefully considered the withheld information, the Commissioner must note that most of the information comprises either free and frank communications, legal advice, sensitive information or rough notes.
55. In the circumstances, having considered the competing public interest arguments and the content of the withheld information, the Commissioner considers that – for most of the withheld information – the balance of the public interest lies in maintaining confidentiality of communications within the Authority.
56. It is important that an authority has a private space to discuss key matters in confidence. The Directive recognises this and the EIRs incorporate an exception permitting access to internal documents to be refused by an authority so as to meet the need (of public authorities) to have a protected space in order to engage in reflection and to pursue internal discussions. (The Commissioner would note that this private space is particularly important when information is subject to legal professional privilege, as is the case for some of the withheld information.)
57. However, the Commissioner considers that there is a small amount of information where the public interest favours disclosure: specifically, the options considered and advice directly relating to each option found in the recommendation made to Ministers, dated 30 January 2025.
58. As this information (which the Authority has not identified as containing legal advice) directly outlines the rationale for recommending what options should, or should not, be followed in relation to the Council's guidance, the Commissioner considers that the public interest in disclosure of this information is particularly strong. While he acknowledges that there remains a risk of inhibition with the disclosure of this information, the Authority will need (in any case) to retain a record of its formal decision-making process for its own internal purposes and in the event of any challenge to its decision.
59. On balance, and in all the circumstances, the Commissioner is therefore satisfied that the public interest in making this recommendation available is not outweighed by that in maintaining the exception in regulation 10(4)(e) of the EIRs. He requires the Authority to disclose this information to the Applicant. (He will write to the Authority to specify the information to be disclosed.)

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 the Authority correctly withheld some information under the exception in regulation 10(4)(e) of the EIRs and so complied with the EIRs in that respect.

However, the Commissioner also finds that the Authority wrongly withheld some information under the exception in regulation 10(4)(e) of the EIRs and so failed to comply with regulation 5(1) of the EIRs in that respect.

The Commissioner therefore requires the Authority to disclose to the Applicant the information that it wrongly withheld under the exception in regulation 10(4)(e) of the EIRs, by **13 October 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.

Euan McCulloch
Head of Enforcement

29 August 2025