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Commissioner  
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# Decision Notice 254/2025

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## Planning application – Professional Judgement Report

Applicant: Anonymous

Authority: Fife Council

Case Ref: 202501044

### Summary

The Applicant asked the Authority for a “Professional Judgement Report” held in relation to a specified planning application. The Authority informed the Applicant that it did not hold the information requested. The Commissioner investigated and found that the Authority had been entitled to inform the Applicant that it did not hold the information requested.

### Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (2) (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)(a) (Exceptions from duty to make environmental information available); 17(1), (2)(a), (b) and (f) (Enforcement and appeal provisions).

### Background

1. On 13 April 2025, the Applicant made a request for information to the Authority. He asked for:

“A copy of the Case Officer’s report, that he used his professional judgement on to grant planning permission for fence or to be told what reason he used to pass illegal fence.”

2. The Authority responded on 15 May 2025 in terms of the EIRs. It informed the Applicant that all information relating to the relevant planning application was publicly available and therefore subject to the exception in regulation 6(1)(b) of the EIRs. It provided the Applicant with a link to the planning application. In line with its duty to provide advice and assistance, it also attached a copy of the “Report of Handling”, which it said detailed “everything considered for the decision”.
3. On 15 May 2025, the Applicant wrote to the Authority requesting a review of its decision. He stated that he was dissatisfied with the decision because the Report of Handling provided by the Authority did not contain the information he asked for. He had asked for the Case Officer’s “Professional Judgement Report”, which he said should:
  - clearly state the specific issue that led to the need for professional judgement
  - document the data, evidence and information gathered to inform the decision
  - demonstrate compliance with relevant guidelines and professional standards.
4. As part of his requirement for review, the Applicant also enclosed an email from an employee of the Authority which said that the Case Officer had used their “professional judgement”. He said that there was nothing in the Report of Handling to indicate why the Case Officer had used his professional judgement or what relevant guidelines he had adhered to.
5. The Authority notified the Applicant of the outcome of its review on 14 June 2025. It noted that the Applicant had specified that he wanted a copy of the Case Officer’s Professional Judgement Report. It therefore informed the Applicant, in terms of regulation 10(4)(a) of the EIRs, that it did not hold the information requested. In line with its duty to provide advice and assistance, it explained that all information it held relating to why planning permission had been granted was contained in the documents it previously provided to the Applicant. It said that it did not hold a Professional Judgement Report as all information was recorded in the aforementioned documents.
6. On 3 July 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 because it had not provided him with the information he had requested.

## **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 8 August 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 how the Authority had

interpreted the Applicant's request and how it established that it did not hold the information requested.

10. The Applicant raised some matters in his 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 FOI law (particularly the EIRs) in responding to the Applicant's request: he has no locus to comment on the Authority's obligations under, or compliance with, planning law.

## **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 subject matter and the terms of the request, the Commissioner accepts the decision of the Authority to deal with the request under the EIRs rather than under FOISA.
13. The Applicant has not disputed the Authority's decision to handle its 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) of the EIRs.

### ***Section 39(2) – Environmental information***

14. 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.
15. In this case, the Commissioner accepts that the Authority was entitled to apply the exemption to the information withheld under FOISA, given his conclusion that it is properly classified as environmental information.
16. 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 responding to the request under FOISA.
17. The Commissioner therefore concludes that the Authority was entitled to apply section 39(2) of FOISA and consider the Applicant's information request under the EIRs.
18. In the circumstances, the Commissioner will consider this case, in what follows, solely in terms of the EIRs.

### ***Regulation 5(1) – Duty to make environmental information available***

19. Regulation 5(1) of the EIRs requires a Scottish public authority which holds the 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.
20. On receipt of a request for environmental information, 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 make the information available, unless a qualification in regulation 6 to 12 applies (regulation 5(2)(b)).

21. 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)(a) – Information not held***

22. Regulation 10(4)(a) of the EIRs states that a Scottish public authority may refuse to make information available to the extent that it does not hold the information when it received the request.
23. The standard of proof to determine whether a Scottish public authority holds the information is the civil standard of the balance of probabilities. In determining where the balance of probabilities lies, the Commissioner considers the scope, quality, thoroughness and results of the searches carried out by the public authority.
24. The Commissioner also considers, where appropriate, any reasons 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 about what information the authority should hold, ultimately the Commissioner's role is to determine what relevant information is (or was, at the time the request was received) held by the public authority.

***The Applicant's submissions***

25. The Applicant said that he was unhappy with the Authority's review outcome because it had not provided him with the Case Officer's Professional Judgement Report, as he had requested.
26. The Applicant also submitted that there was nothing in the Report of Handling to indicate why the Case Officer had used his professional judgement or what relevant guidelines he had adhered to. He considered that the Report of Handling should "clearly state the Case Officer's Professional Judgement Report, either in a statement or clearly indicate where the relevant information is located within the document."
27. As stated above, the Applicant also raised some matters in his 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

***The Authority's submissions***

28. The Authority said that it had interpreted the Applicant's request as seeking the Case Officer's report that formed the basis of the decision to grant planning permission for the erection of a fence at a specified address. Specifically, the Applicant had sought a copy of the report in which the Case Officer "exercised professional judgement" in approving the retrospective planning application for the fence.
29. The Authority therefore understood the Applicant's request as seeking the formal documentation produced during the Case Officer's assessment of the retrospective planning application, detailing the considerations, planning policies and rationale that informed the decision to grant retrospective planning permission for the fence.
30. The Authority said that this information was contained in the Report of Handling and Decision Notice documents. These documents were provided to the Applicant as part of its initial response, along with a link to all further documentation held for the relevant planning application.

31. The Authority noted that, in his requirement for review, the Applicant had raised that the Report of Handling did not contain the information he had requested (i.e. a copy of the Case Officer's Professional Judgement Report).
32. The Authority explained that it had discussed the Applicant's request directly with the Planning Service. It acknowledged that the Applicant had disputed the use of the Report of Handling for decision-making on the planning application, but it confirmed that this was the document the Case Officer was required to complete during the decision-making process of a planning application. The Planning Service confirmed that no separate Professional Judgement Report existed and that current guidance and regulations did not require the production of any supplementary report beyond the Report of Handling in relation to the planning application.
33. The Authority recognised that the Applicant believed that a Professional Judgement Report either was, or should be, held by the Authority. However, it confirmed that it did not hold any such report. It reiterated that all documentation relevant to the decision-making process was publicly accessible via the Authority's planning portal (and through the direct link it had previously provided to the Applicant).
34. Notwithstanding the above, the Authority provided details of the searches it had carried out in response to the Applicant's request. It confirmed that these searches did not identify a Professional Judgement Report as it had never held such a report and confirmed that details of the considerations, planning policies and rationale that informed the decision to grant retrospective planning permission for the fence were instead recorded in the Report of Handling.

#### *The Commissioner's view*

35. As stated above, the Commissioner's remit is limited to considering whether the Authority complied with the EIRs in responding to the Applicant's request. In this case, his remit is limited to establishing what records exist and the extent to which the information actually requested (i.e. the Case Officer's Professional Judgement Report) is held by the Authority.
36. Given the explanations and submissions provided, the Commissioner accepts that the Authority took adequate and proportionate steps in the circumstances to establish if the information was held and he is satisfied that it does not (and did not, on receipt of the request) hold the Case Officer's Professional Judgement Report requested by the Applicant.
37. The Commissioner notes that the Applicant's request also sought to be told "what reason" the Case Officer had used to approve the "illegal" fence. He acknowledges that the Applicant appears to believe that the Report of Handling (or other planning documentation) ought to state explicitly where the Case Officer specifically exercised his professional judgement or that these documents ought to be formulated differently (e.g. by containing further or different information).
38. However, the Commissioner can only focus on what recorded information is actually held by the Authority (or was at the time of the request). While the Applicant believed and expected the specified information (i.e. the Case Officer's Professional Judgement Report) to be held by the Authority, the Commissioner is satisfied that this is not the case. He has no locus, in this context, to determine what information an authority ought to record, or how: he is concerned with what information the authority actually holds.

39. The Commissioner therefore concludes that the Authority was correct to give the Applicant notice, in terms of regulation 10(4)(a) of the EIRs, that it did not hold the information requested.

### ***The public interest***

40. The exception in regulation 10(4)(a) of the EIRs is subject to the public interest test in regulation 10(1)(b) and so can only apply if, in all the circumstances of the case, the public interest in maintaining the exception outweighs that in making the information available.
41. The question of whether or not a public authority holds information is a factual one, determined on the balance of probabilities. If a public authority does not hold the information, then there is no meaningful public interest test that can be undertaken.
42. In this case, for the reasons set out above, the Commissioner is satisfied that the Authority does not hold any information covered by the request and did not do so on receipt of the request.
43. Consequently, the Commissioner accepts that there is no conceivable public interest in requiring the disclosure of such information and finds that the public interest in making information available is outweighed by that in maintaining the exception.

## **Decision**

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

## **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.

**Cal Richardson**  
**Deputy Head of Enforcement**

**28 October 2025**