



Scottish Information
Commissioner
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Decision Notice 264/2025

Portpatrick Harbour slipway consultation

Authority: Dumfries and Galloway Council
Case Ref: 202500722

Summary

The Applicant asked the Authority for all responses and associated communications pertaining to a consultation on the Portpatrick Harbour slipway. The Authority disclosed some information, with some personal data redacted, but the Applicant was dissatisfied as he believed it held further relevant information. The Commissioner investigated and found that the Authority had failed to identify other information falling within the scope of the request.

Relevant statutory provisions

[Freedom of Information \(Scotland\) Act 2002](#)¹ (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).

[Environmental Information \(Scotland\) Regulations 2004](#)² (the EIRs) regulations 2(1) (definition of “the Act”, “applicant”, “the Commissioner” and paragraphs (a) and (c) of definition of “environmental information”) (Interpretation); 5(1) (Duty to make environmental information available on request); 17(1), (2)(a) and (b) (Enforcement and appeal provisions).

¹ <https://www.legislation.gov.uk/asp/2002/13/contents>

² <https://www.legislation.gov.uk/ssi/2004/520/contents>

Background

1. On 24 November 2022, the Applicant made a request for information to the Authority. He asked for all responses and associated communications pertaining to a survey which concluded in October 2022.
2. That same date, the Authority asked the Applicant to clarify which survey he was referring to. The Applicant clarified that his request related to a “consultation request by [the Authority’s] Countryside Access officer regarding Portpatrick Harbour slipway”.
3. The Authority responded on 21 December 2022. It considered the request under the EIRs and applied the exemption in section 39(2) of FOISA. The Authority withheld the information requested under the exceptions in regulations 10(5)(b) (Course of justice, ability to receive a fair trial etc.), 10(5)(d) (Confidentiality of proceedings) and 11(2) (Personal data) of the EIRs.
4. On 21 December 2022, the Applicant wrote to the Authority requesting a review of its decision. The Applicant stated that he was dissatisfied with the decision because he believed the information should be disclosed in the interests of openness and transparency.
5. The Authority notified the Applicant of the outcome of its review on 20 January 2023, upholding its reliance on the exceptions in regulations 10(5)(b) and 11(2) of the EIRs to withhold the information requested.
6. On 21 January 2023, 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 he considered the public interest favoured disclosure.
7. On 4 March 2025, following an investigation, the Commissioner issued [Decision 058/2025](https://www.foi.scot/decision-0582025)³, finding that the Authority had failed to comply with regulation 5(1) of the EIRs, by failing to satisfy him that it had accurately interpreted the request and had identified and located all relevant information. The Commissioner required the Authority to fully reconsider the request, carry out adequate, proportionate searches and reach a decision on the basis of those searches (taking account of the circumstances at the date of the revised review), and notify the Applicant of the outcome.
8. The Authority issued its revised review outcome on 24 April 2025, modifying its original decision. The Authority informed the Applicant that it was no longer relying on regulations 10(5)(b) and 11(2) of the EIRs to withhold the information and disclosed it to the Applicant. The Authority also explained that some personal information had been redacted under regulation 11(2) of the EIRs.
9. On 1 May 2025, the Applicant again wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA/regulation 17 of the EIRs. The Applicant stated that he was dissatisfied with the outcome of the Authority’s review because he believed it had failed to provide all correspondence, including further information pertaining to the respondents and various inter-departmental communications.

³ <https://www.foi.scot/decision-0582025>

Investigation

10. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
11. On 9 May 2025, the Authority was notified in writing that the Applicant had made a valid application and was asked to send the Commissioner the information withheld from the Applicant. The Authority provided the information and the case was subsequently allocated to an investigating officer.
12. 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 focused on the Authority's interpretation of the request, and the searches and enquiries carried out to establish whether it held any further relevant information.
13. The Authority provided submissions to the Commissioner during the investigation, along with additional information relevant to the Applicant's request that it had now identified.
14. The Applicant also provided further comments to the Commissioner, including confirmation that he was happy to accept any third party personal data redactions present in the withheld information.

Commissioner's analysis and findings

15. The Commissioner has considered all of the submissions made to him by the Applicant and the Authority.
16. Given that the Applicant has confirmed that he is raising no dissatisfaction with any personal data withheld under regulation 11(2) of the EIRs, this matter does not fall within the scope of the Commissioner's investigation.

Handling in terms of the EIRs

17. The Authority considered the Applicant's request in accordance with the EIRs, on the basis that the information requested was environmental information as defined in regulation 2(1) of the EIRs.
18. 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.
19. The Authority submitted that the Applicant's request related to the findings pertaining to the slipway investigation. As the slipway in question was part of the built environment with a direct impact upon water in both a natural and man-made setting, and as water was considered to be an element of the environment, the Authority believed this to be environmental information, and so had considered the request under the EIRs.
20. The Commissioner accepts that the request relates to the state of the elements of the environment (in particular water) described in paragraph (a) of regulation 2(1) of the EIRs, and any measures or activities (in paragraph (c)) affecting or likely to affect, or designed to protect, these. As such, the Commissioner is satisfied that the information requested by the

Applicant falls within the definition of environmental information set out in regulation 2(1) of the EIRs, in particular paragraphs (a) and (c) of that definition.

Section 39(2) of FOISA – Environmental information

21. The Authority confirmed that it wished to continue to rely upon section 39(2) of FOISA. 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. In this case, the Commissioner accepts that the Authority was entitled to apply this exemption to the information withheld under FOISA, given his conclusion that it is properly classified as environmental information.
22. The Authority submitted that it was obliged to abide by the statutory duties under the EIRs, and that the public interest lay in maintaining reliance on section 39(2) of FOISA.
23. 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. 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.
24. The Commissioner therefore concludes that the Authority was correct to apply section 39(2) of FOISA and consider the Applicant's information request under the EIRs.

Whether the Authority held any further information - Regulation 5(1) – Duty to make available environmental information on request

25. 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.
26. 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 make that information available, unless a qualification in regulations 6 to 12 applies (regulation 5(2)(b)).
27. 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, but only if, in all the circumstances, the public interest in making the information available is outweighed by that in maintaining the exception.
28. 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 of probabilities lies, the Commissioner considers the scope, quality, thoroughness and results of the searches carried out by the public authority. He 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 about what information the authority should hold, ultimately the Commissioner's role is to determine what relevant recorded information is (or was, at the time the request was received) actually held by the public authority.

The Applicant's submissions

29. In his submissions to the Commissioner, the Applicant believed that, considering the limited information disclosed and the context in which it was supplied, it was obvious that the Authority continued to withhold detail around this enquiry (for instance, all inter-departmental communications) and it was fair to state that he had expected more.
30. In the Applicant's view, the site investigation, the public survey invitation and the consultation did not initiate themselves, and it was clear that a number of associated inter-departmental communications were exchanged to trigger this which, he believed, fell within the scope of his original request.

The Authority's submissions

31. The Authority described the searches carried out to identify and locate any further relevant information, with supporting evidence. It explained that information on this subject was held in a SharePoint site, and searches of Outlook had also been undertaken.
32. The Authority was asked to explain how it had interpreted the Applicant's request. In response, the Authority submitted that it had initially interpreted the request to be regarding the responses [to the consultation] and any communications regarding those responses. It explained that, following a request [by the investigating officer during the investigation] to search for information specifically considering "associated communications pertaining to the consultation", it had now broadened this to include communications regarding the consultation itself from before the consultation started (which it had not initially considered to be within the scope of the request). As the majority of these comprised internal communications, the Authority stated that it would seek to withhold these under the exception in regulation 10(4)(e) (Internal communications) of the EIRs.
33. The Authority was asked whether it held any further responses to the survey. In response, the Authority confirmed that the four survey responses already issued to the Applicant (copies of which had already been provided to the Commissioner) represented all the responses received. These, the Authority explained, had been collated by the service at the time.

The Commissioner's views on whether the Authority held any further relevant information

34. The Commissioner has carefully considered the submissions made by both parties, along with the information identified as falling within scope.
35. In respect of the responses to the consultation, the Commissioner acknowledges that the Authority disclosed four consultation responses to the Applicant in its revised review outcome, with third party personal data redacted. However, following examination of the additional in-scope information identified by the Authority during the investigation, the Commissioner notes the presence of a fifth consultation response which the Authority appears to have made no mention of to the Applicant. This information clearly falls within the scope of the Applicant's request.
36. Turning to the associated communications identified by the Authority during the investigation, having considered these, the Commissioner is satisfied that they also fall within the scope of the Applicant's request.

37. The Commissioner notes that, in its initial interpretation of the request, the Authority did not, however, consider these to fall within scope. In the Commissioner's view, the Applicant's request is clear and does not limit the communications requested to those associated solely with the survey responses. Indeed, if the Authority had any doubt over its interpretation of the request, it had the opportunity to seek clarification from the Applicant at an early stage. The Commissioner can see no evidence of the Authority having sought any clarification on this point from the Applicant.
38. Given that the Authority has identified further information relevant to the Applicant's request (i.e. an additional survey response and communications associated with the survey), the Commissioner must find that the Authority failed to deal with the Applicant's request fully in accordance with regulation 5(1) of the EIRs.
39. In light of the above, the Commissioner cannot be satisfied that the Authority has fully identified all of the information relevant to the Applicant's request. He therefore requires the Authority to carry out full and thorough searches (which he expects to see evidence of), carry out a fresh review (on the basis of those searches) and issue the Applicant with a revised review outcome covering the further information identified during this investigation, together with any additional information that may be identified from the additional searches to be carried out.

Handling issues

40. The Commissioner has some concerns about the Authority's handling of this request. While these concerns do not amount to breaches of FOISA or the EIRs, the Authority's actions had the effect of delaying the disclosure of information to which the Applicant may be entitled, adding costs to both his office and the Authority in meeting statutory duties. He suggests the Authority reflects on the following.

The Authority's interpretation of the request

41. The Commissioner is concerned that it took a prompting by the investigating officer during the investigation for the Authority to broaden the scope of its searches for any further relevant information. This was something the Authority ought to have addressed when considering its revised review outcome, at the latest, particularly in light of the findings in Decision 058/2025. In the Commissioner's view, the Authority's failure to identify the additional in-scope information at an earlier stage not only had the effect of causing avoidable delay to the Applicant in receiving information to which he may be entitled, but has also resulted in additional work and expense for both the Authority and the Commissioner's office (and earlier action may even have avoided an application being made to him in this case).
42. The Commissioner strongly urges the Authority to reflect on its FOI/EIRs practice with a view to avoiding similar situations in the future, to ensure that applicants receive the information they request, to which they are entitled, or an explanation as to why it is being properly withheld, at the earliest opportunity.

The Authority's handling of the request

43. Noting that the Authority had initially relied on regulation 10(5)(d) in its initial response, the Authority was asked to clarify what its position was, for this exception, when it carried out its review of 20 January 2023 and its subsequent revised review outcome of 24 April 2025, given that neither made any mention of this exception.

44. The Authority acknowledged that it had cited regulation 10(5)(b) twice in its original review outcome of 20 January 2023, which led it to believe that this was possibly an error, and that it ought to have confirmed that it was still relying on regulation 10(5)(d) at that time. The Authority stated that its records suggested that it had not actively withdrawn any exception at that stage.
45. The Authority submitted that, when issuing its revised review outcome of 24 April 2025 (which withdrew reliance on regulation 10(5)(b)), this should have correctly stated that it was also no longer relying upon regulation 10(5)(d) at that time.
46. On a separate point, the Authority was asked to clarify why, in its revised review outcome (of 24 April 2025), it had informed the Applicant that it was no longer relying on the exception in regulation 11(2) of the EIRs yet, at the same time, it informed him that it had redacted certain personal data in the information disclosed under that same exception.
47. The Authority conceded that this was an error which it had failed to pick up when reviewing the response for issue. The Authority acknowledged that it should have confirmed that it was no longer relying upon regulation 10(5)(b), but that regulation 11(2) was still being applied for the necessary redactions.
48. The Commissioner is concerned to note that these basic errors occurred. In his view, where an authority does not make clear, to an applicant, its position in relation to exceptions being applied and/or subsequently withdrawn, this not only has the effect of causing confusion, but leads to additional work and expense for his office, and for the Authority. He would urge the Authority to take due care to ensure that any future responses or review outcomes accurately and clearly reflect its position with regard to any exceptions in the EIRs (or exemptions in FOISA) being relied on or withdrawn.
49. The Commissioner has recorded these handling issues in line with his Interventions Policy, the purpose of which is to promote good FOI/EIRs practice across all Scottish public authorities.

Decision

The Commissioner finds that the Authority fully complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA), but failed to fully comply with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by the Applicant.

The Commissioner finds that by relying on section 39(2) of FOISA and considering the request under the EIRs, the Authority complied with Part 1 of FOISA.

However, the Commissioner finds that the Authority failed to comply with regulation 5(1) of the EIRs, by failing to identify additional information falling within the scope of the Applicant's request until during the investigation, and by failing to satisfy him that it has identified and located all information relevant to the request.

The Commissioner therefore requires the Authority to carry out full and thorough searches (which he expects to see evidence of), carry out a fresh review (on the basis of those searches) and issue the Applicant with a revised review outcome covering the further information identified during this investigation, together with any additional information that may be identified as a result of the additional searches to be carried out, by **15 December 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 October 2025