



Scottish Information
Commissioner
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Decision Notice 020/2026

Details about a specified development site

Authority: Perth and Kinross Council

Case Ref: 202401363

Summary

The Applicant asked the Authority for information about a specified development site. The Authority disclosed some information and directed the Applicant to information that was publicly available online. It withheld other information because it comprised internal communications.

The Commissioner investigated and found that the Authority had breached the EIRs by failing to identify some information, withholding other information incorrectly at the time of the review outcome and failing to notify the Applicant that it did not hold information for some parts of the request.

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) (Duty to make environmental information available on request); 10(4)(a) and (e) (Exceptions from duty to make environmental information available); 13(b) (Refusal to make information available); 17(1), (2)(a) and (b) (Enforcement and appeal provisions).

Background

1. On 3 June 2024, the Applicant made a request for information to the Authority. In relation to a specified development site, he asked for:
 - (i) communications between the Authority and the previous owner of the site as well as any communications between the Authority and the current owner of the site or their agents,
 - (ii) all internal and statutory consultee communications on this matter,
 - (iii) the planning enforcement notices “Erection of a New Dwellinghouse and Associated Infrastructure on Ref. No: 23/00830/DOM2 | Status: Warrant Approved Amendment to Housetype (Warrant Ref: 23/00830/DOM2) on Ref. No: 24/00071/AMDOM2 | Status: Pending Consideration and also: “Enforcement Enquiry Ref. No: 19/00106/PLACON | Status: Case Closed Enforcement Enquiry Ref. No: 23/00232/PLACON | Status: Case Closed” with the details of the documents unredacted, and
 - (iv) all information and communication internal within the Authority and external with the developer/his agents in relation to these enforcement notices.
 - (v) Regarding the planning applications: 23/01095/FLL and 18/00115/FLL, all copies of communication and correspondence between the developer and any of his agents via electronic means or otherwise, as well as any internal communications and or documents in relation to these application or issues arising from it, including all communication to and from [specified name’s] office and any of her reports or administrators of her public email address [specified] as well as any internal or private accounts used by [specified name].
2. The Authority responded on 2 August 2024. The Authority disclosed some information but withheld other information under regulations 10(4)(e) and 11(2) of the EIRs, because it was internal legal advice and personal data. The Authority also directed the Applicant to information captured by his request that was already publicly available online. It applied regulation 6(1)(b) of the EIRs to this information.
3. On 5 September 2024, the Applicant wrote to the Authority requesting a review of its decision. The Applicant did not agree with the Authority’s reasons for withholding information from him and he argued that disclosure of this information was in the public interest. The Applicant also raised his concern that the Authority had not identified all of the information falling within the scope of his request.
4. The Authority notified the Applicant of the outcome of its review on 2 October 2024. The Authority upheld its original response regarding the withholding of information under regulation 10(4)(e). The Authority also carried out fresh searches and identified a number of emails that it subsequently partially disclosed to the Applicant, with some information withheld under regulations 10(4)(e) and 11(2) of the EIRs.
5. On 10 October 2024, 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 disagreed with its reasons for withholding information from him.

He also asked the Commissioner to take into account the dissatisfaction he had raised in his requirement for review, which included concerns that not all relevant information had been disclosed.

Investigation

6. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
7. On 8 November 2024, 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.
8. 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 steps the Authority had taken to locate information captured by the request and the Authority's reasons for withholding some internal communications and legal advice under regulation 10(4)(e) of the EIRs.

Commissioner's analysis and findings

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

Handling in terms of the EIRs

10. The Authority considered and responded to the Applicant's request in accordance with the EIRs, having concluded that the information requested was environmental information as defined in regulation 2(1) of the EIRs.
11. Where information falls within the scope of this definition, a person has the right to access it (and the public authority has a corresponding obligation to respond) under the EIRs, subject to various restrictions and exceptions contained in the EIRs.
12. The Authority submitted that the information requested by the Applicant was related to a specified planning application and concerned land development. The Authority explained that information about planning applications will usually be environmental information, given that the information will, in most circumstances, explicitly relate to plans and developments which will have a direct impact on the land use and landscape of a particular area. It argued that the built environment and changes to it will, by definition, impact substantially on the environment in many ways, both directly and indirectly.
13. The Commissioner has considered the subject matter of the request, together with the information falling within the scope of the request and is satisfied that this is "environmental information" as defined in regulation 2(1) of the EIRs.
14. The Commissioner accepts that the information covered by the request is information which relates to measures (including administrative measures as referred to in paragraph (c)) affecting or likely to affect the elements and factors referred to in paragraph (a) of that definition. Consequently, he considers the information to comprise in its entirety

environmental information, as defined in regulation 2(1) of the EIRs. The Commissioner is therefore satisfied that the Authority was correct to consider the Applicant's information request under the EIRs.

15. The Applicant has not disputed the Authority's decision to handle his 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 environmental information available

16. 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.
17. 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)).
18. 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.

The Authority's change of position

Parts (i) and (ii) of the Applicant's request

19. During the investigation, the Authority identified, and disclosed in full, some additional information which fell within scope of parts (i) and (ii) of the request.
20. As this information had not been identified and considered for disclosure in the Authority's review (at the latest), the Commissioner must find that the Authority failed to comply with regulation 5(1) of the EIRs.

Parts (iii) and (iv) of the Applicant's request

21. During the investigation, the Authority changed its position in relation to parts (iii) and (iv) of the Applicant's request. In these parts of the request, the Applicant sought information related to specified enforcement notices. Following reconsideration, the Authority informed the Applicant on 1 August 2025 that it did not hold any information captured by these parts of his request.
22. If a public authority does not hold the information requested, it must issue a notice under regulation 10(4)(a) of the EIRs to that effect. Regulation 13(b) of the EIRs provides that if a request to make environmental information available is refused by a public authority in accordance with regulation 10, the authority must provide a notice in writing explaining which exceptions are being relied upon (subject to certain qualifications which are not relevant in this case).
23. In this case, the Authority failed to issue a notice to the Applicant, under regulation 10(4)(a) of the EIRs, to the effect that it did not hold the information requested in relation to parts (iii) and (iv) of his request at the time of responding to his requirement for review (at the latest). Had it done so, it is highly likely that the Applicant would have had a better sense of what the Authority's position was in respect of the specific information he had requested, including the reasons for the absence of information he expected the Authority to hold.

24. The Commissioner must therefore find that the Authority failed to comply with regulation 13(b) of the EIRs in this respect.

Documents 34, 35 and 36

25. During the investigation the Authority withdrew its reliance on regulation 10(4)(e) in relation to documents 34, 35 and 36, and it disclosed these documents to the Applicant, in an update on 1 August 2025. It explained that it had previously disclosed documents 34, 35 and 36 to the Applicant in its review outcome (pages 184 and 185 of the review outcome) and therefore it was not withholding them under regulation 10(4)(e).

Documents 41 and 42

26. The Authority also reconsidered its position in relation to documents 41 and 42 and concluded that the exception in regulation 10(4)(e) did not apply to these two documents. It provided the Applicant with a copy of these documents on 1 August 2025.
27. Given the Authority's change of position, the Commissioner must find that the Authority was not entitled to rely on regulation 10(4)(e) to withhold information in documents 41 and 42, and in doing so, it failed to comply with regulation 5(1) of the EIRs.

Searches

28. During the investigation the Authority was asked to provide detailed information regarding the searches it had carried out. Specifically, the Authority was asked for details of the search terms it had used to interrogate its resources, and it was asked to identify the datasets that were searched by each individual who had carried out searches. The Authority was also asked to provide the Commissioner with an updated schedule of documents, which clearly indicated the information that had previously been disclosed to the Applicant and what exceptions were being applied to each document that was still being withheld.
29. The Authority provided the Commissioner with this information, but it noted that as two individuals were no longer employed, the evidence it had already provided to the Commissioner was the only information it had in relation to those individuals. The Authority also provided the Commissioner with a document that contained its final position on the information requested by the Applicant.
30. The investigating officer noted that this "final position" appeared to indicate that the Authority had identified information for disclosure which it had not yet released to the Applicant. The Authority was asked for evidence that the information marked up in this "final position" had been provided to the Applicant.
31. In response to this letter, the Authority contacted the Applicant on 1 August 2025 and provided him with information that comprised its "final position" on his information request. This disclosure included additional information not previously disclosed to the Applicant.
32. The Applicant remained dissatisfied following the Authority's additional disclosure on 1 August 2025. He still had concerns that specific information he expected the Authority to hold, including cover emails for information that had been disclosed, had not been identified.
33. The Authority described the searches it had carried out in order to identify information falling within scope of the Applicant's request. The Authority explained that information was generally held in its planning files, including the planning software Idox, but that it had also asked individual officers across relevant departments, including the Chief Executive, to carry out searches of their mailboxes and personal files.

The Authority provided the Commissioner with the names of each officer that conducted searches, along with their comments on whether information had been identified or not.

34. By way of context, the Authority explained in detail how its planning enforcement function operated. The Authority stated that its planning enforcement team carried out investigations of alleged, unauthorised developments. It explained that an enforcement notice could be issued if the Authority was satisfied, after a planning enforcement investigation, that there was a breach of planning control and it was expedient to issue such a notice, taking into account the provisions of the development plan and any other material considerations.
35. The Authority submitted that in the case of the two planning enforcement investigations referred to by the Applicant in his original request, neither of these had resulted in an enforcement notice being issued.
36. 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, which falls within the scope of the request under consideration.
37. Having considered the submissions from both parties, the Commissioner is satisfied that, by the end of his investigation, the Authority had taken adequate and proportionate steps to establish whether it held the information requested. He considers that the Authority's searches were reasonable in the sense of who it asked to carry out the searches and the locations searched, and he is satisfied that the searches were capable of locating the information falling within scope of the request.
38. The Commissioner will now go on to consider the information that the Authority continues to withhold under regulation 10(4)(e) of the EIRs.

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

39. The information withheld by the Authority under regulation 10(4)(e) comprised 50 emails.
40. 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.
41. 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.
42. 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)).
43. Having considered the withheld information under this exception, the Commissioner is satisfied that this information forms internal communications and therefore the exception in regulation 10(4)(e) of the EIRs is engaged.

44. 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

45. 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.
46. 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.

The Applicant's comments on the public interest

47. The Applicant submitted that he believed disclosure of the information was in the public interest. To support this, he provided the Commissioner with detailed arguments about his personal relationship to the subject of the request and his concerns about the Authority's handling of the planning process regarding the specified development site. These arguments will not be repeated here due to their personal nature.
48. It was the Applicant's view that, based on evidence received through other FOI requests, he had evidential grounds the Authority was withholding the information because its disclosure would evidence misconduct and unlawful acts.
49. The Applicant stated that he believed he was subject to prejudicial behaviours by the Authority in their withholding of the information he requested. He argued that the Authority's refusal to disclose was "based on who we are".
50. The Applicant considered that his request promoted transparency, accountability and understanding of public office and ensured transparency, open government and democracy.
51. The Applicant submitted that there was an evidential likelihood of wrongdoing, which the Authority was trying to hide from everyone as it had already been proved to commit illegal behaviour with this application and he had a plausible basis for assuming this.
52. The Applicant considered that the Authority was deliberately misleading the public by not giving the full information. He argued that if the Authority was able to do that in this case, then there was a likelihood it would do the same anywhere.

The Authority's comments on the public interest

53. The Authority withheld the information under regulation 10(4)(e) of the EIRs, which relates to internal communications, and it differentiated its public interest submissions in terms of whether these were internal legal advice discussions or other internal discussions.
54. The Authority submitted that there was a strong public interest in ensuring that any Scottish public authority can give and receive legal advice in confidence to facilitate the discharge of their functions as thoroughly and effectively as possible. It commented 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.

55. The Authority stated that there was considerable public interest in maintaining the principle of legal professional privilege and maintaining the confidentiality of communications between legal advisers and their clients, noting that it was essential that legal advice can be sought and provided without fear of disclosure and, potentially, taken out of context. The Authority submitted there was a strong public interest in ensuring that legal advisers were not constrained from providing advice by the thought of its potential disclosure, and that officers were not discouraged from seeking advice when required. Similarly, it argued that there was a strong public interest in ensuring that officers were able to obtain full and objective legal advice regarding the conduct of the Authority's affairs.
56. The Authority noted that previous decisions from the Commissioner had supported maintaining the confidentiality of such communications and it cited [Three Rivers District Council and others v Governor and Company of the Bank of England \(2004\) UKHL 481](#)¹ and [Department for Business, Enterprise and Regulatory Reform v Information Commissioner and O'Brien \[2009\] EWHC 164 \(QB\)](#)² in support of its position.
57. In relation to the other (non-legal) communications being withheld, the Authority recognised the public interest in ensuring that internal advice could be imparted freely and frankly and that options could be considered on a fully informed basis. Disclosure of the withheld information could discourage the Authority's staff from seeking internal advice and this could inhibit the frankness and openness of parties involved in seeking advice, if they had concerns that their advice would be made public.
58. The Authority submitted that the information was less likely to have been expressed or recorded as it had if it had not been for the private space in which it was communicated. The Authority argued that, if, for this reason, it was unable to obtain impartial, full and objective advice in respect of its actions, that would not be in the public interest.
59. For both types of internal communications, it was the Authority's opinion that the balance of the public interest strongly lay in favour of withholding the information.
60. In terms of the Applicant's comments about the Authority's conduct during the planning processes relevant to the specified development site, the Authority submitted that there was no suggestion that the Applicant did not understand decisions that had been made, simply because the Authority withheld some information. The Authority noted that it had disclosed some information in response to his request, and in response to a complaint and enquiry made by the Applicant.
61. Furthermore, the Authority noted that planning decisions are routinely open to public inspection and planning legislation allows an appeal process (the Local Review Board) and consideration by Scottish Ministers where appropriate. Regarding the particular development specified in the Applicant's request, the Authority provided details of the publicly available information and processes that the subject of the request had gone through.

¹ <https://publications.parliament.uk/pa/ld200001/ldjudgmt/jd010322/three-1.htm>

² [https://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWHC/QB/2009/164.html&query=\(title:\(+o%27brien+\)\)](https://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWHC/QB/2009/164.html&query=(title:(+o%27brien+)))

62. The Authority also provided comments on specific documents it was withholding under this exception, and explained why disclosure of this information would not be in the public interest. The Commissioner has taken account of these comments but will not reproduce them here as they may reveal the content of the withheld information.

The Commissioner's conclusions on the public interest

63. The Commissioner has considered all of the arguments presented to him in relation to the public interest in withholding or disclosing the withheld information, along with the withheld information itself.

64. While he acknowledges the Applicant's concerns in relation to the Authority's handling of planning matters, this is not a matter that the Commissioner can offer any comment on. It is not within the Commissioner's remit to comment on the effectiveness, or otherwise, of planning processes.

65. The Commissioner does, however, recognise the public interest in accountability and transparency with regard to the decision-making processes of public authorities, and in understanding how particular decisions are reached. In this regard, the inherent transparency of the planning process itself goes a considerable way to serving this purpose, as does the considerable amount of information already disclosed to the Applicant in response to his request (over 700 pages by the end of the investigation, not including other information already published online).

66. The Commissioner is not persuaded that the public interest in disclosing the remaining information is sufficient to outweigh the strong public interest in upholding the exception.

67. In all the circumstances, the Commissioner considers there is a greater public interest in protecting the Authority's ability to contemplate issues freely and to discuss and hold internal discussions (whether legal or non-legal) in reaching decisions.

68. Consequently, the Commissioner finds that the Authority was entitled to withhold this information under the exception in regulation 10(4)(e) of the EIRs.

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.

By failing to identify all information captured by the requests, the Commissioner finds that Authority failed to comply with regulation 5(1) of the EIRs.

The Commissioner finds that the Authority complied with the EIRs by correctly withholding some of the information under regulation 10(4)(e) of the EIRs.

However, by wrongly withholding documents 41 and 42 under regulation 10(4)(e), the Commissioner finds that Authority failed to comply with regulation 5(1) of the EIRs.

The Commissioner also finds that by failing to give notice, in accordance with the requirements of regulation 13(b) of the EIRs, that the Authority held no information within scope of parts (iii) and (iv) of the request, the Authority failed to comply with the EIRs.

Given that the Authority disclosed the additional information it had identified and documents 41 and 42 during the investigation, the Commissioner does not require the Authority to take any action in respect of these failures in responding to the Applicant's application.

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.

Euan McCulloch
Head of Enforcement

17 February 2026