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# Decision Notice 285/2025

## Legal advice relating to The Napier Hall in Old Kilpatrick

Applicant: Anonymous

Authority: West Dunbartonshire Council

Case Ref: 202300819

### Summary

The Applicant asked the Authority for legal advice relating to what the Authority can and cannot do with The Napier Hall in Old Kilpatrick. The Authority withheld the information as it considered it was legally privileged. The Commissioner investigated and found that the Authority had considered the request under the wrong legislation. The requested information was environmental, and the Authority should have considered the request under the EIRs. The Commissioner required the Authority to respond to the request under the EIRs.

### Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 39(2) (Health, safety and the environment); 47(1) and (2) (Application for decision by Commissioner).

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (definition of “the Act”, “applicant”, “the Commissioner” and paragraph (c) of the definition of “environmental information”) (Interpretation); 5(1) (Duty to make environmental information available on request); 16 (Review by Scottish public authority); 17(1), (2)(a), (b) and (f) (Enforcement and appeal provisions).

### Background

1. On 22 March 2023, the Applicant made a request for information to the Authority in relation to The Napier Hall in Old Kilpatrick. Among other things, he asked for:

"a copy of the legal advice provided to [the Authority's] staff and paperwork relative to the review of the premises in 2018 in relation to the legal status of The Napier Hall regarding opinion on what the [Authority] can and cannot do with the premises."

2. By way of background, the Authority received a community asset transfer application in relation to The Napier Hall, which led to a review in 2018 of the restrictions on any future disposal for the property.
3. The Authority responded on 20 April 2023. It informed the Applicant that the legal advice requested was privileged and therefore could not be provided.
4. On 18 May 2023, the Applicant wrote to the Authority requesting a review of its decision. He stated that he was dissatisfied with the decision because he believed it was fundamental that all involved parties were fully aware of the position regarding what the Authority can and cannot do with The Napier Hall.
5. The Authority notified the Applicant of the outcome of its review, which upheld its original decision and specified that it was withholding the legal advice requested under the exemption in section 36(1) of FOISA.
6. On 29 June 2023, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. He stated that he was dissatisfied with the outcome of the Authority's review because disclosure of the legal advice requested was crucial to the outcome of the future of The Napier Hall and the public interest favoured disclosure.

## **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 4 July 2023, and in line with section 49(3)(a) of FOISA, the Commissioner gave the Authority notice in writing of the application and invited its comments. The Authority was asked to send the Commissioner the information withheld from the Applicant. The Authority provided the information and its comments.
9. The case was subsequently allocated to an investigating officer.
10. During the investigation, the Authority was invited to comment on whether it considered the information requested was environmental information.

## **Commissioner's analysis and findings**

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

### ***FOISA or the EIRs?***

12. The relationship between FOISA and the EIRs was considered at length in [Decision 218/2007](#)<sup>1</sup>. Broadly, in light of that decision, the Commissioner's general position is as follows:

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<sup>1</sup> <https://www.foi.scot/decision-2182007>

- (i) The definition of what constitutes environmental information should not be viewed narrowly.
- (ii) There are two separate statutory frameworks for access to environmental information, and an authority is required to consider any request for environmental information under both FOISA and the EIRs.
- (iii) Any request for environmental information therefore must be handled under the EIRs.
- (iv) In responding to a request for environmental information under FOISA, an authority may claim the exemption in section 39(2).
- (v) If the authority does not choose to claim the section 39(2) exemption, it must respond to the request fully under FOISA: by providing the information; withholding it under another exemption in Part 2; or claiming that it is not obliged to comply with the request by virtue of another provision in Part 1 (or a combination of these).
- (vi) Where the Commissioner considers a request for environmental information has not been handled under the EIRs, he is entitled (and indeed obliged) to consider how it should have been handled under that regime.

13. Given the subject matter of the request and having considered the nature and content of the withheld information, the Commissioner, as stated above, asked the Authority to consider whether the request properly fell to be handled as a request for environmental information and therefore be responded to under the EIRs.

14. The Authority responded that it had not considered whether the EIRs applied. However, had it done so, it would have applied the exception in regulation 10(5)(b) of the EIRs as the information attracted legal advice privilege.

15. “Environmental information” is defined in regulation 2(1) of the EIRs. Where information falls within the scope of this definition, a person has a right to access it (and the public authority has a corresponding obligation to respond) under the EIRs, subject to the various restrictions and exceptions contained in the EIRs.

16. Given the subject matter of the request (i.e. legal advice relating to what the Authority can and cannot do with The Napier Hall) and having considered the content and nature of the withheld information, the Commissioner considers that the requested information is environmental information, as defined by regulation 2(1) of the EIRs (particularly paragraph (c)).

17. Given that the information requested is properly considered to be environmental information, the Authority had a duty to consider it in terms of regulation 5(1) of the EIRs. In failing to do so, the Authority failed to comply with regulation 5(1) of the EIRs.

#### ***Section 39(2) of FOISA – environmental information***

18. The exemption in section 39(2) of FOISA provides, in effect, that environmental information (as defined in regulation 2(1) of the EIRs) is exempt from disclosure under FOISA, thereby allowing any such information to be considered solely in terms of the EIRs.

19. In this case, as stated above, the Authority responded to the Applicant’s request solely under FOISA.

20. The Commissioner finds that the Authority would have been entitled to apply the exemption in section 39(2) of FOISA to the request, given his conclusion that the information requested was properly classified as environmental information.
21. As there is a separate statutory right of access to environmental information available to the Applicant, the Commissioner also accepts that, in this case, the public interest in maintaining this exemption and in handling the request in line with the requirements of the EIRs outweighs any public interest in disclosing the information under FOISA.

#### ***Regulation 16 of the EIRs***

22. Regulation 16 of the EIRs states that, on receipt of a requirement to conduct a review, the authority shall review the matter and decide whether it has complied with the EIRs, within 20 working days (regulations 16(3) and (4)). It also states that, where an authority has not complied with its duty under the EIRs, it shall immediately take steps to remedy the breach of duty (regulation 16(5))
23. Although the Authority responded to the Applicant's requirement for review, as explained above, this was a result of the Authority considering the request solely in terms of FOISA and not under the EIRs
24. It is apparent that the Authority failed to respond to the Applicant's request of 22 March 2023 in terms of the EIRs and therefore failed to comply with regulation 5(1) of the EIRs. It is also apparent that the Authority failed to carry out a review meeting the requirements of regulation 16 of the EIRs
25. The Commissioner therefore requires the Authority to provide a response to the Applicant's requirement for review of 18 May 2023, in terms of regulation 16 of the EIRs.

#### ***Next steps***

26. During the investigation, the Authority accepted, in response to a question from the investigating officer informed by information provided by the Applicant, that some of the withheld information was already in the public domain.
27. As stated above, the Authority said that it would have applied the exception in regulation 10(5)(d) to withhold the information requested if it had considered the request in terms of the EIRs. At the same time, it stated that "given [named employee] has since shared the privileged advice, the information is no longer protected by this exemption".
28. The Commissioner also notes that the Applicant considered that the Authority had interpreted his request too narrowly. The Applicant said that he had asked for the legal advice as to what the Authority could and could not do with The Napier Hall, but argued that it was "quite clear" that he was seeking "all legal advice in relation to [The Napier Hall] (past and present) and in addition paperwork relative the review of 2018".
29. While the Applicant may have intended for his request to have included all legal advice (past and present) in relation to The Napier Hall, the Commissioner must find that, on a plain reading of the terms of his request, it was limited to the legal advice relative to the 2018 review.
30. That said, the Commissioner requires the Authority to undertake fresh searches as part of its revised review outcome to ensure that it has identified all legal advice relative to the 2018 review. This is because the Applicant shared an email with the Commissioner from the Authority (dated 28 February 2023) in which the Authority stated that:

"The advice at the time of the community asset transfer application (which included a possible future disposal) and subsequent review was that provided the use remained within the purpose of the title deeds then this could be leased, transferred or disposed of provided it was within the terms of the original lease." [emphasis added]

31. The Applicant argued that this meant that the Authority had not disclosed to him the full legal advice regarding what the Authority could and could not do with The Napier Hall. In the Commissioner's view, this advice, if it consists of legal advice and is held by the Authority, would seem likely to fall within the scope of the Applicant's request, given that it appears to relate to the 2018 review.
32. In summary, when providing a response to the Applicant's requirement for review in terms of regulation 16 of the EIRs, the Commissioner requires the Authority to:
  - undertake fresh searches to ensure that all legal advice relative to the 2018 review has been identified and considered for disclosure (giving specific regard to paragraphs 30 and 31)
  - disclose all of the information falling within the scope of the request to which it considers no exception applies (e.g. because legal privilege has been waived)
  - ensure that it clearly identifies any information that it wishes to withhold and justifies and explains why that information is being withheld. (If it wishes to withhold information on the basis that it is legally privileged, it must satisfy itself that this privilege can apply and has not, for example, been waived.)

## **Decision**

The Commissioner finds that the Authority failed to comply with the requirements of regulations 5(1) and 16 of the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the Applicant's information request and requirement for review.

The Commissioner requires the Authority to provide a response to the Applicant's requirement for review, in terms of regulation 16 of the EIRs, by 22 January 2026. In doing so, he requires the Authority to have regard to the conditions set out in paragraph 32 above.

## **Appeal**

Should either the Applicant or the Authority wish to appeal against this decision, they have the right to appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days after the date of intimation of this decision.

## **Enforcement**

If the Authority fails to comply with this decision, the Commissioner has the right to certify to the Court of Session that the Authority has failed to comply. The Court has the right to inquire into the matter and may deal with the Authority as if it had committed a contempt of court.

**Euan McCulloch**  
**Head of Enforcement**

**8 December 2025**