



Scottish Information
Commissioner

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Decision Notice 287/2025

Governance relating to specified planning application

Authority: East Lothian Council

Case Ref: 202500553

Summary

The Applicant asked the Authority for information regarding governance, professional ethics and community involvement in relation to a specified planning application. The Authority considered that the information requested was environmental and refused to respond to the request on the basis that it was manifestly unreasonable. The Commissioner investigated and found that the Authority had been correct to consider the information environmental, but that it had provided inadequate submissions to evidence that the request was manifestly unreasonable. He therefore required the Authority to respond to the request.

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

Background

1. On 27 November 2024, the Applicant made a three-part request for information to the Authority in relation to a specified planning application. They subsequently clarified part (c) of their request of 28 November 2024. The three-part request, including the clarification, is set out in full in Appendix 1 (subject to some third party personal data redactions).
2. The Authority responded on 23 December 2024 in terms of the EIRs. It refused to comply with the Applicant's request on the basis that it considered it would be manifestly unreasonable to do so given the complexity of the request and the time and cost involved in providing the information (which it estimated to be a minimum of £855 and a total of 21 working hours).
3. On 6 January 2025, the Applicant wrote to the Authority requesting a review of its decision. They stated that they were dissatisfied with the decision for the following reasons:
 - they disagreed that their request was manifestly unreasonable given the information was on hand at a specified planning meeting, and so not complex or burdensome to provide
 - the Authority had failed to evidence the significant burden of responding to their request and they wished to see a cost estimate for each part of their request
 - the public interest favoured provision of the information requested
 - the Authority had been wrong to respond to their request under the EIRs given the information requested related to governance and was not environmental.
4. The Authority notified the Applicant of the outcome of its review on 21 January 2025, which fully upheld its original decision and maintained that the costings it provided were sufficiently detailed.
5. On 14 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. They stated that they were dissatisfied with the outcome of the Authority's review for the reasons set out in their requirement for review.

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 1 May 2025, the Authority was notified in writing that the Applicant had made a valid application, and the case was subsequently 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 relating to why it considered complying with the Applicant's request to be manifestly unreasonable.
9. Further submissions were also sought and obtained from the Applicant.

Commissioner's analysis and findings

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

Handling in terms of the EIRs

11. 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).
12. 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.
13. The Applicant challenged the Authority handling of their request under the EIRs (as opposed to FOISA). Firstly, the Commissioner must therefore determine whether all or part of the information requested by the Applicant is environmental information.
14. The Applicant submitted that their request related to concerns regarding governance, officials' conduct, professional ethics and a lack of community consultation regarding a planning application of local interest. They considered that the environmental consequences of that planning decision were stark but argued that their request concerned the overarching process by which that decision had been made, not environmental issues.
15. The Authority submitted that the information requested was environmental in terms of definitions (a) and (c) of regulation 2(1) of the EIRs. It considered that the Applicant's concerns provided "broad cover" but argued that the information falling within each part of their request was environmental information on the basis that all related to the planning application specified by the Applicant in their request.
16. Specifically, the Authority noted that part (a) of the Applicant's request referred to "safeguarding sight lines and supervision directives and guidance over playing fields" for the purposes of definitions 2(1)(a) and (c) of the EIRs. It also submitted that parts (b) and (c) of the Applicant's request concerned information "around" a planning application which itself was designed to affect the environment (and therefore also fell within definitions 2(1)(a) and (c)).
17. The Commissioner's [briefing on the definition of environmental information](#)¹ advises that planning matters are likely to fall principally within the definition of measures (including administrative measures) in part (c) of the definition of environmental information in regulation 2(1) of the EIRs. His guidance further states 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."
18. The Commissioner acknowledges that no types of information are excluded from the potential ambit of environmental information and that court cases have confirmed that environmental information, and the scope of the Directive, should be interpreted broadly.
19. Having considered the full terms of the Applicant's request (as reproduced in Appendix 1), the Commissioner is satisfied that the information falling within each part of the Applicant's

¹ <https://www.foi.scot/sites/default/files/2022-03/EIRBriefingsDefinition.pdf>

request is plainly connected (by virtue of the second paragraph of the request) to a specific planning application and is, in the circumstances, sufficiently connected to the effect on the environment of decisions made in respect of that planning application.

20. The Commissioner therefore accepts that this is information which relates to a measure (a planning application) affecting or likely to affect the elements referred to in paragraph (a) of the definition of environmental information in regulation 2(1) of the EIRs and therefore would fall within paragraph (c) of that definition. Consequently, he considers the information requested to comprise (in its entirety) environmental information.

Section 39(2) of FOISA – Environmental information

21. 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.
22. In this case, the Authority responded to the Applicant's request solely in terms of the EIRs, but it did not appear to claim the exemption in section 39(2) of FOISA. It also did not respond to a specific question from the Commissioner asking it to clarify its position in respect of that exemption.
23. However, the Commissioner accepts that the Authority would have been entitled to apply this exemption to withhold the information requested under FOISA, given his conclusion that it is properly classified as environmental information.
24. 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.
25. The Commissioner therefore concludes that the Authority would have been entitled to apply section 39(2) of FOISA and consider the Applicant's information request under the EIRs. However, the Authority technically should have applied the exemption in section 39(2) of FOISA.
26. The Commissioner does not require the Authority to take any action in response to this failure, as he is satisfied that the Authority would have been entitled to apply the exemption to the request. However, he would urge the Authority to ensure that it applies the exemption whenever it responds to a request for environmental information solely in terms of the EIRs.
27. In the circumstances, therefore, the Commissioner will consider this case, in what follows, solely in terms of the EIRs.

Regulation 5(1) of the EIRs – Duty to make environmental information available

28. 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.
29. 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)).

30. Under the EIRs, a public authority may refuse to make environmental information available if one or more of the exceptions in regulation 10 applies.

Regulation 10(4)(b) of the EIRs – Manifestly unreasonable

31. Regulation 10(4)(b) of the EIRs provides that a Scottish public authority may refuse to make environmental information available to the extent that the request for information is manifestly unreasonable. In considering whether the exception applies, the authority must interpret it in a restrictive way and apply a presumption in favour of disclosure. Even if it finds that the request is manifestly unreasonable, it is still required to make the information available unless, in all the circumstances, the public interest in doing so is outweighed by that in maintaining the exception.
32. The Commissioner's general approach is that the following factors are relevant when considering whether a request is manifestly unreasonable. These are that the request:
 - (i) would impose a significant burden on the public body;
 - (ii) does not have a serious purpose or value;
 - (iii) is designed to cause disruption or annoyance to the public authority;
 - (iv) has the effect of harassing the public authority; or
 - (v) would otherwise, in the opinion of a reasonable person, be considered manifestly unreasonable or disproportionate.
33. This is not an exhaustive list. Depending on the circumstances, other factors may be relevant, provided the impact on the authority can be supported by evidence. The Commissioner recognises that each case must be considered on its merits, taking all the circumstances into account.

The Applicant's submissions

34. The Applicant disagreed that their request was manifestly unreasonable. They submitted that a named individual had presented evidence to the specified planning committee (whose decision resulted in the removal a tree belt and hedgerow from a specified school playing field) which had failed to signpost a viable alternative which preserved both. They also said that the named individual had referred to various supporting information, as part of that evidence, which was not in the public domain.
35. The Applicant considered that Authority officials had failed to follow Scottish Government best practice by failing to consult the local community on an alternative scheme which would have preserved the tree belt/hedgerow. They said that they wished to understand if the specified experts named in part (b) of their request had (or had not) supported the Authority's evidence to the planning committee (whose decision had resulted in the removal of both).
36. The Applicant submitted that, while parties consulted in respect of the specified planning application were a matter of public record on the Authority's website, responses from those parties were not, and that it was in the public interest that these were available for scrutiny.
37. The Applicant further disputed that responding to their request would impose a significant burden on the Authority on the basis that:

- the information would be on hand, given officials had referred to that information at the planning committee meeting referred to in their request
- the information would not be complex to provide, much of it being statutory consultation information and, in all, related to one item at a single planning committee meeting.

The Authority's submissions

38. The Authority submitted that the Applicant's request lacked purpose or value given it sought information relating to an historic planning committee decision which could no longer be challenged given the passage of time (and which the Applicant themselves lacked standing to challenge, regardless).
39. The Authority considered it important that good governance was applied to requests for information but argued that the information underlying the Applicant's request had been available to the planning committee at the time of its decision (and therefore the value of the request was diminished given that decision had been taken and could no longer be challenged).
40. The Authority further argued that responding the request would impose a significant burden and divert important resources at a time that these were stretched and limited, and which would be better focussed on other matters.
41. As stated above, the Authority advised the Applicant that it would take (at least) 21 working hours and cost £855 to comply with their request.
42. The Authority said that the Applicant's request was broad, but that it was clear that the information requested related to the specified planning application, given the Applicant's reference to that application and to specific key terms (e.g. North Berwick High School and playing fields) and that relevant information was identified on that basis.
43. The Authority confirmed that the information itself was not complex in nature and had been gathered by officers for the purposes of the planning application (and been subsequently considered by the planning authority for the determination of planning permission).
44. However, the Authority submitted that, in the circumstances, a disproportionate level of time would be required to retrieve that information and to carry out appropriate redactions. It stated that the information was not in a shareable format and therefore there was time and complexity involved in converting that "raw" information into a suitable format and to then perform any necessary redactions.
45. The Authority further submitted that the information was of a level of detail which required "higher level" officers to obtain, and to identify appropriate redactions. Specifically:
 - Service Managers for Planning, and Education and Countryside (Grade 13) and a further official (Grade 11) would, given the "level of detail", have to obtain the information and identify appropriate redactions
 - a further official (Grade 7) would be required to review and carry out redactions.
46. Based on the above, the Authority estimated it would take 21 hours (as a minimum) to supply the information and it provided the following calculation:
Service Managers Planning; Education and Countryside (Grade 13): 7 hours * £59.60 = £417.20

Planning official (Grade 11): 4 hours * £44.20 = £176.80

Planning official (Grade 7): 10 hours * £26.10 = £261.00

21 hours * Grades 13, 11, 7 (variously) = £855.00

47. The Authority explained that complying with the Applicant's request would therefore divert "higher level" staff from running two service areas (Planning, and Education and Countryside) and another official from current work on "considerable" public consultation and engagement in relation to parking charges in the local authority area. It said that a less senior officer (Grade 7) would also be diverted from dealing with incoming planning applications.
48. The Authority further submitted that, in considering the burden of responding to the request it had taken into account the significant volume of staff time and effort in answering a range of requests, communications and complaints on this subject matter. It argued that, in all the circumstances, devoting further time to providing a response to this request would be unreasonable, disproportionate and not in the wider public interest, particularly given the matter had been through a formal planning process where community objections and views had been given due consideration.
49. The Authority noted that it did not charge for the information requested, as permitted under regulation 8 of the EIRs, as the time and cost required to produce a response were considered manifestly unreasonable. It also said that it did not extend the time scale for responding to the request, in terms of regulation 7 of the EIRs, to enable it to deal with the complexity it had identified, as such an extension would not have changed the underlying resource implications (which it considered to be manifestly unreasonable).

The Commissioner's view

50. The Commissioner has carefully considered the submissions from the Applicant and the Authority.
51. As a starting point, the Commissioner agrees that it was reasonable for the Authority to interpret the Applicant's request (parts of which were framed very broadly) as being limited to information relating to the planning application specified in their request.
52. The Commissioner's briefing on regulation 10(4)(b) of the EIRs² states that:

"Even if a public authority thinks that a request lacks serious purpose or value, the requester might, from a subjective and reasonable point of view, have a genuine desire and/or need to obtain the information. The requester is not obliged to share their motives for seeking the information with the public authority. The inclusion of this criterion simply recognises that some requests may be so obviously lacking in serious purpose or value that they can only be seen as manifestly unreasonable."
53. Having considered the Applicant's submissions, the Commissioner accepts that they have a genuine desire to obtain the information requested and, whether or not their concerns are well-founded, he does not consider that the request is so obviously lacking in serious purpose as to render responding to that request manifestly unreasonable.
54. As stated above, the Authority argued that, as the period for bringing challenge to a planning committee decision had passed, the request therefore lacked value. The Commissioner

² <https://www.foi.scot/sites/default/files/2023-07/BriefingRegulation104bManifestlyUnreasonableRequests.pdf>

does not accept this. While the utility of the information may, in that respect, be reduced, it does not follow that the request is so lacking in serious purpose or value as to render it manifestly unreasonable.

55. In terms of the significant burden described by the Authority, the Commissioner's briefing on regulation 10(4)(b) of the EIRs states that a request will impose a significant burden on a public authority where complying with it would require a disproportionate amount of time, and the diversion of an unreasonable proportion of its resources, including financial and human, away from other statutory functions.
56. There is no cost limit for determining what is deemed to be an excessive cost of compliance under the EIRs, as there is in FOISA. Under FOISA, public authorities do not have to comply with a request if the cost of compliance exceeds £600. Despite the EIRs themselves lacking a cost ceiling, the Commissioner recognises that there may be cases where the time and expense involved in complying with a request for environmental information means that any reasonable person would regard it as excessive.
57. As stated above, the Authority submitted that the cost of complying with the request would cost £855 and take 21 working hours (at a minimum). Had the Authority provided adequate evidence to explain how it had arrived at this estimate, then it is possible that the Commissioner would have agreed that complying with the request would be manifestly unreasonable. However, he is not satisfied that the Authority has provided him with adequate evidence in this case. Specifically:
 - the Authority has not provided him with any indication of how many documents fall within the scope of the request, the volume of information held (e.g. in Mb or Gb), how long identifying and/or redacting each document might take or any evidence of sample searches to substantiate the time cited
 - while the Authority referred to the burden of responding to the request in the context of other apparently voluminous correspondence received on this subject matter, it did not provide submissions to him explaining the relevance of this to the Applicant's request
 - despite being invited to do so, it did not (other than in general terms) provide further detail of: searches undertaken for relevant information, the steps involved in obtaining and providing the information, or the process of converting "raw" information into a "suitable format".
58. In the absence of any more specific evidence of how the Authority arrived at the cost estimate provided, the Commissioner cannot be satisfied that the Authority has provided a robust evaluation of the costs involved.
59. While it is feasible that complying with the information request in question would impose a significant burden on the Authority, particularly given the breadth of parts of that request, it falls to the Authority to satisfy the Commissioner that it has met the requirements of the legislation in each individual case.
60. In the circumstances, the Commissioner cannot conclude, on the basis of the submissions he has received, that the Authority was entitled to rely on the exception in regulation 10(4)(b) of the EIRs. As such, he is not required to go on to consider the application of the public interest test in regulation 10(1)(b) of the EIRs.

Handling matters

61. The Applicant was also dissatisfied that the Authority had failed to provide them with a more detailed estimate setting out the cost of responding to each part of their request (despite them having asked it to).
62. The Commissioner's [briefing on the content of notices](#)³ confirms that an authority which refuses to respond to a FOISA request on the grounds of excessive cost (section 12(1) of FOISA) is required to set out the projected costs in its refusal notice, in terms of section 16(4) of FOISA. However, there is no equivalent requirement under the EIRs where an authority has refused to respond to a manifestly unreasonable request.
63. The Commissioner is therefore satisfied that the Authority did not fail to comply with the EIRs by refusing to provide the more detailed cost estimate requested by the Applicant.

Next steps

64. The Commissioner requires the Authority to issue the Applicant with a revised review outcome (in terms of regulation 16 of the EIRs and otherwise than in terms of regulation 10(4)(b)). In doing so, the Authority must:
 - take adequate and proportionate steps to establish what information is held, using appropriate search terms and searching all locations and mediums where relevant information may be held
 - retain evidence of those searches in the event of a further appeal to the Commissioner
 - ensure that it clearly identifies any information that is being withheld and justifies and explains why that information is being withheld.

Decision

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

Specifically, the Commissioner finds that the Authority was not entitled to rely on the exception in regulation 10(4)(b) of the EIRs for information which would fulfil the Applicant's request.

The Commissioner therefore requires the Authority to respond to the Applicant's requirement for review in accordance with the requirements of the EIRs (other than in terms of regulation 10(4)(b)), by **23 January 2026**. In doing so, he requires the Authority to have regard to the conditions set out in paragraph 64.

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.

³ <https://www.foi.scot/sites/default/files/2022-03/BriefingContentOfNotices.pdf>

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.

David Hamilton

Scottish Information Commissioner

9 December 2025

Appendix 1: Text of information request

27 November 2024 request

“ ... This is a freedom of information request on all of the land shaded yellow on inset map 10 to East Lothian Local Development Plan and marked ‘Education Purpose’.

The reason for the request is that I consider that following Planning Committee meeting of 7 November 2023 ... [Authority] officials failed in governance, professional ethics and community involvement regarding planning application 23/00911/P for part of the above land.

... The information I require is:

- a) all reports, minutes, letters, notes, emails, meetings and phone calls between [a specified individual] and staff of the DofECS, the Head Teacher of NBHS or her staff, senior leadership and head of curriculum; [a specified individual] and/or [a specified individual]; any department or agent of the Scottish Government regarding safeguarding sight lines and supervision directives and guidance over playing fields;
- b) all reports, minutes, notes, emails meetings and phone calls between [a specified individual] and/or [a specified individual] with [a specified individual]; [a specified individual]; the author of the unpublished landscape report; [a specified individual] of Findlays; [a specified individual]; [a specified individual] and [a specified individual];
- c) all of the 14 comments documents listed on the subject application website, along with request letters or emails and any briefing relating thereto. Also the Countryside Team Manager report.

...”

28 November 2024 part c) clarification

“ ... If you go into the planning applications for Decided 23/00911/P you will see a section for consultee comments. Previously these were listed here but I see they no longer are. Although once listed, the comments were never made public - I wish to read these comments along with the Planning Dept requests of the consultees. There were originally 14 consultees but I see it refers to 8. I would like to see all 14.

...”