



Scottish Information
Commissioner
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Decision Notice 292/2025

Revenue from leasing the Inglis farmland for a Battery Energy Storage System

Authority: East Lothian Council
Case Ref: 202500717

Summary

The Applicant asked the Authority for the amount of money it had been offered to lease the Inglis farmland for the Battery Energy Storage System. The Authority withheld the requested information as it considered it to be protected by confidentiality. During the investigation, the Authority amended its position and argued that the information was commercially sensitive. The Commissioner investigated and found that the Authority had complied with the EIRs and was entitled to withhold the information.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2) and (6) (General entitlement); section 2(1) (Effect of exemptions); 39(2) Environmental information; 47(1) and (2) (Application for decision by Commissioner).

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (definition of “the Act”, “the applicant” and “the Commissioner”; paragraphs (a) and (c) of definition of “environmental information”) (Interpretation); 5(1) (Duty to make environmental information available on request); 10(1), (2) and (5)(e) (Exceptions from duty to make environmental information available); 17(1), (2)(a) and (b) (Enforcement and appeal provisions).

Background

1. On 26 March 2025, the Applicant made a request for information to the Authority. She asked how much money the Authority had been offered (or were currently negotiating to be offered) on an annual basis, through leasing the Inglis farmland to Pegasus and/or Gresham for the Battery Energy Storage System (BESS).
2. The Authority responded on 16 April 2025. It withheld the information under regulation 10(5)(d) of the EIRs, on the bases that disclosure would, or would be likely to, prejudice substantially the confidentiality of the proceedings of the Authority.
3. On 24 April 2025, the Applicant wrote to the Authority requesting a review of its decision. She was dissatisfied with the Authority's response and stated that any finances in a public body (the Authority) should be fully transparent and open to public scrutiny. She argued that disclosure of the information was in the public interest.
4. The Authority notified the Applicant of the outcome of its review on 2 May 2025, upholding its original decision without modification.
5. On 7 March 2025, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. By virtue of regulation 17 of the EIRs, Part 4 of FOISA applies to the enforcement of the EIRs as it applies to the enforcement of FOISA, subject to specified modifications. The Applicant stated that the land was publicly owned and the Authority's finances should be open and transparent to the public.

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 28 May 2025, 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 regarding its reliance on regulation 10(5)(d) 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 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.
11. Where information falls within the scope of regulation 2(1) of the EIRs, 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.
12. The Commissioner is satisfied that the information covered by this request (information relating to the lease of land for a BESS site) is environmental information as defined in regulation 2(1) of the EIRs. In reaching this conclusion, the Commissioner has considered the identified information, along with paragraphs (a) and (c) of the definition of environmental information set out in regulation 2(1) of the EIRs, and he agrees with the Authority in categorising the information as environmental. He notes that the Applicant has not disputed the Authority's decision to handle her request under the EIRs.

Section 39(2) – Environmental information

13. The Authority confirmed that it wished to rely on 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.
14. In this case, the Commissioner accepts that the Authority was entitled to apply this exemption to the information requested, given his conclusion that it is properly classified as environmental information.
15. 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 requests 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.
16. 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.

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

17. 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.
18. On receipt of a request for environmental information, the authority must ascertain what information it holds falling within the scope of the request. Having done so, regulation 5(1) requires the authority to make the information available, unless a qualification in regulation 6 to 12 applies (regulation 5(2)(b)).
19. 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. In considering any of the exemptions, the authority must apply a presumption in favour of disclosure.

Authority's change of position

20. During the investigation, the Authority changed its position. It withdrew its reliance on regulation 10(5)(d) of the EIRs and submitted that it was now withholding the information under regulation 10(5)(e) of the EIRs. The Authority argued that disclosure of the requested information would prejudice substantially the confidentiality of commercial information, which is provided for by law to protect a legitimate economic interest.
21. The Authority subsequently provided the Applicant with its updated position, notifying her of this change of exception.
22. Having considered the Authority's submissions on its change of position here, the Commissioner has no option but to find that the Authority was not entitled to withhold the information under the exemption in section 10(5)(d) of the EIRs. Regulation 10(5)(e) – Confidentiality of commercial or industrial information
23. Regulation 10(5)(e) provides that a Scottish public authority may refuse to make environmental information available to the extent that its disclosure would, or would be likely to, prejudice substantially the confidentiality of commercial or industrial information where such confidentiality is provided for by law to protect a legitimate economic interest.
24. The Aarhus Convention: An Implementation Guide¹, which offers guidance on the interpretation of the Convention from which the EIRs derived, notes (at page 88) that the first test for considering this exception is whether national law expressly protects the confidentiality of the withheld information. The law must explicitly protect the type of information in question as commercial or industrial secrets. Secondly, the confidentiality must protect a “legitimate economic interest”: this term is not defined in the Convention, but its meaning is further considered below (paragraph 37).
25. Having taken this guidance into consideration, the Commissioner's view is that, before regulation 10(5)(e) can be engaged, authorities must consider the following matters:
 - i) Is the information publicly available?
 - ii) Is the information industrial or commercial in nature?
 - iii) Does a legally binding duty of confidence exist in relation to the information – express or implied?
 - iv) Would disclosure of the information cause, or be likely to cause, substantial harm to a legitimate economic interest?
26. In the following, the Commissioner will consider if the Authority was justified in withholding information under regulation 10(5)(e) of the EIRs.
27. As stated in many previous decisions, the disclosure or withholding of information in one case should not be taken to mean that information in a similar case would necessarily require to be disclosed or withheld. As the Commissioner has made clear in many other decision notices, each case must be considered separately and, on a case-by-case basis.

¹ [Aarhus Implementation Guide interactive eng.pdf](#)

Is the information publicly available?

28. The Authority submitted that the withheld information was not publicly available.
29. The Commissioner has examined the withheld information and he accepts that it is not in the public domain.

Is the information commercial or industrial in nature?

30. The Authority explained that the information consisted of the value of rent held within a Lease Agreement and the value of Option Fees and Option Extension Fees held within an Option Agreement between the Authority and Gresham House Asset Management Limited (Gresham).
31. Having considered the withheld information, together with the submissions from the Authority, the Commissioner accepts that the information is commercial in nature.

Does a legally binding duty of confidence exist?

32. In terms of regulation 10(5)(e) of the EIRs, confidentiality “provided by law” will include confidentiality imposed on any person under the common law of confidence, under a contractual obligation, or by statute.
33. The Authority confirmed that a legally binding duty of confidence existed in relation to the information contained in the Option Agreement and the Lease Agreement. It submitted that each agreement imposes an express duty of confidentiality in the form of confidentiality clauses barring the Authority from disclosing the information requested. The Authority provided the Commissioner with text from the Lease Agreement and the Option Agreement, to support its position.
34. The Commissioner does not accept that contractual terms or custom and practice, of themselves, mean that all information identified should be, or will be, automatically considered confidential. To accept such a proposition would essentially give public authorities the ability to withhold such information under the EIRs, regardless of whether the information in question is confidential. The Commissioner is required to focus on the nature of any withheld information to determine whether a duty of confidence should stand.
35. Having reviewed the withheld information, the Commissioner considers that the information is not generally accessible to the public already, it was communicated in circumstances importing an obligation of confidentiality and unauthorised use or disclosure of the information would be to the detriment of the party communicating it.
36. In the circumstances, the Commissioner is therefore satisfied a legally binding duty of confidence exists in relation to the information.

Would disclosure of the information cause, or be likely to cause, substantial harm to a legitimate economic interest?

37. The term “legitimate economic interest” is not defined in the EIRs. In the Commissioner’s view, the interest in question should be financial, commercial or otherwise “economic” in nature. The prejudice to that interest must be substantial; in other words, it must be of real and demonstrable significance.
38. The Authority stated that no lease was currently in place regarding the subjects of the request, and the Option and Lease Agreements set out the terms of payment to the Authority for the land.

39. The Authority explained this meant that Gresham had the right, but not the obligation, to enter into a lease at a later date — within a set timeframe and under pre-agreed conditions.
40. The Authority noted that disclosure, in response to an information request, was disclosure to the general public, not just to the Applicant. It stated that publicly disclosing the information requested, would allow Gresham's competitors to gain access to Gresham's pricing, allowing those competitors to adjust their rates and gain an unfair advantage when tendering for similar contracts in future, thereby causing substantial harm to Gresham's legitimate economic interests.
41. The Authority submitted that disclosure would also undermine its own legitimate economic interests in attracting contractors and achieving Best Value, and it would open it up to legal action by Gresham. It asserted that the contractor (Gresham) shared this information with the Authority on the basis that it would not be released into the public domain. It argued that publication of this information, given the existence of explicit confidentiality clauses, would serve as a deterrent to other contractors looking to do business with the Authority.
42. The Commissioner considers that disclosure of the withheld information in this case would be likely to prejudice the legitimate economic interests of Gresham. He notes that Gresham is an asset management company that identifies investment opportunities for clients. The Commissioner accepts that Gresham works in a competitive environment, where other asset managers and specialist investors may be bidding for the same land or assets. He also accepts that disclosure of the information contained in Lease and Option Agreements would enable Gresham's competitors to determine its pricing strategy and undercut it in future purchases/investments.
43. Moreover, the Commissioner considers that disclosure of the information would also be likely to prejudice the legitimate economic interests of the Authority. He accepts that disclosure of the information, which has been protected by explicit confidentiality clauses, would act as a deterrent to other contractors, who would be less willing to enter into business with the Authority, for fear of commercially sensitive information being disclosed. The Commissioner considers that if the Authority is unable to attract the most competitive contractors, it is unlikely to achieve Best Value, as it will likely have a smaller pool of contractors to choose from.
44. Overall, the Commissioner is satisfied that the Authority was entitled to apply the exception in regulation 10(5)(e) of the EIRs to the information falling within the scope of the request. He accepts that disclosure of this information would allow a competing company to gain significant insight into Gresham's pricing and would, to some extent, be likely to negatively affect the Authority's ability to obtain best value for money.

The public interest test

45. Having accepted that the exception in regulation 10(5)(e) applies to the withheld information, the Commissioner is required to consider the public interest test in regulation 10(1)(b) of the EIRs.
46. This states that a Scottish public authority may only withhold information to which an exception applies where, in all the circumstances, the public interest in making the information available is outweighed by the public interest in maintaining the exception.

The Applicant's comments on the public interest

47. The Applicant argued that Authority should disclose financial information related to the BESS development, on the grounds of public interest, transparency, and potential conflict of interest.
48. The Applicant stated that the land was publicly owned, and the Authority, a public body, had both approved the planning application and stood to gain financially from the development. The Applicant considered this to be a clear conflict of interest.
49. The Applicant asserted that the BESS site is located only 39 metres from a children's playpark and residential housing, raising serious community concerns regarding health and wellbeing.
50. The Applicant clarified that these concerns were evidenced by a growing grassroots movement, including:
 - i) Over 250 members in a recently formed group (*Communities Against Cockenzie BESS*),
 - ii) Active Facebook discussions, and
 - iii) A petition lodged with the Scottish Parliament ([PE2157](#))

The Authority's comments on the public interest

51. The Authority acknowledged the public interest in ensuring that it was open and transparent regarding the spending of public funds, and it recognised that the disclosure of information demonstrating a conflict of interest held by elected members would likely – if present – be in the public interest.
52. The Authority noted that the Applicant had argued that the public interest favoured disclosure, citing concerns raised by herself and community members regarding community health, well-being, and a potential conflict of interest held by the Authority at the Planning Committee concerning the development of the site at Cockenzie Power Station.
53. However, the Authority stated that the Applicant had not demonstrated how the disclosure of the information would effectively serve the public interest in these areas. It contended that there was no relation between the rates of rent and options held in these Agreements and community health. Additionally, it argued that there was no clear link between this particular information and any potential conflict of interest held by Planning Committee members.
54. The Authority submitted that there was other non-exempt information, including published information, available to the Applicant to seek transparency regarding the Authority's spending and Councillors' declared interests.
55. The Authority submitted that the requested information comprised substantial elements of Gresham's business and finances. It stated that disclosing the information would result in substantial harm to the Authority's legitimate economic interests, making it less able to fulfil its duty to obtain value for money through the management of contracts in the future. In turn, it submitted that this disclosure would be detrimental to the public interest in ensuring that public monies were spent effectively.
56. In its response to the Applicant's arguments in paragraphs 38 – 40, the Authority confirmed that it did not dispute that it owned the land in question or that it had an obligation to manage public money effectively.

57. The Authority rejected the Applicant's arguments that the decision to grant planning permission represented a conflict of interest for Planning Committee members. Furthermore, it did not see how the disclosure of the specific rates requested would provide any evidence to support the applicant's claim.
58. The Authority submitted that it held a great deal of financial information that was already open to public scrutiny or was subject to disclosure under information legislation. However, it explained that, in some circumstances, the public interest lay in keeping certain financial information confidential, as recognised by the relevant exceptions in the EIRs. It argued that in this instance, the public interest lay in maintaining the exception.

The Commissioner's view on the public interest

59. The Commissioner has carefully considered the submissions made by both parties on the public interest test, together with the information (which he has previously found to be excepted from disclosure under regulation 10(5)(e) of the EIRs).
60. The Commissioner acknowledges the general public interest in transparency and accountability, particularly in relation to the expenditure of public funds. He also recognises the personal interest the Applicant has in the withheld information and that the information will likely also be of interest to other affected parties. He understands the genuine concerns that communities have regarding the placement of BESS sites, particularly when they are so close to residential housing and playparks.
61. The Applicant provided the Commissioner with a leaflet about the campaign against the BESS site. This leaflet outlines various risks associated with locating the site so close to a community, including the risk of out of control fires, highly toxic fumes and groundwater pollution, ongoing noise and health impact and a lack of emergency planning. It refers to [UK government guidance](#)² which states (at paragraph 3.1.1) that thermal runaway fires, explosions and the release of toxic gases "pose a serious risk to the immediate vicinity of any BESS". It is clear that there are genuine risks and concerns regarding the placement of BESS sites.
62. While the Commissioner understands the Applicant's concerns about conflict of interest, he must also bear in mind that there is extensive provision in place to keep a local authority's determination of planning applications apart from its other functions.
63. The Commissioner accepts the Authority's position that no lease was in place regarding the subjects of the request, and that Gresham had the right, but not the obligation, to enter into the lease at a later date. He recognises this means that the withheld information in this case does not relate to expected or definite income, rather it relates to potential income that the Authority may obtain if Gresham enters into the lease.
64. In the Commissioner's view, it is in the public interest for organisations operating in a commercial environment to be able to compete fairly in a competitive market. He considers it is in the public interest that Gresham are not disadvantaged as a result of having entered into contractual arrangements with the Authority, with a consequential adverse impact on their ability to participate effectively in future competitive exercises.
65. The Commissioner also accepts that, to some extent, other organisations might be discouraged from seeking to do business with the Authority for fear of commercially sensitive

² <https://www.gov.uk/government/publications/grid-scale-electrical-energy-storage-systems-health-and-safety/health-and-safety-in-grid-scale-electrical-energy-storage-systems-accessible-webpage>

information being disclosed to the world-at-large (which is the effect of disclosure under the EIRs).

66. As noted above, the Commissioner has already concluded that disclosure of this information would be likely to cause substantial prejudice to the legitimate economic interests of both Gresham and the Authority. He considers that such harm would also be contrary to the public interest.
67. The Commissioner finds this to be a case where the public interest is finely balanced. He acknowledges the concerns that the Applicant, and the local community, have regarding the potential site of this BESS, but he is not persuaded that disclosure of the information that is being withheld in this case would address those public interest arguments. The information in this case is purely financial and does not relate to the decision-making processes of the Authority.
68. Having carefully considered the public interest arguments put forward by both parties, the Commissioner has concluded that the public interest in making the information available is outweighed by the public interest in maintaining the exception in regulation 10(5)(e) of the EIRs.
69. On balance, the Commissioner is satisfied that the Authority was entitled to withhold the information under the exception in regulation 10(5)(e) of the EIRs

Decision

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

Appeal

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

Euan McCulloch
Head of Enforcement

11 December 2025