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Commissioner  
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# Decision Notice 310/2025

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## Planning application: details of road construction consent, road opening consent and dropped kerb consent

Authority: East Dunbartonshire Council  
Case Ref: 202500656

### Summary

For a specified planning application, the Applicant asked the Authority for information related to road construction, road opening and dropped kerb consent. The Authority disclosed some information to the Applicant, who raised his concern that other information captured by the request had not been identified.

The Commissioner investigated and found that the Authority partially failed to comply with the EIRs because it had not informed the Applicant that it held no information relating to road opening or dropped kerb consent.

### 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" and "the Commissioner") (Interpretation); 5(1) (Duty to make environmental information available on request); 13(b) (Refusal to make information available); 17(1), (2)(a) and (b) (Enforcement and appeal provisions).

Aarhus Convention article 4(5)

Directive 2003/4/EC article 4(5)

## **Background**

1. On 20 February 2025, the Applicant made a request for information to the Authority. He asked for information recorded in whatever format, held, sent or received by the Authority relating to planning application TP/ED/21/0365 in relation to any application for road construction consent, road opening consent or dropped kerb consent.
2. The Authority responded on 20 March 2025, partially disclosing some documents with redactions under regulations 10(5)(e) and 11(2) of the EIRs. Under section 25 of FOISA, the Authority directed the Applicant to further information which was available on the planning portal of its website.
3. On 21 March 2025, the Applicant wrote to the Authority requesting a review of its decision. The Applicant stated that he was dissatisfied with the decision because he did not consider that the Authority had disclosed all the information captured by his request. He raised his specific concern that not all of the relevant application forms had been identified and disclosed.
4. The Authority notified the Applicant of the outcome of its review on 22 April 2025. It did not uphold the findings of its original response. Instead, the Authority identified further information which fell within scope of the request and it disclosed this to the Applicant.
5. On 29 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. The Applicant stated he was dissatisfied with the outcome of the Authority's review because he considered that the Authority held additional information which it had not identified or disclosed to him.

## **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 20 May 2025, the Authority was notified in writing that the Applicant had made a valid application. 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 searches that the Authority had carried out and the application forms that the Applicant considered should be held by it.

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

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

### ***Scope of the investigation***

10. The investigation will examine whether the Authority has identified all of the information falling within the scope of the Applicant's request.

### ***Handling in terms of the EIRs***

11. The Authority considered and responded to the Applicant's request and requirement for review 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 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.
13. The Applicant requested information about a planning application for a residential development, including associated infrastructure such as roads and dropped kerbs, on a specific plot of land. 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 (particularly paragraphs (a) and (c) of that definition). 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.

### ***Regulation 5(1) – 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 scope of the request. Having done so, regulation 5(1) requires the authority to make that information available, unless a qualification in regulations 6 to 12 applies (regulation 5(2)(b)).
18. Under the EIRs, a public authority may refuse to make environmental information available if one of the exceptions in regulation 10 applies and, in all the circumstances of the case, the public interest in maintaining the exception or exceptions outweighs the public interest in making the information available.

### ***The information held by the Authority***

19. In this request, the Applicant asked for all information sent, received and held by the Authority regarding any application for road construction consent, road opening consent or dropped kerb consent made in relation to planning application TP/ED/21/0365.
20. 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.

*The Applicant's comments*

21. The Applicant noted that he had been provided with 12 blank forms in response to a separate information request (and he provided the Commissioner with copies of these 12 forms). These forms were numbered CC1 to CC10 (and there were 3 forms for CC10 – so 12 in total).
22. The Applicant explained that he understood that these 12 forms were involved in the application process, but of the 16 documents disclosed by the Authority, it had only disclosed 3 of these 12 forms. Additionally, the Applicant commented that that all the information provided to him appeared to be related to road construction consent. He noted that none of the information related to road opening consent or dropped kerb consent.
23. The Applicant explained that he understood that road opening consent was required where the road outwith the development was to be opened to connect to utility infrastructure. He stated that he was unable to tell from the publicly available plans if such connections were to be made in TP/ED/21/0365. The Applicant commented that the Authority had not advised him that road opening consent was not required for this development.
24. He further commented that the Authority had not informed him that dropped kerb consent was not required for this development.
25. As the Authority had not advised him that road opening consent and dropped kerb consent were not required for this application, the Applicant argued that it was reasonable for him to have requested this information from the Authority.
26. The Applicant submitted that he was not satisfied that the Authority had identified all of the relevant information captured by his request. He believed that the Authority held further information which it had not disclosed to him.

*The Authority's comments*

27. The Authority interpreted the request as seeking the road construction consent, road opening consent or dropped kerb consent for a specific planning application (TP/ED/21/0365).
28. The Authority was asked about the forms which the Applicant considered were relevant to his request; the forms numbered CC1 to CC10 inclusive (with form CC10 spread across three separated documents to make up the 12 forms that the Applicant referred to). The Authority explained that the relevant forms had been completed by the developer but that not all of the forms were covered by the Applicant's request. By way of an example, it noted that form CC5 related to local authority adoption of footpaths, which might not be relevant to every planning consent [and which was not part of this request].
29. The Authority noted that of the 12 forms referenced by the Applicant, only forms CC1 and CC4 related to the granting of road construction consent.

It added that form CC9 had a check list part which showed if a submission included dropped kerbs for vehicle access or pedestrian crossings, and it also included cycle lanes. The Authority noted that CC9 did not form part of the granting of construction consent or road opening.

30. The Authority explained that where development of land or property was sought through planning permission, any associated application for dropped kerb permission would be available in the publicly available planning files [on the planning portal].
31. The Authority stated that there was no application for dropped kerb consent for applications approved through the planning process, and it had advised the Applicant of this..
32. It noted that any existing property that wanted to add a dropped kerb could do so by submitting a dropped kerb application. The Authority submitted that dropped kerb applications for existing properties were held within a dedicated folder in its electronic files. The Authority explained that it had carried out searches of these files in relation to the development site location. It concluded, given that there was no application for dropped kerb on the publicly available planning files or in the electronic files for existing properties, that no such information existed for this particular development site. The Authority provided the Commissioner with a screen shot, evidencing the search it had carried out on dropped kerb consent, and which had showed that no records were held.
33. The Authority explained that road opening consent was required under section 56 of the Roads (Scotland) Act 1984<sup>1</sup>, to carry out changes to the road and it believed that there should be a road opening permit for planning application TP/ED/21/0365, which was the subject of the Applicant's request. However, it commented that following repeated searches, it could find no record of such a permit in its files. The Authority submitted that this information, if held, would have been stored in a specific file location which held all applications received under section 56 and section 109 of the Roads (Scotland) Act 1984 and it provided a screenshot of the search it had carried out in this location. The Authority submitted that it did not hold the road opening consent information captured by the request.

#### ***The Commissioner's conclusions***

34. The Commissioner has carefully considered the submissions from the Applicant and the Authority.
35. It is clear that the Applicant's dissatisfaction relates to his expectation that the Authority should hold completed forms for road construction consent, road opening consent and dropped kerb consent for the specified planning application; an expectation that is not unreasonable given that the Authority had not told the Applicant that it did not hold any information that related to road opening consent or dropped kerb consent. The Applicant had previously obtained blank copies of the forms CC1 to CC10, and he expected that these forms would have formed part of the planning application for TP/ED/21/0365.
36. Notwithstanding the Applicants expectations, the Commissioner is satisfied that the Authority had, by the end of his investigation, 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 were asked to carry out the searches and the locations searched – he finds that the searches would be capable of locating any information falling within scope of the request.

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<sup>1</sup> <https://www.legislation.gov.uk/ukpga/1984/54/section/56>

37. Furthermore, the Commissioner is satisfied that the Authority has disclosed, or directed the Applicant to, all of the information it holds in relation to road construction consent for the specified planning application and, in this respect, he is satisfied that the Authority complied with regulation 5(1) of the EIRs.
38. In its submissions to the Commissioner, the Authority stated that it had advised the Applicant that there was no dropped kerb consent for applications approved through the planning process. However, it is clear from the Authority's response to the Applicant's request and requirement for review that he was not informed that the Authority did not hold any information related to road opening consent or dropped kerb consent for this particular planning application. Moreover, the Authority has not provided the Commissioner with any evidence to show that it had notified the Applicant that there was no dropped kerb consent for applications approved through the planning process.
39. While the Applicant believed and expected information related to road opening consent and dropped kerb consent to be held by the Authority – indeed, the Authority believed and expected it should hold information related to road opening consent – the Commissioner is satisfied, on balance, that this is not the case. Whether a public authority should hold information (which it does not hold) is not a matter for the Commissioner to decide.
40. If a Scottish public authority does not hold the information requested, the Commissioner considers it must give the applicant notice to that effect. Regulation 13(b) of the EIRs provides that if a request to make environmental information available is refused by a Scottish public authority in accordance with regulation 10, the authority must provide a notice in writing explaining the reasons for that refusal, including which exceptions are being relied upon (subject to certain qualifications which are not relevant in this case). While there is no direct obligation to apply the exception in regulation 10(4)(a) of the EIRs, it is apparent from Articles 4(5) of both the Aarhus Convention and Directive 2003/4/EC that notice to that effect should be given where the authority concludes that it does not hold the information: it would be bizarre if this were not the case, and the Commissioner is satisfied that regulation 13(b) should be read to include that obligation.
41. In this case, the Authority failed to issue a notice to the Applicant to the effect that it did not hold the information requested in relation to road opening or dropped kerb consent. Had it done so, it is highly likely that the Applicant would have had a better understanding 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. The Commissioner must therefore find that the Authority failed to comply with regulation 13(b) of the EIRs in this respect.
42. In all the circumstances, the Commissioner is satisfied, on the balance of probabilities, that the Authority does not (and did not, on receipt of the request) hold information in relation to road opening or dropped kerb consent with regard to planning application TP/ED/21/0365.

#### ***Engagement with the Commissioner's office***

43. The Commissioner has concerns about the Authority's handling of this appeal. Section 49(3) of FOISA compels the Commissioner to invite comments from public authorities. It is normal practice for authorities to take this opportunity to explain their handling of the request and to defend their position with evidence.

44. In this particular case, the Authority appeared to be extremely unwilling to engage with the Commissioner in a positive way, or to give its reasons for handling the request in the way that it did. The Authority's initial submissions were extremely brief and, on the whole, did not properly answer the questions put forward or provide the evidence that the Commissioner asked for.
45. The Authority was also initially unwilling to provide the Commissioner with the information that had been disclosed to the Applicant. A Scottish public authority must bear in mind that information disclosed under FOISA or the EIRs is disclosure to the wider public domain and, as such, should be disclosed to anyone who asks for it (including the Commissioner).

## **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.

The Commissioner finds that by disclosing, or directing the Applicant to, information related to road construction consent for the specified planning application, the Authority complied with the EIRs.

However, by failing to notify the Applicant that it held no information in relation to road opening consent or dropped kerb consent for the specified planning application, the Authority failed to comply with regulation 13(b) of the EIRs.

Given that the Commissioner is satisfied that the Authority does not (and did not, on receipt of the request) hold the information on road opening or dropped kerb consent, he does not require the Authority to take any action in respect of this failure, in response 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.

## **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**

**19 December 2025**