



Scottish Information
Commissioner
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Decision Notice 312/2025

Proposed sites for inclusion in development plan

Authority: East Lothian Council

Case Ref: 202500885

Summary

The Applicant asked the Authority for information relating to whether a specific area had been wholly or partially proposed in a call for sites for inclusion in a local development plan. The Authority refused to make the information available as it argued that the information was material in the course of completion, unfinished documents or incomplete data. The Commissioner investigated and found that the Authority failed to comply with the EIRs in responding to the Applicant's information 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) (Duty to make environmental information available on request); 10(1) and (2) and (4)(d) (Exceptions from duty to make environmental information available); 17(1), (2)(a), (b) and (f) (Enforcement and appeal provisions).

Background

1. On 9 April 2025, the Applicant made a request for information to the Authority. Referring to a map that the Authority had provided to him; he asked the following:

"Please can you provide the information as to whether the areas shown by the red lines on the map below have been wholly or partially proposed in the LDP2 call for potential sites for inclusion in the development plan. These are the fields either side of the new Markle bridge... If they have been proposed in the call for sites, please would you provide the information [the Authority] holds on these sites."

2. The Authority responded on 5 May 2025 in terms of the EIRs. It informed the Applicant that it was withholding the information requested under the exception in regulation 10(4)(d) of the EIRs.
3. On 9 May 2025, the Applicant wrote to the Authority requesting a review of its decision. He stated that he was dissatisfied with the decision because he disagreed that the exception in regulation 10(4)(d) of the EIRs applied and, even if it did, the public interest favoured disclosure.
4. The Authority notified the Applicant of the outcome of its review on 6 June 2025, which upheld its original decision without modification.
5. On the same date, 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. He stated that he was dissatisfied with the outcome of the Authority's review, for the reasons set out in his 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 17 June 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 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 answer specific questions.

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 under the EIRs, having concluded that the information requested was environmental as defined in regulation 2(1) of the EIRs.
11. Where information falls within scope of this definition, a person has a right to access it (and the public authority a corresponding obligation to respond) under the EIRs, subject to various restrictions and exceptions contained in the EIRs.

12. The Commissioner is satisfied that the information covered by the Applicant's request falls within the definition of environmental information set out in regulation 2(1) of the EIRs.
13. The Applicant has not disputed the Authority's handling of the request under the EIRs, and the Commissioner will consider the information solely in terms of the EIRs in what follows.

Section 39(2) of FOISA – Environmental information

14. 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. In this case, the Commissioner accepts that the Authority was entitled to apply this exemption to the information withheld under FOISA, 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 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.
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) and (2)(b) of the EIRs – Duty to make available environmental information on request

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, 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 provide that information to the requester, unless a qualification in regulations 6 to 12 applies (regulation 5(2)(b)).
19. 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)(d) – material in the course of completion, unfinished documents or incomplete data

20. Regulation 10(4)(d) of the EIRs provides an exception from the duty to make environmental information available, where the request relates to material, which is still in the course of completion, to unfinished documents or to incomplete data. Where a Scottish public authority refuses to make information available on this basis, it must state the time by which the information will be finished or completed (regulation 13(d)).
21. The Aarhus Convention: An Implementation Guide¹ provides guidance (at page 85) as to the type of material this exception is intended to cover. It describes the expression "in the

¹ <https://unece.org/environment-policy/publications/aarhus-convention-implementation-guide-second-edition>

course of completion" as relating to the process of preparation of the information or document and not to any decision-making process for the purpose of which the information or document has been prepared. It states that the mere status of something as a draft alone does not automatically bring it within the exception.

22. It also states that the words "in the course of completion" suggest that the term refers to individual documents that are actively being worked on by the public authority, and which will have more work done on them within some reasonable timeframe. Once these documents are no longer "in the course of completion" they may be released, even if they are still unfinished and even if the decision to which they pertain has not yet been resolved.
23. The withheld information (initially) provided by the Authority comprised a single document containing a map (hereafter referred to as "Document 1"). This is the withheld information considered in the text that follows. (During the investigation, the Authority identified further information falling within the scope of the request. This information is considered later in the decision notice.)

The Authority's submissions about the exception

24. By way of background, the Authority explained that the information requested related to a site which, along with many others, was (at the time of the request) being assessed by the Authority and external parties to determine its suitability for development.
25. The Authority confirmed that the boundary marking for the site as held at the time of the Applicant's request was an indicative shape provided by the developer as part of the call for sites. If sites were to be included as proposals for formal consideration as part of the Local Development Plan development process, they would be checked for access rights, ownership and suitability, and so the boundary shapes would be subject to change as part of this process.
26. According to the Authority, the boundary shape (as proposed) would be considered complete at the point where the proposed plan had been approved by Elected Members and any relevant amendments applied. Following this, the plan would be published as part of the statutory process.
27. Following the publication of the proposed plan, the Authority explained that all stakeholders would have twelve weeks to comment on any aspect of the proposed plan, which would then proceed to a period of examination, and any objections considered by an external Reporter.
28. The Authority submitted that the information regarding the proposed sites would be regarded as complete when it was "prepared for release to the general public along with [the Authority's] assessments, based on [the Authority's] agreed site assessment methodology." After this point, the public would be given the opportunity to view the proposals and comment on the suitability of the sites proposed.
29. Referring to the area marked out within the map provided by the Applicant as part of his request, the Authority explained that this was partially included in the developer's submissions in response to the call for sites but that "this did not in itself constitute a proposal". It said that the proposal was "developed over time in correspondence with [the Authority]" and was shaped by its site assessment process. Once completed, a sub-set of proposals would be selected and put to Elected Members for inclusion in the draft Local Development Plan, which would then be published and (as stated above) opened for comment by members of the public.

30. The Authority maintained that disclosure of the withheld information without the context of the Plan development process would be meaningless. It said that site proposals were put to the public as a managed stage of Plan development, and to disclose information that may be imminently subject to change had no real value to the public. In fact, it argued that such a disclosure may be misleading, resulting in confusion and undermining the statutory development process.

The Applicant's submissions about the exception

31. The Applicant explained that his request to the Authority concerned whether a housing site had been proposed in the call for sites, rather than whether the Authority was taking the proposal forward to the next stage of the process.
32. The Applicant submitted that this proposal (if it existed) had, therefore either already been received by the Authority (and hence was complete and not subject to change) or had not been made at all and so was not subject to change. The matter of whether a site had been proposed or not was complete, and the information (if it had been submitted to the Authority as a proposal) was also complete. He therefore disagreed that the information requested "may still be subject to change".

The Commissioner's view about the exception

33. Having considered the withheld information in Document 1 (i.e. the map), the Commissioner does not accept that it is information in the course of completion, an unfinished document or incomplete data.
34. The Authority has not provided any evidence to suggest that Document 1 is actively being worked on. In the circumstances, the Commissioner considers that Document 1 is a complete document for the stage of the process to which it relates. That it might be subject to change at a different stage of the process (which appears to be conditional on the proposal being included for formal consideration as part of the Local Development Plan development process) is not sufficient for the exception in regulation 10(4)(d) of the EIRs to apply.
35. To the extent that the Authority is concerned that disclosure of this information might mislead or cause confusion, it can choose to provide a commentary alongside this information, which places it in context or explains its limitations as it sees fit.
36. For these reasons, the Commissioner does not accept that the exception in regulation 10(4)(d) of the EIRs is engaged in relation to Document 1. As the Commissioner has found that the exception contained in regulation 10(4)(d) of the EIRs does not apply, he is not required to consider the public interest test in regulation 10(1)(b). He therefore requires the Authority to disclose Document 1 to the Applicant.

Further information located during the investigation

37. During the investigation and in response to questions from the Commissioner, the Authority located further information falling within the scope of the Applicant's request. Specifically, it identified eleven further documents (spanning over 100 pages).
38. The Commissioner must therefore find that the Authority failed to comply with regulation 5(1) of the EIRs by not identifying and considering this information for disclosure by the date of the Applicant's review outcome (at the latest).

39. The Authority applied the exception in regulation 10(4)(d) of the EIRs to withhold the eleven further documents in their entirety but it did not provide any further submissions on the application of the exception in addition to those previously provided in relation to Document 1.
40. For the same reasons that he found the exception in regulation 10(4)(d) of the EIRs did not apply to the withheld map, the Commissioner does not consider that the exception applies to the eleven further documents identified by the Authority during his investigation. However, it appears that some of the information within these eleven further documents includes third party personal data or other information that might have been provided by a third party without the expectation of disclosure.
41. In the circumstances, the Commissioner therefore requires the Authority to fully consider the information in the eleven documents for disclosure and to issue the Applicant with a revised review outcome in relation to that information. In doing so, the Authority must ensure that it considers the specific content of these documents for disclosure and, if it wishes to withhold any information, to clearly identify any such information and to justify and explain why it is being withheld.
42. The Commissioner would also reiterate that to the extent the Authority considers that disclosure of this information would be misleading and cause confusion, it can choose to provide a commentary with such information, which places it in context or explains its limitations as it sees fit.
43. The Commissioner must stress that it is fundamentally the responsibility of public authorities to identify the information it wishes to withhold and to justify and explain this. It is not his role to identify information that he considers an authority should have, or might wish to have, withheld. If an appropriate exemption under FOISA or exception under the EIRs has not been applied by an authority to withhold certain information, the Commissioner has the right to require disclosure of that information.

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 failed to comply with regulation 5(1) of the EIRs by:

- wrongly withholding the information requested under the exception in regulation 10(4)(d) of the EIRs
- failing to identify, until during his investigation, information relevant to the Applicant's request.

The Commissioner therefore requires to the Authority to:

- disclose Document 1 to the Applicant
- issue the Applicant with a revised review outcome (in terms of regulation 16 of the EIRs) in relation to the further information relevant to his request that it identified during his investigation, either disclosing the information or explaining why (in accordance with any relevant provision in the EIRs, except regulation 10(4)(d)) the information cannot be disclosed.

The Commissioner requires the Authority to take the above action, by **2 February 2026**.

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