



Scottish Information
Commissioner
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Decision Notice 317/2025

Information relating to a planning application at House of Rosskeen

Authority: Highland Council

Case Ref: 202500383

Summary

The Applicant asked the Authority for information about a specific planning application relating to the development at House of Rosskeen. The Authority disclosed some information to the Applicant (subject to redactions relating to personal data), but the Applicant believed the Authority held further information falling within the scope of her request. The Commissioner investigated and found that the Authority had failed to provide adequate submissions to justify its position that it held no further information.

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 the definition of "environmental information") (Interpretation); 5(1) (Duty to make environmental information available on request); 17(1), (2)(a), (b) and (f) (Enforcement and appeal provisions).

Background

1. On 12 November 2024, the Applicant made a request for information to the Authority. She asked for the following:
 - “A copy of all correspondence, including meeting minutes and documentation not already on the planning portal regarding the development at House of Rosskeen (planning application no. 23/05466/FUL) between the [Authority], Bracewell Stirling, consultees, et al, that make any reference to IMFLDP1, IMFLDP2 and the IMFLDP2 Examination Report.
 - A copy of all correspondence, including meeting minutes and documentation not already on the planning portal regarding the development at House of Rosskeen (planning application no. 23/05466/FUL) between the [Authority], Bracewell Stirling, consultees, et al, that makes any reference to biodiversity.
 - A copy of the most recent bat survey, corresponding licence and associated conditions related to the development at House of Rosskeen (planning application no. 23/05466/FUL).
 - A copy of the full 2017 Screening Opinion and completed checklist that was applied to the current development at House of Rosskeen (application no. 23/05466/FUL). relating to the Green Freeport, housing figures, biodiversity and bat survey have gone ignored, despite numerous follow-ups. We are now going to the Information Commissioner to complain.”
2. The Authority did not respond to the information request.
3. On 15 January 2025, the Applicant wrote to the Authority in respect of its failure to respond.
4. The Applicant did not receive a response to her requirement for review.
5. On 13 February 2025, the Applicant wrote to the Commissioner stating that she was dissatisfied with the Authority's failure to respond and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
6. The Authority notified the Applicant of the outcome of its review on 26 February 2025. It disclosed some further redacted information to the Applicant, although it did not specify on what basis it had redacted information within the documents disclosed.
7. The Applicant queried the Authority's review outcome in various emails dated 28 February, and 4 and 5 March 2025. Following these emails, the Authority provided further information to the Applicant and explained that the redacted information was personal data.
8. On 21 March 2025, the Commissioner issued [Decision 068/2025](#)¹ finding that the Authority failed to respond to the Applicant's request for information and requirement for review within the timescales laid down by sections 10(1) and 21(1) of FOISA and regulations 5(2) and 16(4) of the EIRs. Given that it had, in the intervening period, responded to the Applicant's requirement for review, he did not require the Authority to take any action in respect of these failures.

¹ https://www.foi.scot/sites/default/files/2025-05/Decision068-2025_0.pdf

9. On 25 March 2023, 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 she was dissatisfied with the outcome of the Authority's review because she did not agree that the Authority had provided all information it held falling within the scope of her request.

Investigation

10. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
11. On 25 March 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.
12. 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 how the Authority had determined that it held no further information falling within the scope of the request and whether it considered the request ought to have been handled in terms of the EIRs.
13. During the investigation, the Applicant confirmed that she was not challenging the third party personal data redactions made by the Authority. The Commissioner will therefore not consider this information further in his decision notice.

Commissioner's analysis and findings

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

FOISA or EIRs?

15. The relationship between FOISA and the EIRs was considered at length in [Decision 218/2007](#)². Broadly, in the light of that decision, the Commissioner's general position is as follows:
 - (i) The definition of what constitutes environmental information should not be viewed narrowly.
 - (ii) There are two separate statutory frameworks for access to environmental information, and an authority is required to consider any request for environmental information under both FOISA and the EIRs.
 - (iii) Any request for environmental information therefore must be handled under the EIRs.

² <https://www.foi.scot/decision-2182007>

- (iv) In responding to a request for environmental information under FOISA, an authority may claim the exemption in section 39(2).
- (v) If the authority does not choose to claim the section 39(2) exemption, it must respond to the request fully under FOISA: by providing the information; withholding it under another exemption in Part 2; or claiming that it is not obliged to comply with the request by virtue of another provision in Part 1 (or a combination of these).
- (vi) Where the Commissioner considers a request for environmental information has not been handled under the EIRs, he is entitled (and indeed obliged) to consider how it should have been handled under that regime.

16. Having considered the information requested (which relates to a specified planning application), the Commissioner asked the Authority to consider whether the request properly fell to be handled as a request for environmental information and therefore responded to under the EIRs.

17. In response, the Authority explained that the matter had been overlooked as the review had been “carried out quickly” following its previous failure to respond. It confirmed that “planning matters are invariably dealt with as EIRs”.

18. It is clear to the Commissioner from the information falling within the scope of the request, that this would be environmental information, as defined in regulation 2(1) of the EIRs.

19. Given that the information requested is properly considered to be environmental information, the Authority has a duty to consider it in terms of regulation 5(1) of the EIRs. In failing to do so (until during the investigation), the Commissioner finds that the Authority failed to comply with regulation 5(1) of the EIRs.

Section 39(2) of FOISA – environmental information

20. 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.

21. The Commissioner finds that the Authority would have been entitled to apply the exemption in section 39(2) of FOISA to the request, given his conclusion that the information requested was properly classified as environmental information

22. As there is a separate statutory right of access to environmental information available to the Applicant, the Commissioner also accepts that, in this case, the public interest in maintaining this exemption and in handling the request in line with the requirements of the EIRs would outweigh any public interest in disclosing the information under FOISA.

Regulation 16 of the EIRs

23. Regulation 16 of the EIRs states that, on receipt of a requirement to conduct a review, the authority shall review the matter and decide whether it has complied with the EIRs, within 20 working days (regulations 16(3) and (4)). It also states that, where an authority has not complied with its duty under the EIRs, it shall immediately take steps to remedy the breach of duty (regulation 16(5)).

24. Although the Authority responded to the Applicant’s requirement for review on 26 February 2025, as explained above, this was a result of the Authority considering the request solely in terms of FOISA and not under the EIRs.

25. It is apparent that the Authority failed to respond to the Applicant's request of 12 November 2024 in terms of the EIRs and therefore failed to comply with regulation 5(1) of the EIRs. It is also apparent that the Authority failed to carry out a review meeting the requirements of regulation 16 of the EIRs.
26. Having found that the Authority should have responded to the Applicant's request in terms of the EIRs, the Commissioner will now decide whether the Authority held any further information falling within the scope of the Applicant's request.

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

27. Regulation 5(1) of the EIRs (subject to the qualifications in regulations 6 to 12) 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 held by the authority when it receives a request.
28. 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) of the EIRs requires the authority to make the information available, unless a qualification in regulation 6 to 12 applies (regulation 5(2)(b)).
29. 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.
30. 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.
31. The Commissioner 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.

The Applicant's submissions

32. The Applicant disagreed that the Authority's response to her request was satisfactory and considered that it held further information relevant to her request that it had failed to identify and locate.
33. During the investigation, the Commissioner asked the Applicant to explain what information she considered was missing from what the Authority had identified and disclosed to her in response to her request.
34. The Applicant noted that one part of her request was for all correspondence that referenced the derivatives of the terms included in the original request (e.g. Inner Moray Firth Development Plan 1, Inner Moray Firth Development Plan 2, local development plan, development plan, LDP, DP, etc.). She submitted that what the Authority had provided to her in response to this part of her request did not match what she had asked for.
35. The Applicant also said that there were emails missing from email trails. She noted what she considered were significant gaps in email dates and said that it was clear from the content of some of these emails that conversations regarding the development had moved on, but those emails had not been disclosed to her.

36. The Applicant noted that her request referenced bats and NatureScot (as one of the “consultees”) on several occasions and that she had asked for any correspondence from NatureScot. She noted that the Authority said that the development was not within NatureScot’s threshold but said that she did not ask about the threshold – she asked for any correspondence.
37. The Applicant referred to an extract from information that had been disclosed to her by the Authority, which stated that a consultee had been liaising with NatureScot. She said it was therefore clear that correspondence with NatureScot did exist and noted that no correspondence had been disclosed to her between the Authority or consultees and NatureScot.
38. The Applicant also suggested that it would be “incredibly surprising” if the development was not within NatureScot’s threshold, given such significant bat activity.

The Authority’s submissions

39. The Authority explained that the information requested was associated with a planning application for a housing development near Rosskeen. It provided a link to the planning application in question, as well as links to other information publicly available in a committee report.
40. The Authority noted that, during consideration of an application, submissions received from members of the public and statutory consultees would also be available via the link to the planning application, but these responses would be removed once the planning application had been agreed (in compliance with data protection legislation).
41. The Authority explained that information associated with planning applications was managed by the case officer responsible for the case – they managed the documents associated with the application, including correspondence with the applicants, statutory consultees (like NatureScot) and other specialist consultants.
42. The Authority said that relevant documents were stored in its planning system and its associated document management system. It explained that staff were instructed regarding which documents should be published at each stage in the process and that, after a planning application is approved, the developer is expected to provide the Authority with evidence that the conditions prescribed within the planning permission have been complied with (and, in most cases, these documents should be added to the case for public viewing).
43. Given the above background, the Authority said that the case officer and their line manager were the relevant staff members to contact to confirm if any of the information the Applicant considered to be missing had been overlooked and that the case officer had searched both their email and the case file.
44. The Authority noted that its response had confirmed that it only held notes for one meeting and that other meetings had been held over Teams and were not minuted. It said that there was no requirement for it to take minutes of every meeting attended by a case officer.
45. The Authority also explained that if a statutory consultee required reports to be provided or surveys to be carried out, then this would be passed on to the applicant or put in the decision as a condition. In this case, it noted that NatureScot had indicated that it had no specific advice in relation to this site – meaning that there was no requirement for further correspondence with NatureScot on this matter.

46. During the investigation, the Commissioner asked the Authority to provide further evidence of the searches it had carried out in response to the Applicant's request.
47. The Authority explained that in order to identify information that fell within the scope of the Applicant's request, the case officer had to be familiar with both the case and with what had already been published on the planning portal. It did not consider it possible to simply search for the planning reference to obtain results as any such searches would produce duplicates, false positives and copies of information which had already been published.
48. The Authority provided two screenshots which showed the results of an email search using (separately) the search terms "Rosskeen" and the planning reference number, which it said illustrated the difficulties posed by email searches. It noted that searching for "Rosskeen" returned 675 results, "many of which were clearly not in the scope of the request", while searching for the planning reference returned 474 results.
49. In order to assess what information was held (and not already published on the planning portal), the Authority explained that the case officer would access the internal version of the system to see the complete case file. This contained files which had been published and others marked as sensitive and not available to the public. The case officer would also have to review specific correspondence from those identified in the request.
50. During the review, the Authority advised that a number of issues had been confirmed following further correspondence from the Applicant. It provided a copy of the correspondence it had with the case officer as part of this process. It said that it hoped this information would provide assurance that its approach complied with the Scottish Ministers' Code of Practice on the discharge of functions by Scottish public authorities under FOISA and the EIRs (the [Section 60 Code](#)³), which states (at 6.2.2) that:

"Searches should be proportionate and focus on systems (whether paper-based or electronic) where staff with a working knowledge of the records relating to the information request consider what information might be held."
51. The Authority also provided additional information on the system used as the main repository for planning information. It said that online submissions were received and reviewed before being published on the planning portal. It also explained that all emails and other correspondence (e.g. the bat survey) would be forwarded to the mailbox of the relevant case officer, who would then decide whether specific correspondence should be added to the casenote on Uniform or whether more information was required.
52. Regarding the specific point made by the Applicant relating to correspondence from NatureScot, the Authority explained that officers had confirmed that there was no other correspondence held. It viewed the email from NatureScot (which had been disclosed to the Applicant) as being "quite conclusive" and could see no reason for the case officer to correspond with them further.

The Commissioner's view

53. In considering whether a Scottish public authority holds the requested information in any given case, the Commissioner must be satisfied that the authority has carried out adequate,

³ <https://www.gov.scot/binaries/content/documents/govscot/publications/advice-and-guidance/2016/12/foi-eir-section-60-code-of-practice/documents/foi-section-60-code-practice-pdf/foi-section-60-code-practice-pdf/govscot%3Adocument/FOI%2B-%2Bsection%2B60%2Bcode%2Bof%2Bpractice.pdf>

proportionate searches in the circumstances, taking account of the terms of the request and all other relevant circumstances.

54. In all cases, however, it falls to the public authority to persuade the Commissioner, with reference to adequate, relevant descriptions and evidence, that holds no more information than it has identified and located in response to the request. In this case, notwithstanding the opportunities given to provide comments, the Commissioner is not satisfied that the Authority has achieved this.
55. Specifically, the Commissioner finds that the Authority's submissions on searches fall short because it has not provided him with adequate evidence of the searches it undertook in response to the request.
56. The Commissioner acknowledges that identifying information that has not already been published can be challenging and that it must therefore rely on the knowledge of the case officer who has an awareness of what information has and has not been published. He accepts that the case officer was the appropriate party to undertake searches, given their knowledge and familiarity with the case and what had already been published.
57. However, the Authority only provided the Commissioner with two screenshots to evidence the searches it had carried out (separately) using the search terms "Rosskeen" and the planning reference.
58. According to the Authority, these screenshots showed the difficulties posed by email searches producing duplicates, false positives and copies of information which had already been published.
59. However, the Commissioner considers it possible that information relevant to the request might be located were further searches undertaken without only using the general terms "Rosskeen" and the planning reference. The Applicant's request contains a number of specific terms, which the Commissioner considers could be used and combined with other search terms to further refine searches.
60. In all the circumstances, therefore, the Commissioner cannot, based on the submissions he has received, uphold the Authority's claim that it does not hold any further information relevant to the request.
61. The Commissioner requires the Authority to carry out fresh searches for information relevant to the request, reach a decision on the basis of those searches and notify the Applicant of the outcome (all in terms of regulation 16 of the EIRs). In doing so, the Authority must:
 - consider carefully the terms of the request and ensure that its interpretation of the request is reasonable and fully addresses the request
 - 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 case of a further appeal to the Commissioner
62. The Commissioner also considers it would be helpful if the Applicant could be more specific about what information she thinks is specifically missing. In the circumstances, the Commissioner would encourage the Authority to engage with the Applicant, in terms of regulation 9 of the EIRs, with a view to reaching a clear, and mutually shared, understanding of the specific information that she believes has not been identified and located but that falls

within the scope of her request, before issuing its revised review outcome in terms of regulation 16 of the EIRs. However, ultimately, it is for the Authority to undertake adequate and proportionate searches in response to the Applicant's request to identify the information that falls within scope.

Decision

The Commissioner finds that the Authority failed to comply 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 should have dealt with the request under the EIRs rather than under the Freedom of Information (Scotland) Act 2002. In responding under FOISA, the Authority failed to comply with regulations 5(1) and 16 of the EIRs.
- The Authority has failed to satisfy him that it did not hold any further information relevant to the Applicant's request. As a result, it failed to comply with regulation 5(1) of the EIRs.

The Commissioner therefore requires the Authority to carry out adequate, proportionate searches for the information, reach a decision on the basis of those searches and notify the Applicant of the outcome (all in terms of regulation 16 of the EIRs), by **5 February 2026**. In doing so, he requires the Authority to have regard to the conditions set out in paragraph 61 above

Appeal

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

Enforcement

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

Euan McCulloch
Head of Enforcement

22 December 2025