



Scottish Information
Commissioner
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Decision Notice 036/2026

Information relating to a specific planning application
regarding a proposed hot food takeaway

Authority: Falkirk Council
Case Ref: 202500723

Summary

The Applicant asked the Authority for information relating to a specified planning application regarding a proposed hot food takeaway. The Authority provided some information but withheld other information on the grounds it was internal communications, and the public interest favoured withholding it. The Commissioner investigated and found that the Authority had correctly withheld most of the information requested, but that certain information was wrongly withheld. He required the Authority to disclose the wrongly withheld 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 “environmental information”) (Interpretation); 5(1) (Duty to make environmental information available on request); 10(1), (2) and (4)(e) (Exceptions from duty to make environmental information available), 17(1), (2)(a), (b) and (f) (Enforcement and appeal provisions).

Background

1. On 4 February 2025, the Applicant made a request for information to the Authority. He asked for:
 - a) copies of consultation responses from the Roads Authority and Environmental Health for planning approval 17/0001/FUL
 - b) copies of all and any correspondence between Planning and the Roads Authority during the processing of this planning application 17/0001/FUL
 - c) copies of all and any correspondence between Planning and Environmental Health during the processing of this planning application 17/0001/FUL
 - d) copies of all and any correspondence between Planning and the Roads Authority from the determination of this planning application 17/0001/FUL until today's date relating to this site
 - e) copies of all and any correspondence between Planning and Environmental Health from the determination of this planning application 17/0001/FUL until today's date relating to this site
2. The Authority responded on 24 February 2025 in terms of the EIRs. It disclosed some information but withheld other information under the exception in regulation 10(4)(e) of the EIRs, on the grounds that it was internal communications and the public interest favoured withholding it.
3. On 25 February 2025, the Applicant wrote to the Authority requesting a review of its decision. He stated that he was dissatisfied with the decision because he did not consider that the Authority had applied a presumption in favour of disclosure or properly applied the public interest test.
4. The Authority did not respond to the Applicant's requirement for review.
5. The Applicant wrote the Commissioner on 22 April 2025, stating that he was dissatisfied with the Authority's failure to respond to his request and applying for a decision in terms of section 47(1) of FOISA.
6. The Authority subsequently notified the Applicant of the outcome of its review on 8 May 2025, which fully upheld its original decision.
7. As a result of this, the Applicant withdrew his application for a decision in terms of section 47(1) of FOISA regarding the Authority's failure to respond.
8. However, on 9 May 2025, the Applicant again 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, for the reasons set out within his requirement for review.

Investigation

9. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.

10. On 27 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 subsequently allocated to an investigating officer.
11. 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 its application of the exception in regulation 10(4)(e) of the EIRs.

Commissioner's analysis and findings

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

FOISA or EIRs

13. 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.
14. The information requested appears to fall clearly within the scope of the definition of environmental information contained in regulation 2(1) of the EIRs.
15. The Applicant has not disputed the Authority's decision to handle his request under the EIRs. The Commissioner is satisfied, in the circumstances, that the information requested falls within the definition of environmental information set out in regulation 2(1) of the EIRs.

Section 39(2) of FOISA – environmental information

16. 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.
17. In this case, therefore, the Commissioner accepts that the Authority was entitled to apply the exemption in section 39(2) of FOISA, given his conclusion that the information requested is properly considered to be environmental information.
18. 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.
19. 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.
20. The Commissioner therefore concludes that the Authority was correct to apply the exemption in section 39(2) of FOISA and to consider the Applicant's information request under the EIRs.

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

21. 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.

22. 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)).
23. 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.

Regulation 10(4)(e) – Internal communications

24. Regulation 10(4)(e) of the EIRs provides that a Scottish public authority may refuse to make environmental information available to the extent that the request involves making available internal communications. This is a class-based exception, meaning that there is no need to consider whether disclosure of the communication would cause harm before applying the exception.
25. As with all of the exceptions under regulation 10 of the EIRs, a Scottish public authority applying this exception must interpret it in a restrictive way and apply a presumption in favour of disclosure (regulation 10(2)). Even where the exception applies, the information must be disclosed unless, in all the circumstances, the public interest in making the information available is outweighed by that in maintaining the exception (regulation 10(1)(b)).
26. The information being withheld by the Authority under the exception in regulation 10(4)(e) of the EIRs comprises email chains between the Authority's Roads and Planning teams
27. During the investigation, the Authority indicated that one of the documents it had withheld under the exception in regulation 10(4)(e) of the EIRs did not, in fact, fall within the scope of the Applicant's request as it was not an exchange between the departments of the Authority specified in the request. Having considered this document (provided to him as Document 3.2), the Commissioner accepts that it falls outwith the scope of the Applicant's request.
28. The Applicant has not suggested that any of the withheld information is other than an internal communication.
29. The Authority remained of the view that the information withheld under the exception in regulation 10(4)(e) constituted internal communications for the purpose of that exception.

The Commissioner's view on regulation 10(4)(e)

30. For the information to fall within the scope of the exception in regulation 10(4)(e) of the EIRs, it need only be established that the information is an internal communication. The Commissioner must therefore satisfy himself whether the information under consideration here can be deemed to be an internal communication for the purposes of regulation 10(4)(e) of the EIRs.
31. Having considered carefully the specific content of the withheld information and the terms of the request, the Commissioner is satisfied, in the circumstances, that the withheld information is internal communications and is therefore subject to the exception in regulation 10(4)(e) of the EIRs.
32. The Commissioner must, therefore, go on to consider whether, in all of the circumstances of this case, the public interest in disclosing the information is outweighed by the public interest in maintaining the exception.

The public interest test – regulation 10(4)(e)

The Applicant's submissions on the public interest

33. The Applicant explained that planning permission for the site concerned was approved conditionally, with some consultation responses raising concerns relating to road safety, noise and smells emanating from the proposed hot food takeaway.
34. The Applicant submitted that these concerns were significant enough to inform the conditions attached to the planning consent. He considered that these conditions, which were aimed at safeguarding the amenity of the area, demonstrated that the public's health and safety was central to the decision-making process.
35. The Applicant therefore believed that it was in the public interest to disclose further comments from these consultees and that the public had a right to understand the full context of these concerns and how they were addressed by the Authority in its decision-making.
36. The Applicant considered that there was a legitimate public interest in knowing how the Authority had balanced concerns raised when granting planning permission and that it was vital for local residents to have access to the information that influenced the conditions attached to the planning approval. This would also allow those residents to ensure that any conditions were being enforced appropriately.
37. The Applicant submitted that the concerns raised about traffic and safety and noise and odour directly impacted public health and safety. As these matters would affect the broader community, he believed that the public interest in ensuring the accountability and transparency of the planning process far outweighed by potential harm in disclosure of the withheld information.

The Authority's submissions on the public interest

38. The Authority submitted that in processing, determining and reaching decisions in planning applications about whether planning enforcement action is to be pursued, officers ought to be able to fully and frankly exchange their views in writing.
39. According to the Authority, such discussions might comprise matters which might be perceived as potentially controversial or sensitive. It recognised that there was an interest in accountability and transparency, but considered that the absence or reduction of a free or private space for such discussions would be likely to have a detrimental impact on the quality of decision-making.
40. The Authority said that enforced disclosure of information of the nature under consideration in this case would increase the likelihood that future communications would become more circumspect, and appropriate information would be less likely to be shared, expressed or recorded.
41. The Authority argued that this would undermine its ability to test positions through effective and efficient exchanges for the purposes of deliberation and to formulate recommendations during the planning process and following determination of an application, which would not serve the public interest. It also did not consider that disclosure of the withheld information would meaningfully add to the public's understanding of the position.
42. Regarding the public safety matters raised by the Applicant, the Authority acknowledges that matters of road safety and general amenity issues may have been relevant to deliberations

over the planning consent as originally granted in 2017. However, it said that these matters did not by themselves settle the question of public interest in disclosure of the withheld information.

43. The Authority stated that there was no suggestion that its officers had not had due regard to public safety or had failed to consult appropriately. Even if concerns had previously been expressed in respect of road traffic or parking issues, it argued that this did not, by itself, have a determinative effect – either in formulating a planning enforcement decision or in a decision to disclose or withhold correspondence associated with that decision.
44. The Authority noted that consultation responses from its Roads Development Unit and Environmental Protection Unit had been disclosed and were publicly available on its website. It considered that these documents substantially contributed to satisfying the public interest in transparency and accountability in this matter.

The Commissioner's view on the public interest

45. The Commissioner has considered the submissions from both parties on the public interest test, in relation to the withheld information itself.
46. As stated above, regulation 10(2)(b) of the EIRs builds in an explicit presumption in favour of disclosure, which makes it clear that where arguments are evenly balanced for withholding and disclosing the information, the information must be disclosed.
47. The Commissioner agrees that there is significant public interest in the transparency of the planning system. However, he considers that disclosure of most of the withheld information would provide either no insight or only very limited insight into the substantive issues (i.e. the public safety matters) of concern to the Applicant (and, on some level, to the wider public in the local area). In the circumstances, he considers that there is, by extension, only a limited public interest in disclosure of this information.
48. In the circumstances, the Commissioner accepts that the public interest in protecting the ability of the Authority to formulate recommendations during the planning process and following determination of an application outweighs the limited public interest in disclosure of most of the withheld information.
49. However, the Commissioner considers that there is a stronger public interest in disclosure of some of the withheld information – specifically, in Documents 1 and 3.3.
50. Unlike the other withheld information, this information would provide insight into the Authority's view (or, at least, the view of particular officials within the Authority) on the public safety matters raised by the Applicant. While the Authority correctly notes that the consultation responses for its Roads Development Unit and Environmental Protection Unit are in the public domain, the Commissioner considers that disclosure of the small amount of information in question would materially add to the information contained in these responses.
51. In the circumstances, the Commissioner finds that the public interest in the disclosure of this specific information outweighs the public interest in maintaining the exception in regulation 10(4)(e) of the EIRs. He does not consider this specific information to be particularly controversial or sensitive and he is satisfied, in the particular circumstances of this case, that its disclosure would not prejudice to any significant degree the Authority's ability to formulate recommendations during the planning process and following determination of an application.
52. The Commissioner therefore requires the Authority to disclose this specific information to the Applicant. (He will write to the Authority to specify the information to be disclosed.)

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 the Authority correctly withheld some information under the exception in regulation 10(4)(e) of the EIRs and so complied with the EIRs in that respect.

However, the Commissioner also finds that the Authority wrongly withheld other information under the exception in regulation 10(4)(e) of the EIRs and so failed to comply with regulation 5(1) of the EIRs in that respect.

The Commissioner therefore requires the Authority to disclose to the Applicant the information that it wrongly withheld under the exception in regulation 10(4)(e) of the EIRs, by 17 April 2026. (He will write to the Authority to specify the information to be disclosed.)

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

3 March 2026