



Scottish Information
Commissioner
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Decision Notice 045/2026

Information relates to a planning application

Authority: East Dunbartonshire Council

Case Ref: 202500658

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); 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”, “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/13/0514 in relation to any application for road construction consent, road opening consent or dropped kerb consent.
2. The Authority responded on 20 March 2025, disclosing information related to his request and advising him, under section 25 of FOISA, that further information was available via its online [Planning Portal](#).¹
3. On 21 March 2025, the Applicant wrote to the Authority requesting a review of its decision. The Applicant stated that he was seeking all information and it was clear that the Authority had failed to release the application forms [captured by his request].
4. The Authority notified the Applicant of the outcome of its review on 22 April 2025. It stated that the request had been processed under regulation 5(2)(a) of the Environmental Information (Scotland) Regulations 2004 (the EIRs), and it disclosed additional information 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 that all of the documents that were disclosed appeared to relate only to road construction consent, and there was no mention of road opening consent or dropped kerb consent. He argued that the Authority held further information that it had not released.

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 15 May 2025, the Authority was notified in writing that the Applicant had made a valid application, 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. These related to the searches it had carried out and how it had determined that no further information was held.

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. In its review outcome, the Authority processed the request under the EIRs, having concluded that the information was environmental information as defined in regulation 2(1) of the EIRs.

¹<https://planning.eastdunbarton.gov.uk/online-applications/>

11. 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.
12. 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.
13. 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.
14. The Applicant has not disputed the Authority’s decision to handle his request under the EIRs.

Section 39(2) of FOISA – Environmental information

15. 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.
16. In this case, the Authority responded to the Applicant’s requirement for review solely in terms of the EIRs, but it did not appear to claim the exemption in section 39(2) of FOISA.
17. However, the Commissioner accepts that the Authority would have been entitled to apply this exemption to withhold the information requested under FOISA, given his conclusion that it is properly classified as environmental information.
18. 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 outweighs any public interest in disclosing the information under FOISA.
19. In the circumstances, therefore, the Commissioner will consider this case, in what follows, solely in terms of the EIRs.

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

20. Regulation 5(1) of the EIRs (subject to the various qualifications contained 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 that is held by the authority when it receives a request.
21. 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)).

22. 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.

Information held by the Authority

23. 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/13/0514.
24. 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.
25. 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

26. In his requirement for review, the Applicant had expressed dissatisfaction with the Authority's response. He stated that the Authority had, at a minimum, failed to release the application forms submitted. He explained that, in response to an unrelated information request, the Authority had previously informed him that 12 forms were involved in the planning application process.
27. In his application to the Commissioner, the Applicant noted that, of the 16 documents that had been disclosed to him by the Authority, only three documents appeared to relate to the 12 application forms required by the planning application process. The Applicant provided the Commissioner with blank copies of these 12 forms; CC1 Construction Consent Application; CC2 Doquets Of Service; CC3 Notice Of Service; CC4 Construction Consent; CC5 Footpath Agreement; CC6 Adoption application; CC7 Road Bond; CC8 Carriageway Design Certificate; CC9 Construction Consent Checklist; and CC10 Lighting Certificate (3 separate forms).
28. In addition, the Applicant commented that all of the disclosed documents seemed to relate to road construction consent and there appeared to be no mention of road opening consent or dropped kerb consent. Given this, the Applicant did not believe that the Authority had provided him with all of the information captured by his request.

The Authority's comments

29. In its submissions to the Commissioner, the Authority stated that there was no dropped kerb applications for developments approved through the planning process. It noted that this had previously been explained to the Applicant.
30. The Authority submitted that it had a robust file structure to allow effective searches to be carried out. It explained that the development control officer and their line manager, who were involved in the searches, were very familiar with the file structure and knew what information was available.

31. The Authority confirmed that all relevant information was retained within its formal file structure (it noted that it did not - and does not - use its email system to store information). Given this, the Authority carried out searches for information that related to the granting of road construction consent or road opening consent for planning application TP/ED/13/0514.
32. It explained that it searched files relating to application TP/ED/13/0514 within the development control folders of the Authority's filing system. It noted that there was an electronic folder for development control, which had subfolders for each application, and that these files were held within the Authority's formal file structure in its networked drive.
33. The Authority clarified that a keyword search was not required to search for information, as the information in question was held within a structured filing system and the information was obtained by navigating to the correct area of the network drive. The Authority provided the Commissioner with a screenshot that showed the file structure of the drive and which demonstrated how the information was stored.
34. At the Commissioner's request, the Authority carried out a further search of the pre-engagement application information, and the Authority confirmed that no relevant information was held.
35. The Authority commented that all of the information relating to planning application TP/ED/13/0514 would be held in the subfolder in its networked drive. It was asked whether this file would also hold correspondence relating to the planning file and it confirmed that this was the case. However, it noted that it did not hold any correspondence in relation to road opening/road construction and kerb dropping in relation to this specific planning application. It confirmed that correspondence relating to this planning file would not be stored anywhere else, and it stated that such correspondence did not exist.
36. In relation to dropped kerb consent, it explained that if a driveway was to form part of a planning application, it would be highlighted and would be considered as part of the planning process. It noted that dropped kerb consent was not required for existing properties if the applicant had already secured planning approval.
37. The Authority commented that it did not know which 12 application forms the applicant was referring to in his application. However, the Authority confirmed that the search of its records found no evidence of any road opening applications or consents, in relation to planning file TP/ED/13/0514. The Authority stated that it did not hold any information relating to road opening or dropped kerb consent for TP/ED/13/0514, including correspondence held, sent or received.
38. The Authority was asked why it had not applied regulation 10(4)(a) to the parts of the Applicant's request which sought information relating to road opening consent or dropped kerb consent for application TP/ED/13/0514, given its position that the information was not held.
39. The Authority asserted that it did hold information relevant to the request, and that this information was disclosed to the Applicant. It noted that, if it was helpful to the Applicant, it was willing to give the Applicant notice that specific information was not held, but it did not consider this to be necessary, given that it had already disclosed the information which it did hold.

The Commissioner's view

40. The Commissioner has taken account of the submissions provided by the Applicant, which explained why he believed that the Authority held further information falling within the scope of his request.
41. Having closely considered the terms of the request and the submissions and evidence provided by the Authority, the Commissioner is satisfied that the Authority's interpretation of the request was reasonable and not unduly narrow.
42. By the end of his investigation, the Commissioner is satisfied that the Authority took proportionate steps to identify information falling within the scope of the Applicant's request. He is also satisfied, on the balance of probabilities, that it does not hold any further relevant information. He considers that the Authority's searches were reasonable in the sense of those tasked to carry them out and the locations searched.
43. The Commissioner has taken account of the concerns raised by the Applicant regarding the lack of records of application for road opening consent and dropped kerb consent. However, he considers that while the Applicant may have expected information to be held, the Commissioner is satisfied, based on the evidence provided by the Authority, that it is not.
44. Having considered the case in detail, in particular the submissions provided by the Authority and the subject matter and scope of the request, the Commissioner is satisfied that the Authority does not hold any further recorded information. While the Applicant believed and expected further information to be held by the Authority, the Commissioner is satisfied that this is not the case.
45. As the Commissioner is satisfied that the Authority does not hold any correspondence or any information in relation to dropped kerb consent or road opening consent for application TP/ED/13/0514, he must find that the Authority failed to comply with regulation 13(b) of the EIRs, by not notifying the Applicant that some of the information he had requested was not held.
46. If a Scottish public authority does not hold the information requested, it is required to give the applicant notice to that effect. The exception in regulation 10(4)(a) of the EIRs permits an authority to refuse to provide information if that information is not held. 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 (including regulation 10(4)(a)), 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).
47. 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: and the Commissioner is satisfied that regulation 13(b) should be read to include that obligation.
48. 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. The Commissioner notes the Authority's opinion that it had identified and disclosed information falling within the scope of the Applicant's information request, but that information only related to road construction consent; it did not relate to the other two prongs of the request.

49. Had the Authority notified the Applicant that information falling within specific parts of his request was not held, 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.
50. 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/13/0514.

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.

Jennifer Ross
Deputy Head of Enforcement

11 March 2026