



Scottish Information  
Commissioner  
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# Decision Notice 050/2026

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## Information related to a planning application

Authority: East Dunbartonshire Council  
Case Ref: 202500660

### Summary

The Applicant asked the Authority for information about road construction, road opening or dropped kerb consent in relation to a specified planning application. The Authority disclosed some information to the Applicant, who believed further information was held which fell within scope of his request.

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) (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” and “the Commissioner”) (Interpretation); 5(1) (Duty to make environmental information available on request); 10(4)(a) (Information not held); 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 relating to any application for road construction consent, road opening consent or dropped kerb consent for planning application TP/ED/13/0671.
2. The Authority responded on 20 March 2025, disclosing some information with redactions under regulations 10(5)(e) (Confidentiality of commercial or industrial information) and 11(1) (Personal data) of the EIRs. Under section 25 (Information otherwise accessible) of FOISA, the Authority also advised the Applicant that further information was available on its [Planning Portal](#)<sup>1</sup>.
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 considered the Authority had not provided all of the information captured by the request and highlighted his concern that (as a minimum) not all of the relevant application forms had been disclosed.
4. The Authority notified the Applicant of the outcome of its review on 22 April 2025. It did not uphold its original response and notified the Applicant that it had identified further information falling within scope of the request, which it disclosed.
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 did not accept that the Authority had provided all of the information falling within the scope of his request and he believed that the Authority held further information that it had not disclosed.

## 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 19 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 carried out and the application forms which the Applicant considered should be held.

## Commissioner's analysis and findings

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

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

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

10. In its review outcome, the Authority processed the 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 the scope of this definition, a person has a right to access it (and the public authority has a corresponding obligation to respond) under the EIRs, subject to the 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) (Health, safety and the environment) 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 environmental information available***

20. 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.

21. 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)).
22. 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*

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/13/0671.
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. The Applicant stated that, while the Authority had released 16 documents in response to his requirement for review, only three seemed to be related to the 12 forms involved in the application process. He explained that he had received these forms in response to a separate information request. The Applicant provided the Commissioner with blank copies of the 12 forms (numbered CC1 to CC10, with CC10 being comprised of three forms).
27. Moreover, the Applicant commented that all of the disclosed information appeared to relate to road construction consent and there seemed to be no mention of road opening consent or dropped kerb consent. Given this, the Applicant submitted that the Authority held further information which it had failed to disclose to him.

#### *The Authority's comments*

28. In its submissions, the Authority stated that there was no dropped kerb application for developments approved through the planning process, and that it had advised the Applicant of this in relation to this, and other, requests for information.
29. The Authority explained that if a development required that dwellings had driveways, the plans for those driveways were included in the building plans and submitted through the planning application for approval.
30. It further noted that dropped kerb consent was sought where an owner wanted to add a driveway to an existing house and that process was therefore intended only for use by existing householders in an already built property.

31. The Authority, in relation to the forms involved in the planning application process, explained that there were no dropped kerb consent forms for developments approved through the planning process. It stated that only forms CC1 and CC4 related to road construction consent and while CC9 had a checklist, part of which identified whether a submission included dropped kerbs for vehicle access or pedestrian crossings and included cycle lanes, it did not form part of the granting of construction consent or road opening consent.
32. The Authority explained that if a property being developed required a dropped kerb, this would be shown in the publicly available planning files. Moreover, it stated that if an existing property wanted to add a dropped kerb, that was processed by the Authority as a dropped kerb application and that these were held in a dedicated folder in the Authority's system.
33. The Authority submitted that there was no record of any application (for a dropped kerb) within its files in relation to planning application TP/ED/13/0671. It stated that this had been confirmed by numerous searches and it submitted that if the information was held, it would have been found. The Authority provided the Commissioner with screenshot evidence of the searches it had carried out, demonstrating that it had entered the road name into its system. The Authority explained that while the search did return one property in that location, this was not part of the planning application TP/ED/13/0671.
34. Given the outcome of its search evidence, the Authority stated that it had concluded that there had been no dropped kerb application in respect of the specified planning application, for the reason that if there had been, this would either be publicly available or easily located within its files.
35. The Authority noted that the planning application which was the subject of the request dated back to 2013 and it stated that the officer who processed such forms at the time was no longer employed by the Authority. The Authority stated that emails were not used for record keeping and were therefore not retained when officers left the Authority. The Authority explained that this was in accordance with good information management practices. It confirmed that there were no internal emails held which were relevant to the request.
36. The Authority explained that all relevant information (relating to planning applications) was retained within the Authority's formal file structure. Given this, a search was made for documents retained by the Authority relating to the granting of road construction consent or road opening consent (for application TP/ED/13/0671) within the development control folders of its filing system. The Authority submitted that their file structure was robust and it enabled effective searches to be carried out. It noted that the officers involved in the searches were very familiar with the file structure and knew what information was available.
37. The Authority explained that a search was also carried out for forms related to road construction and road opening consent and it stated that all such forms had been disclosed to the Applicant.
38. The Authority provided the Commissioner with an extract from its records retention policy confirming the retention period for records relating to road construction consent was six years.
39. In relation to road opening consent, the Authority confirmed that road opening consent was required to carry out changes to the road and explained that this was known as a Section 56 Application.

Furthermore, it stated that it believed that there should be a road opening permit (in relation to the specified planning application) but that repeated searches had found no such record within the Authority's files.

40. The Authority provided the Commissioner with a screenshot of its file structure, including the folder where road opening applications were recorded. It submitted that there was no road opening application held for the specified planning application (TP/ED/13/0671). It stated that the request was handled by the manager for the relevant service, and that this officer would know if and where any relevant information was held.

#### *The Commissioner's view*

41. The Commissioner has carefully considered all of the submissions from the Applicant and the Authority.
42. In relation to dropped kerb consent, the Commissioner considers the Authority's explanation about the circumstances in which consent is required to be persuasive. Given this, he is satisfied that dropped kerb consent was not required in relation to planning application TP/ED/13/0671. Furthermore, he finds that the screenshots provided by the Authority, evidence the Authority's position that this information is not held.
43. The Commissioner notes the Authority's acknowledgement (as referenced in paragraph 39 above) that it believed a road opening permit should be held, but that it was not.
44. The Commissioner is satisfied that, by the close of his investigation, the Authority had taken 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 relation to those tasked to carry them out and the locations searched and he is satisfied that the screenshots provided to his office, evidence that no further information is held.
45. 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 (and indeed, the Authority itself, considered that it should hold information in relation to a road opening permit) the Commissioner is satisfied that this is not the case.
46. It is not the Commissioner's role to determine what information should, or should not be, retained by an Authority, he can only consider if information was held at the time that a request was made.
47. As the Commissioner is satisfied that the Authority does not hold further information in relation to dropped kerb consent or road opening consent for the specified application, 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.
48. 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).

49. 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](#)<sup>2</sup> and [Directive 2003/4/EC](#)<sup>3</sup> 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.
50. 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.
51. 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 the Authority's position 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.
52. 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/13/0671.

## 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.

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<sup>2</sup> <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:041:0026:0032:EN:PDF>

<sup>3</sup> <https://eur-lex.europa.eu/eli/dir/2003/4/oj/eng>

## **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**

**18 March 2026**