



Scottish Information
Commissioner
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Decision Notice 105/2026

Burntisland Harbour access

Authority: Fife Council

Case Ref: 202501768

Summary

The Applicant asked the Authority for all information regarding the Authority's consideration of a legal opinion relating to public access to Burntisland Harbour. The Authority considered the request under FOISA. It disclosed some information but withheld other information under various exemptions in FOISA.

The Commissioner investigated and found that the Authority had considered the request under the wrong legislation. The requested information was environmental information, and the Authority should have considered the request under the EIRs. The Commissioner required the Authority to respond to the request under the EIRs.

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 environment); 47(1) and (2) (Application for decision by Commissioner).

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (definitions of "the Act", "applicant" and "the Commissioner" and paragraphs (a), (c) and (f) of definition of "environmental information") (Interpretation); 5(1) (Duty to make environmental information available on request); 16 (Review by Scottish public authority); 17(1), (2)(a), (b) and (f) (Enforcement and appeal provisions).

Background

1. On 8 July 2025, the Applicant made a request for information to the Authority. He asked for all information held by the Authority regarding its consideration of a specified legal opinion relating to community access to Burntisland Harbour.
2. The Authority did not respond to the request.
3. On 20 August 2025, the Applicant wrote to the Authority requesting a review of its failure to respond to his request.
4. The Authority notified the Applicant of the outcome of its review on 11 September 2025. The Authority handled the request under FOISA. The Authority disclosed some information but withheld other information under sections 30(c), 30(b)(ii), 38(1)(a) and 38(1)(b) of FOISA.
5. On 11 September 2025, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant stated he was dissatisfied with the outcome of the Authority's review because he considered that the information captured by his request should be 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 18 November 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.
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 whether the Authority considered that the information requested could be environmental information and its reasons for withholding the information.

Commissioner's analysis and findings

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

FOISA or EIRS?

10. The relationship between FOISA and the EIRs was considered at length in [Decision 218/2007](#)¹. Broadly, in light of this decision, the Commissioner's general position is as follows:
 - (i) The definition of what constitutes environmental information should not be viewed narrowly.

¹ <https://www.foi.scot/decision-2182007>

- (ii) There are two separate statutory frameworks for access to environmental information and an authority is required to consider the request for environmental information under both FOISA and the EIRs.
 - (iii) Any request for environmental information therefore must be handled under the EIRs.
 - (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, as well as dealing with the request under the EIRs, deal with 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 of FOISA (or a combination of these).
 - (vi) The Commissioner is entitled (and indeed obliged), where he considers a request for environmental information has not been dealt with under the EIRs, to consider how it should have been dealt with under that regime.
11. "Environmental information" is defined in regulation 2(1) of the EIRs. Where information falls within the scope of this definition a person has a right to access it under the EIRs, subject to regulations 10 and 11 of the EIRs.
 12. The Applicant asked the Authority for information regarding a legal opinion about community access to Burntisland Harbour. In his application to the Commissioner the Applicant explained that Forth Ports had fenced and locked the community out of Burntisland's East Dock Breakwater. The Applicant commented that he had been advised that there existed several established rights of way which were blocked by this "lock out".
 13. The Commissioner asked the Authority to explain why it did not consider that the request, given its subject matter, sought environmental information.
 14. In response, the Authority stated that it had reconsidered the information requested and it now considered this to be environmental information. The Authority's view was that the information related to access rights over land and the use and regulation of land at Burntisland Harbour. As such, it considered that the information captured by the request fell within the definition given in regulation 2(1)(a), (c) and (f) of the EIRs.
 15. Accordingly, the Authority considered that section 39(2) of FOISA should have been applied and the request should now be considered under the EIRs.
 16. The Commissioner has considered the terms of the Applicant's request and he is satisfied that the request sought environmental information within the terms of the definition in regulation 2(1)(a), (c) and (f) of the EIRs
 17. Given that the information requested is environmental information, the Authority had a duty to consider it in terms of regulation 5(1) of the EIRs. In failing to do so, it failed to comply with regulation 5(1).

Section 39(2) of FOISA – environmental information

18. The exemption in section 39(2) of FOISA provides, in effect, that environmental information (as defined in 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.
19. In this case, as stated above, the Authority responded to the Applicant's request solely under FOISA.
20. 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.
21. 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.

Regulation 16 of the EIRs

22. 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 (regulation 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)).
23. Although the Authority responded to the Applicant's requirement for review on 11 September 2025, this was only in terms of handling the request solely in terms of FOISA and not the EIRs.
24. It is apparent that the Authority failed to respond to the Applicant's request of 8 July 2025 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.
25. The Commissioner therefore requires the Authority to provide a response to the Applicant's requirement for review of 20 August 2025, in terms of regulation 16 of the EIRs.
26. The Commissioner's decision below states a compliance date of 26 June 2026, in line with the timescales he is required to follow. This is the latest day on which the Authority must issue a response: the deadline does not prevent the Authority from issuing one sooner.

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.

By failing to identify that the request asked for environmental information, the Authority failed to comply with regulation 5(1) of the EIRs.

The Commissioner requires the Authority to provide a response to the Applicant's requirement for review, in terms of the regulation 16 of the EIRs, by **26 June 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.

Jennifer Ross
Deputy Head of Enforcement

12 May 2026