



Scottish Information
Commissioner
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Decision Notice 150/2026

Breaches of unfit housing legislation

Authority: East Lothian Council

Case Ref: 202301379

Summary

The Applicant asked the Authority how many times it had breached unfit housing legislation by failing to keep its housing stock to a fit and habitable condition. The Authority informed the Applicant that it did not hold any information falling within scope of the request. The Commissioner investigated and found that the Authority had not interpreted the request correctly. He required the Authority to carry out a fresh review and to provide the Applicant with a revised review outcome.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2) and (6) (General entitlement); 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)(a) (Exceptions from duty to make information available); 17(1), (2)(a), (b) and (f) (Enforcement and appeal provisions).

Housing (Scotland) Act 2001 section 27 (Repairs) and Schedule 4 (Scottish Secure Tenancy: Landlord’s Repairing Obligations).

Background

1. On 11 September 2023, the Applicant made a request for information to the Authority. He asked:

- How many times did the Authority breach unfit housing legislation by failing to maintain its housing stock to a fit and habitable state to live in?
2. On 20 September 2023, the Authority wrote to the Applicant to ask him to clarify which legislation his request referred to. On 23 September 2023, the Applicant responded that he was referring to the Housing Act, which said that a property must be wind and watertight and in a habitable condition for the tenant being charged rent.
 3. The Authority responded on 4 October 2023 in terms of the EIRs. It informed the Applicant, in line with the exception in regulation 10(4)(a) of the EIRs, that it did not hold the information requested.
 4. On 7 October 2023, the Applicant wrote to the Authority requesting a review of its decision. He stated that he was dissatisfied with the Authority's decision because it had refused to provide the information he requested.
 5. The Authority notified the Applicant of the outcome of its review on 1 November 2023, which fully upheld its original response. It explained that it was unclear which legislation the Applicant had referred to and that it could find no reference to wind and watertight and habitable conditions for the tenant being charged rent. It also directed the Applicant to the Scottish Housing Regulator's website for information on a list of properties that are non-compliant due to being "below tolerable standard".
 6. On 4 November 2023, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of the Freedom of Information (Scotland) Act 2002 (FIOISA). 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 he was dissatisfied with the outcome of the Authority's review because it had failed to provide him with the information requested.

Investigation

7. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
8. On 14 February 2024, and in line with section 49(3)(a) of FOISA, the Commissioner gave the Authority notice in writing of the application and invited its comments. The Authority responded.
9. The case was subsequently allocated to an investigating officer.

Commissioner's analysis and findings

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

Handling in terms of the EIRs

11. Where information falls within the scope of the definition of "environmental information" in regulation 2(1) of the EIRs, a person has a right to access it (and the public authority a corresponding obligation to respond) under the EIRs, subject to various restrictions and exceptions contained in the EIRs.

12. Having considered the terms of the request and the nature of the information requested, the Commissioner accepts the decision of the Authority to deal with the request under the EIRs rather than under FOISA.
13. The Applicant did not challenge the Authority's decision to deal with the request as one for environmental information. The Commissioner will therefore consider this case solely under the EIRs.

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

14. 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.
15. 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)).
16. 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)(a) – Information not held

17. Regulation 10(4)(a) of the EIRs provides that a Scottish public authority may refuse to make environmental information available to the extent that it does not hold that information when it received the request.
18. The standard of proof to determine whether a Scottish public authority holds the 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.
19. The Commissioner also considers, where appropriate, any reasons 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 information is (or was, at the time the request was received) held by the public authority.

The Applicant's submissions

20. The Applicant disagreed that the Authority did not hold the information requested. He considered that the Authority was "nitpicking" because he might not have used the correct wording, but he argued that it should be "very well aware" of the legislation referred to in his request.

The Authority's submissions

21. The Authority noted that it had sought clarification from the Applicant as to the legislation referred to in his request. After receiving this clarification, it said that it had advised the Applicant, following its searches, that it identified no legislation in force that matched the description he had provided.
22. Having conducted reasonable searches of relevant housing legislation that might meet that described by the Applicant and based on the specialist knowledge of the Authority's housing

officers, the Authority concluded that the information requested did not exist and that it did not hold it. It therefore maintained that it was appropriate to rely on the exception in regulation 10(4)(a) of the EIRs.

The Commissioner's view

23. The Commissioner has carefully considered the submissions from both parties, together with the terms of the Applicant's request and the clarification he provided. He has also considered information available in the public domain.
24. The Commissioner notes that the Applicant's request concerned the Authority's own housing stock and failures to keep that stock wind and watertight and habitable. In that context, he considers the request should have been understood as referring, at least, to the [Housing \(Scotland\) Act 2001](#)¹ (the Housing Act) (in particular section 27 and paragraph 1 of Schedule 4).
25. Paragraph 1 of Schedule 4 of the Housing Act provides that a landlord in a Scottish secure tenancy must:
 - (a) ensure that the house is, at the commencement of the tenancy, wind and watertight and in all other respects reasonable fit for human habitation, and
 - (b) keep the house in such condition throughout the tenancy.
26. The Commissioner notes that the above legislation is readily identifiable through an online search using the terms specified in the request.
27. The Commissioner also notes that the Authority's own Voids Management Policy (accessible on [this webpage](#)²) states that, before a new tenancy begins, the Housing Act requires the Authority to make sure that its properties were "wind and watertight and reasonably fit for human habitation". Although that policy relates to void (i.e. empty) properties rather than repairs during an existing tenancy, the Commissioner considers that it supports his view that the Authority should have understood the nature and scope of the Applicant's request.
28. In light of the above, the Commissioner finds that the Authority failed to identify the relevant legislation when responding to the Applicant's request. While he acknowledges that the Applicant did not identify the precise statutory provision, he considers that the Applicant provided sufficient detail to allow the Authority to identify the relevant legislation.
29. The Commissioner therefore finds that the Authority failed to interpret the Applicant's request correctly. In the circumstances, he cannot accept the Authority's claim that it holds no information falling within the scope of the request. He therefore finds that the Authority was not entitled, on the basis of the submissions provided, to rely on the exception in regulation 10(4)(a) of the EIRs.
30. In the circumstances, the Commissioner requires the Authority to conduct a fresh review, carry out adequate and proportionate searches on the basis of the interpretation set out in this decision notice and issue the Applicant with a revised review outcome in terms of regulation 16 of the EIRs.

¹ <https://www.legislation.gov.uk/asp/2001/10>

² <https://www.eastlothian.gov.uk/meetings/meeting/16441/cabinet>

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.

In particular, the Commissioner finds that the Authority failed to comply with regulation 5(1) of the EIRs because it failed to correctly interpret the Applicant's request and therefore failed to demonstrate that it was entitled to rely on the exception in regulation 10(4)(a).

The Commissioner therefore requires the Authority (in terms of regulation 16 of the EIRs) to carry out adequate and proportionate searches for the information requested on the basis of the interpretation set out in this decision notice, reach a decision on the basis of those searches and notify the Applicant of the outcome, by **20 July 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.

Cal Richardson
Deputy Head of Enforcement

4 June 2026