



Scottish Information
Commissioner
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Decision Notice 156/2026

Short term lets process

Authority: Highland Council
Case Ref: 202501683

Summary

The Applicant asked the Authority for information, including worked examples, about its process for evaluating whether a planning application was for a material change of use. The Authority provided the Applicant with some information and referred him to other information available on its website. The Commissioner investigated and found that the Authority did not hold further information falling within the scope of the Applicant's request.

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); 17(1), (2)(a), (b) and (f) (Enforcement and appeal provisions).

Background

1. On 28 February 2025, the Applicant made a request for information to the Authority. He asked for all details of the evaluation process used for planning applications from 1 February 2022 up to 4 March 2024 to determine whether a material change of use occurred and for "worked through examples of the material change of use decision making for" six specified applications.

2. The Authority responded on 25 March 2025. It provided links to, and an explanation of, its guidance and explained that reports on handling for its applications could, once completed, be found through its planning portal.
3. On 7 April 2025, the Applicant wrote to the Authority requesting a review of its decision. He stated that he was dissatisfied with the decision because:
 - the guidance did not contain as much detail on how the evaluation was carried out as he had expected
 - he did not agree that reports on handling contained sufficient detail on how factors are balanced
 - in any event, not all the applications in question had reports on handling.
4. The Authority notified the Applicant of the outcome of its review on 14 May 2025, which upheld its original decision. It confirmed that it held no further documentation on how evaluations are carried out and provided further explanation relating to the specific applications that the Applicant queried.
5. On 22 September 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 he was dissatisfied with the outcome of the Authority's review because he did not consider that the information provided meaningfully addressed his concerns.

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 16 October 2025, the Authority was notified in writing that the Applicant had made a valid application. The case was subsequently 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 related to how it had established what information it held that fell within the scope of the request.

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. Where information falls within the scope of regulation 2(1) of the EIRs, 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.
11. During the investigation, the Authority confirmed that it had handled this request under the EIRs.

12. Having considered the subject matter and the terms of the request, the Commissioner accepts the decision of the Authority to deal with the request under the EIRs rather than under FOISA.

Validity of request for how evaluation is carried out

13. For a request under FOISA or the EIRs to be valid, it must be for recorded information. This means that a request for opinions, explanations or justifications will not be valid, except insofar as that information is already recorded.
14. The Authority explained that it considered whether a request for how a process is carried out constituted a request for recorded information. It ultimately concluded that it should provide an explanation of its process as that would be expected under the duty to provide advice and assistance.
15. The Commissioner accepts that public authorities may not always have recorded an explanation of specific processes. However, he recognises that instructions on how a process should be carried out and evaluations of how processes are actually carried out is information that public authorities can hold. On this basis, he agrees that this is a valid request (regardless of whether this specific information is actually held).

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

16. 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.
17. 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)).
18. 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 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.

Whether further information is held on how evaluation is carried out

The Applicant's submissions

20. The Applicant argued that the Authority failed to adequately explain how it reached its decisions.
21. The Applicant submitted that he had seen numerous mentions of whether the applicant for a short term let can demonstrate, on the balance of probability, that the use of the property as a short term let is not a material change of use. He suggested that the term "balance of probability" suggests that there is actually a formula or reusable scientific method so that these factors are applied fairly to achieve a repeatable result and that anyone looking at the decision could understand why that decision had been made.

22. Despite this expectation, the Applicant noted that he had not received an explanation from the Authority on how these factors interacted, which probabilities were applied (and how) and how the decision outcome was reached.

The Authority's submissions

23. The Authority explained that the assessment is made by an officer or, as in this case, a group of officers, applying their professional knowledge, training and experience. The "how" is essentially officers reading application forms, submissions and published information. It submitted that it held no documents which explain the "how" of these decisions. However, the guidance it provided to the Applicant assisted the officers in this respect.
24. The Authority confirmed that no searches were required as the staff are aware of the guidance they use and the way they carry out assessments. It also explained that the balance of probabilities is a well-established legal test that does not refer to any specific formula.

The Commissioner's view

25. 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 their request.
26. The Commissioner recognises that the term "balance of probabilities" is a well-established legal standard of proof. As stated above, it is the standard of proof that his decisions are based upon, and it requires a decision maker to decide whether something is more likely than not. It does not inherently entail a scientific or algorithmic approach.
27. The Commissioner therefore does not accept that references to the balance of probabilities mean that the Authority must hold recorded information showing a formula or reusable scientific method when reaching its decision, as suggested by the Applicant. The question for the Commissioner is whether, on the balance of probabilities, the Authority holds recorded information falling within the scope of the Applicant's request.
28. Given the nature of the information requested, the Commissioner is satisfied, in the circumstances, that staff working in the relevant business area of the Authority had sufficient knowledge to confirm whether the information requested was held or not.
29. Having considered 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. He has no locus, in this context, to determine what information an authority ought to record, or how: he is concerned with what information the authority actually holds.
30. In all of the circumstances, the Commissioner concludes that the Authority was correct to advise the Applicant that it did not hold further information describing how the Authority reaches these decisions.

Whether further information is held on worked examples

31. 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 lies, the Commissioner will make the same considerations set out at paragraphs 18 and 19 above.

The Applicant's submissions

32. The Applicant was not satisfied that the information linked to or provided to him by the Authority was sufficiently detailed to constitute a worked example.

The Authority's submissions

33. During the investigation, the Authority commented that it is not required to provide worked examples in response to a request unless they already existed. It confirmed that it did not hold any information which could be referred to as a worked example.
34. In reaching this conclusion, the Authority explained that it consulted the responsible Area Planning Manager who explained that a monitoring spreadsheet was used for the triage process containing application references, dates and decisions. However, this did not contain details of how assessments were made or why the decision was reached.
35. The Area Planning Manager also identified various rough notes in the Idox system where the Authority stores documents relating to planning applications. Although these gave some indications of the criteria considered, the Authority confirmed it did not consider these rough notes represent worked examples.
36. The Authority therefore suggested that it would have been appropriate to have explained to the Applicant that it did not hold the worked examples requested.

The Commissioner's view

37. The Commissioner has carefully considered the submissions from both parties, together with the terms of the request.
38. The Commissioner recognises that "worked example" can contain a range of degrees of detail. Having viewed them, he agrees that the rough notes do not constitute worked examples.
39. Although, as the Authority has recognised, the reports on handling do not contain the degree of detail that the Applicant may hope for, the Commissioner acknowledges that they reflect a structured decision-making process. He therefore considers that completed reports on handling narrowly constitute worked examples for the purposes of the Applicant's request.
40. In the circumstances, the Commissioner is therefore satisfied that the one report on handling that was published at the time of the review outcome fell within the scope of the Applicant's request.
41. For the remaining cases (i.e. those that did not have reports on handling at the time of the review), the Commissioner is satisfied, in the circumstances, that staff working in the relevant business area of the Authority had sufficient knowledge to confirm whether any worked examples would be held.
42. Having given careful consideration to the submissions and explanations that have been provided, the Commissioner is satisfied, on the balance of probabilities, that the Authority does not (and did not, on receipt of the request) hold any further recorded information which would fulfil the Applicant's request regarding the remaining cases.
43. While the Applicant believed and expected different or further information to be held by the Authority, the Commissioner is satisfied that this is not the case. As stated above, he has no locus, in this context, to determine what information an authority ought to record, or how: he is concerned with what information the authority actually holds.

Decision

The Commissioner finds that, in respect of the matters specified in the application, the Authority complied with the Environmental Information (Scotland) Regulations 2004 in responding to the information request made by the Applicant.

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.

Cal Richardson
Deputy Head of Enforcement

10 June 2026