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# Decision Notice 195/2025

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## Correspondence relating to the Musselburgh Flood Protection Scheme

Authority: East Lothian Council

Case Ref: 202501587

### Summary

The Applicant asked the Authority for correspondence connected to the Musselburgh Flood Protection Scheme. The Authority refused to comply with the request as it considered the request to be manifestly unreasonable. The Commissioner investigated and found that the Authority had provided inadequate submissions to evidence that the request was manifestly unreasonable and that the Authority had failed to comply with the timescales set out in the EIRs. He required the Authority to respond to the 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) and (2) (Duty to make environmental information available on request); 7(1), (2) (Extension of time); 10(4)(b) (Exceptions from duty to make environmental information available); 17(1), (2)(a), (b) and (f) (Enforcement and appeal provisions).

## Background

1. On 23 June 2025, the Applicant made a request for information to the Authority. He asked for all correspondence between the Authority and four specified parties in January 2018.
2. On 7 July 2025, the Authority noted that the Applicant's request was very broad and that it was unclear exactly what information was requesting. It asked the Applicant to describe the information he was looking for.
3. On 8 July 2025, the Applicant clarified that he was looking for information on what consideration was given by the Authority's officers and members ahead of the awarding of a specified contract in relation to the Musselburgh Flood Protection Scheme. He said that he also wished to receive whatever information was held by the Authority about the subsequent transfer of this contract to another party (whom he presumed was one of the parties specified in his original request) and what evaluation the Authority had undertaken about the outputs and value for money of the contract.
4. On 5 August 2025, the Authority informed the Applicant that it was, as permitted by regulation 7(1) of the EIRs, extending the deadline to comply with his request to 3 September 2025.
5. On the same day, the Applicant wrote to the Authority requesting a review of its decision. He stated that he was dissatisfied with what he considered to be delays in handling his case. In particular, he submitted that a delay in responding to his request until 3 September 2025 was totally unacceptable and that he considered the Authority was attempting to avoid disclosing information it may find difficult.
6. The Authority notified the Applicant of the outcome of its review on 11 August 2025, which upheld its position that it was entitled to extend the time for complying with the request under regulation 7(1) of the EIRs.
7. On 3 September 2025, the Authority wrote to the Applicant and advised him that the information requested was excepted from disclosure under regulation 10(4)(b) of the EIRs on the request was manifestly unreasonable.
8. On 8 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 for the following reasons:
  - It would not be disproportionate for the Authority to comply with his request
  - The public interest favoured disclosure of the information requested
  - The Authority should have given him a further opportunity to seek a review (which he would have sought) of its response of 3 September 2025
  - He was dissatisfied with the Authority's compliance with the timescales under the EIRs.

## **Investigation**

9. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
10. On 12 November 2025, the Authority was notified in writing that the Applicant had made a valid application. The case was subsequently allocated to an investigating officer.
11. 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 its handling of the request and why it considered complying with it would be manifestly unreasonable.

## **Commissioner's analysis and findings**

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

### ***Applicability of the EIRs***

13. "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 the information under the EIRs, subject to qualifications and exceptions in the EIRs.
14. In this case, the Applicant expressed dissatisfaction with the application of the EIRs. He commented that the Authority handled all information requests, even those tangentially connected to the Flood Protection Scheme, under the EIRs. Under this approach, he considered that "almost every issue has an environmental impact".
15. Having considered the nature of the information requested, the Commissioner is satisfied that the information will substantially fall within the definition of environmental information as defined in regulation 2(1) (in particular, paragraphs (a) and (c) of that definition).
16. The Commissioner is therefore satisfied that the Authority was correct to handle the Applicant's request in terms of the EIRs.

### ***Timescales***

17. Regulation 5(2)(a) of the EIRs gives Scottish public authorities a maximum of 20 working days following the date of receipt of the request to comply with a request for information. This is subject to qualifications which are not relevant in this case.
18. Unlike FOISA, the EIRs contains no provision for extending the timeframe while the Authority seeks clarification of the request.
19. However, regulation 7(1) of the EIRs allows a Scottish public authority to extend the time allowed by regulation 5(2)(a) by a further period of up to 20 working days, if the volume and complexity of the information requested makes it impracticable for the authority to provide an earlier response. In such cases, therefore, the time allowed for a response can be extended to a maximum of 40 working days.
20. Regulation 7(2) of the EIRs specifies that, when extending the time for responding, the Authority must notify the Applicant as soon as possible and, in any event, no later than 20 working days after the date of receipt of the request for the information.

21. In this case, the Authority failed to inform the Applicant, no later than 20 working days, that it was extending the time for responding under regulation 7(1) of the EIRs. In this respect, the Authority therefore failed to comply with regulation 7(2) of the EIRs. In addition, it failed to notify the Applicant of its reasons for considering the information to be voluminous and complex, as required by regulation 7(3)(b).
22. Regardless of the volume or complexity of the information falling within the scope of the Applicant's request, the Commissioner notes that the Authority was not entitled to extend the time for compliance more than 40 working days after the date of receipt of the request for the information (i.e. beyond 18 August 2025).
23. The Commissioner therefore finds that the Authority was not entitled to extend compliance to 3 September 2025 – 52 working days after the request.
24. As the Authority did not provide its response no later than 20 working days after the date of receipt of the request for the information, the Commissioner must find that the Authority failed to comply with the timescales set out in regulation 5(2)(a) of the EIRs.

### ***Right to review***

25. As stated above, the Applicant expressed dissatisfaction with the Authority not indicating in its response of 3 September 2025 he could seek a review (which he would have sought) of that response.
26. The Commissioner notes that the Authority's response of 3 September 2025 followed the Applicant's requirement for review of 5 August 2025. While the Applicant's requirement for review focused on the Authority's decision to extend the time for responding to his request, the Commissioner accepts that it was part of the Applicant's broader dissatisfaction with the Authority's failure to substantively respond to his request no later than 20 working days after the date of receipt.
27. In the circumstances, therefore, the Commissioner considers that the Authority's response of 3 September 2025, given that it was issued subsequent to the Applicant's requirement for review of 5 August 2025 of the Authority's failure to respond to his request on time, technically constitutes a review outcome for the purposes of the EIRs.
28. A review outcome under the EIRs does not give rise to a right to a further review by the Authority. Instead, the correct route for challenging dissatisfaction with a review outcome is to make an appeal to the Commissioner in terms of section 47(1) of FOISA – as the Applicant did in this case.
29. Consequently, the Commissioner finds that the Authority did not fail to comply with the EIRs by not including information in its response of 3 September 2025 (which he has concluded was, in fact, a review outcome in terms of the EIRs) on a further right of review by the Authority.

### ***Regulation 10(4)(b) – Manifestly unreasonable***

30. Regulation 10(4)(b) provides that a Scottish public authority may refuse to make environmental information available to the extent that the request for information is manifestly unreasonable.
31. In considering whether the exception applies, the authority must interpret it in a restrictive way and apply a presumption in favour of disclosure. Even if it finds that the request is manifestly unreasonable, it is still required to make the information available unless, in all the

circumstances, the public interest in doing so is outweighed by that in maintaining the exception.

32. The Commissioner's general approach is that the following factors are relevant when considering whether a request is manifestly unreasonable. These are that the request:
- (i) would impose a significant burden on the public authority;
  - (ii) does not have a serious purpose or value;
  - (iii) is designed to cause disruption or annoyance to the public authority;
  - (iv) has the effect of harassing the public authority; or
  - (v) would otherwise, in the opinion of a reasonable person, be considered manifestly unreasonable or disproportionate.
33. This is not an exhaustive list. Depending on the circumstances, other factors may be relevant, provided the impact on the authority can be supported by evidence. The Commissioner recognises that each case must be considered on its merits, taking all the circumstances into account.

#### *The Applicant's submissions*

34. The Applicant stated that he strongly disagreed with the Authority's position that the staff cost of answering his request would be disproportionate and not in the public interest.
35. The Applicant suggested that the Authority had never intended to provide him with the information requested and that it had "dragged out the process as long as is permitted by the legislation and thus frustrate a genuine information request".

#### *The Authority's submissions*

36. The Authority confirmed that searches in response to the request had identified 301 separate correspondence items that required review. It explained that each item would need to be reviewed individually to establish relevance to the request and further review to "establish if they were confidential" in terms of the EIRs.
37. In what follows, the Authority set out the tasks required for responding to the emails element of the communication and correspondence part of the request.
38. The Authority submitted that it expected that searching for relevant items would take ten minutes, with another ten minutes required to download these documents. This amounted to a total of 20 minutes.
39. With a sample of 50 files, the Authority noted that it took 20 minutes in total to open and sort them into relevant and irrelevant documents. This amounted to an average of 0.4 minutes per file.
40. For files identified as relevant, the Authority stated it would take 1.55 minutes per file to convert them into PDF format, 8.4 minutes per file to review the items and redact them as necessary and 1.9 minutes per file to check the redactions. This amounted to an average of 11.85 minutes per file.
41. In light of the above, the Authority provided the following calculation:
- Initial search time = 20 minutes

- 301 files at 0.4 minutes per file sort time = 120.4 minutes
  - 301 files with 58% relevant being 175 relevant files at 11.85 minutes per file = 2,073.75 minutes
  - Total time = 20 minutes + 120.4 minutes + 2073.75 minutes = 2,214.15 minutes or 36.9 hours
42. The Authority submitted that “the key elements of time” would be undertaken by a Principal Solicitor as it would need to establish what information was relevant and what needed redacted as “commercially in confidence”. It stated that the total cost for this would be £1,888.54, based on the hourly cost of employing a Principal Solicitor at grade 11. However, it considered that the “key time cost” would be the loss of over a week of the Principal Solicitor in assessing the files.
43. The Authority also commented that additional time would be required for all relevant officers to check calendars and diaries for any in-person and virtual meetings and to check mobile phones for any relevant text messages.

*The Commissioner’s view*

44. The Commissioner has carefully considered the submissions from the Applicant and the Authority.
45. Although each case is different, the Commissioner has considered the Authority’s calculation and reviewed a sample of the emails provided. Having done so, he cannot identify any exceptional features which would justify an average of 11.85 minutes to review and redact each relevant email, and he is not satisfied that the Authority has otherwise provided sufficient evidence to demonstrate that this estimate is reasonable.
46. However, in the circumstances of the case, the Commissioner considers it appropriate to go on to consider whether responding to the request would be manifestly unreasonable even if he accepted the Authority’s estimate of 11.85 minutes to review and redact each relevant email.
47. Unlike FOISA, there is no cost limit to the duty to comply with a request for environmental information. Exceeding the £600 cost limit set under section 12(1) of FOISA may be relevant in considering whether a request is manifestly unreasonable for the purposes of the EIRs, but a request costing more than that to process does not necessarily fall into that category.
48. While regulation 10(4)(b) of the EIRs sets a separate test, the Commissioner considers, in general terms, that the effective cap of 40 hours to gather and provide information under FOISA without exceeding the upper cost limit provides a reasonable guideline. (The maximum hourly rate an authority can charge for staff time, under FOISA, is £15 per hour.) In this regard, he notes that the EIRs require the exceptions in regulation 10 of the EIRs to be interpreted restrictively and a presumption to be applied in favour of disclosure.
49. As noted above, the Authority estimated that it would take 36.9 hours to search, sort, review and redact the 301 separate correspondence items identified. That is, less time than the effective cap of 40 hours under FOISA. While the Authority also referred to additional searches of calendars, diaries and mobile phones, it provided no indication of the time required to do this or the likely volume of information these searches would yield. The Commissioner can therefore give little weight to that additional, but unquantified, burden.

50. The Commissioner also notes that the Authority's calculation appears to factor in time spent on deciding whether information should be released rather than the time spent in identifying, physically redacting and providing the information. Had the request not sought environmental information and therefore been handled under FOISA, the Authority would not have been entitled, on the basis of the submissions provided, to refuse to respond to the request on the basis that to do so would exceed the upper cost limit in FOISA. The Commissioner is not satisfied that there is any basis for taking such "thinking time" into account under the EIRs.
51. The Commissioner recognises the Authority's concern that a senior member of its legal team would need to be diverted to respond to the request. He acknowledges that there may be limited circumstances in which diverting specialist staff from core functions may make responding to a request manifestly unreasonable.
52. However, it is the responsibility of each authority to ensure that they adequately resource their information governance function. The Commissioner therefore considers that concerns about diverting staff will render requests manifestly unreasonable only under exceptional circumstances. He is unaware of any such exceptional circumstances in this case, and the Authority has not explained what statutory or core functions would be materially affected or why the work could not be managed or allocated differently.
53. In any event, it is unclear to the Commissioner why the Authority considers that all of this work must be undertaken by a Principal Solicitor. Having reviewed a sample of the emails, it appears to the Commissioner that the majority of this work could be carried out by more junior staff under the supervision of a suitably senior decision maker. He does not consider that the Authority has provided sufficient evidence to justify allocating the entire exercise to the Principal Solicitor (or another employee at the same grade). In any event, as noted above, the Commissioner does not accept that an average review and redaction time of 11.85 minutes for each relevant email is reasonable.
54. In all the circumstances, the Commissioner cannot conclude, on the basis of the submissions he has received, that the Authority was entitled to rely on the exception in regulation 10(4)(b) of the EIRs. As such, he is not required to go on to consider the application of the public interest test in regulation 10(1)(b) of the EIRs.
55. The Commissioner requires the Authority to issue the Applicant with a revised review outcome (in terms of regulation 16 of the EIRs and otherwise than in terms of regulation 10(4)(b)).

## 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.

Specifically, the Commissioner finds that the Authority was not entitled to rely on the exception in regulation 10(4)(b) of the EIRs for information which would fulfil the Applicant's request.

The Commissioner therefore requires the Authority to provide the Applicant with a revised review outcome, in terms of regulation 16 and otherwise than in terms of regulation 10(4)(b), by **11 September 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.

**Euan McCulloch**  
**Head of Enforcement**

**28 July 2026**