



Scottish Information
Commissioner
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Decision Notice 198/2026

Representations or consultation responses relating to the Whitesands Project Flood Protection Scheme

Authority: Dumfries and Galloway Council
Case Ref: 202600330

Summary

The Applicant asked the Authority for copies of all representations or consultation responses received by the Authority under section 104 of the Community Empowerment (Scotland) Act 2015 relating to the Whitesands Project Flood Protection Scheme. The Authority refused to confirm or deny whether it held the information requested. The Commissioner investigated and found that the Authority was not entitled to refuse to confirm or deny whether the information existed and was held. He required the Authority to issue a revised review response to the Applicant.

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 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”, “the Commissioner” and “environmental information”) (Interpretation); 5(1) and (2)(b) (Duty to make environmental information available on request); 10(5)(a) and (f) and (8) (Exceptions from duty to make environmental information available); 11 (Personal data); 17(1), (2)(a), (b) and (f) (Enforcement and appeal provisions).

Community Empowerment (Scotland) Act 2015 section 104 (Disposal and use of common good property: consultation).

Background

1. On 28 October 2025, the Applicant made a request for information to the Authority. He asked for copies of all representations or consultation responses received by the Authority under [section 104](#)¹ of the Community Empowerment (Scotland) Act 2015 in relation to the Whitesands Project (Flood Protection Scheme), together with any summary, analysis, or report arising from those representations. He stated that all personal or identifiable information should be fully redacted.
2. The Authority responded on 25 November 2025 in terms of the EIRs. It gave notice to the Applicant, under regulation 11(6) of the EIRs, that it neither confirmed nor denied whether it held the information requested. Were it to hold such information, the Authority stated that the exception in regulation 10(5)(f) of the EIRs would apply as disclosure would, or would be likely to, cause prejudice to the interests of the persons who provided the information voluntarily to the Authority.
3. On 4 December 2025, the Applicant wrote to the Authority requesting a review of its decision. He stated that he was dissatisfied with the decision for the following reasons:
 - If a section 104 consultation was done, Community Empowerment and Common Good Property Guidance for Local Authorities makes it clear that representations will be published.
 - If a section 104 consultation was not done, then the Authority was in breach of its statutory obligations under the Community Empowerment (Scotland) Act 2015.
 - Either way, the Authority was not entitled to hide the fact of whether it had or had not done the section 104 consultation: he considered that position “simply untenable”.
4. The Authority notified the Applicant of the outcome of its review on 20 February 2026, which fully upheld its original decision.
5. Later the same day, 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 agree that the exceptions claimed by the Authority had been correctly applied.

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 26 May 2026, the Authority was notified in writing that the Applicant had made a valid application. 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

¹ <https://www.legislation.gov.uk/asp/2015/6/section/104>

on this application and to answer specific questions related to the applicability of the exceptions claimed.

Commissioner's analysis and findings

9. The Commissioner has considered all of the submissions made to him by the Applicant and the Authority.
10. As stated in previous decisions, in [Scottish Ministers v Scottish Information Commissioner \[2006\] CSIH 8²](#), at paragraph [18], the Court of Session recognised that:

"... in giving reasons for his decision, [the Commissioner] is necessarily restrained by the need to avoid, deliberately or accidentally, disclosing information which ought not to be disclosed."
11. In this decision notice, the Commissioner has endeavoured to give as full an account of his reasoning as he can, but, by necessity, in this case the comments of the Court of Session are applicable to some aspects.

Application of the EIRs

12. 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.
13. The Authority considered the request under the EIRs, having concluded that the information requested, if it existed and were held, would be environmental information as defined in regulation 2(1) of the EIRs.
14. However, during the investigation, the Authority commented that the substance of the request related to a common good consultation process as opposed to environmental decisions relating to a flood protection scheme itself. It therefore questioned whether it should have considered the request under FOISA.
15. Having considered the terms of the request, the Commissioner is satisfied that the information requested, if it existed and were held, would be information on a measure affecting, or likely to affect, water, land, the landscape and the built environment. It therefore falls within the definition of environmental information in regulation 2(1) of the EIRs, particularly paragraph (c).

Section 39(2) of FOISA – Environmental information

16. The exemption in section 39(2) 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.
17. In this case, the Commissioner accepts that the Authority was entitled to apply this exemption to the information requested, given his conclusion that, if it existed and were held, it would be properly classified as environmental information.

² https://www.bailii.org/scot/cases/ScotCS/2008/CSIH_08.html

18. As there is a statutory right of access to environmental information available to the Applicant in this case, the Commissioner accepts, in all the circumstances, that the public interest in maintaining the exemption (and responding to the request under the EIRs) outweighs any public interest in responding to the request under FOISA.
19. The Commissioner therefore concludes that the Authority was correct to apply section 39(2) of FOISA and to consider the request under the EIRs. In what follows, he will therefore consider this case solely in terms of the EIRs.

Regulation 11(6) of the EIRs – neither confirm nor deny

20. Regulation 11 of the EIRs relates to personal data. Regulation 11(6) allows a Scottish public authority to respond to a request for information by not revealing whether the requested information exists or is held by it (whether or not it actually holds that information), if giving such confirmation would involve making information available in contravention of regulation 11.
21. Regulation 11(2) of the EIRs provides that personal data shall not be made available where the applicant is not the data subject and other specified conditions apply. These include that disclosure would contravene any of the data protection principles in the UK GDPR or DPA 2018 (regulation 11(3A)(a)).
22. Regulation 10(5)(f) of the EIRs is a separate exception that provides that a Scottish public authority may refuse to make environmental information available to the extent that its disclosure would, or would be likely to, prejudice substantially the interests of the person who provided that information, where that person –
 - (i) was not under, and could not have been put under, any legal obligation to supply the information;
 - (ii) did not supply it in circumstances such that it could, apart from the EIRs, be made available; and
 - (iii) has not consented to its disclosure.
23. Regulation 10(5)(f) of the EIRs does not provide a basis for a public authority to neither confirm nor deny whether the requested information exists or is held by it. The EIRs contain two provisions that allow a public authority to respond to a request for information by not revealing whether the requested information exists or is held by it (whether or not it actually holds that information):
 - Regulation 11(6) of the EIRs, if giving such confirmation would involve making information available in contravention of regulation 11.
 - Regulation 10(8) of the EIRs, if giving such confirmation would, or would be likely to, prejudice substantially any of the interests referred to in regulation 10(5)(a) and would not be in the public interest under regulation 10(1)(b).
24. Accordingly, while regulation 10(5)(f) of the EIRs may be relied on to withhold environmental information, it cannot justify the refusal to confirm or deny whether that information exists or is held.
25. In light of the above, the Commissioner asked the Authority to explain its reliance on regulation 11(6) of the EIRs in conjunction with regulation 10(5)(f) of the EIRs.

The Authority's submissions

26. The Authority confirmed that it considered that the exception in regulation 10(5)(f) of the EIRs applied to the information requested, if it existed and were held, and that the exception in regulation 10(5)(d) possibly applied too.
27. In the circumstances, the Authority maintained that applying regulation 11(6) of the EIRs to neither confirm nor deny whether it held the information requested or whether that information existed was the "appropriate mechanism". However, the Authority did not explicitly seek to rely on regulation 11(2) of the EIRs in conjunction with regulation 11(6).
28. The Authority also confirmed that it was not applying regulation 10(8) of the EIRs.
29. The Commissioner must ensure that his decision notice does not confirm one way or the other whether the information requested actually exists or is held by the authority. He is therefore unable to set out the Authority's submissions in any more detail.

The Commissioner's view

30. The Commissioner has carefully considered the submissions provided by the Authority.
31. As stated above, regulation 11(6) of the EIRs only permits a public authority to respond to a request for information by not revealing whether the requested information exists or is held by it (whether or not it actually holds that information), if giving such confirmation would involve making information available in contravention of regulation 11.
32. As the Authority has not explicitly sought to rely on any of the other provisions of regulation 11 in conjunction with regulation 11(6), the Commissioner must find that the Authority was not entitled to rely on regulation 11(6) to neither confirm nor deny whether it held the information requested.
33. The only other available route for a neither confirm nor deny response by the Authority would be in terms of regulation 10(8) of the EIRs in conjunction with the exception in regulation 10(5)(a). The Authority confirmed that it was not relying on regulation 10(8).
34. The Commissioner must therefore find that the Authority was not entitled to refuse to confirm or deny whether it held the information requested.
35. Had the Authority sought to rely on regulation 11(6) of the EIRs in conjunction with the exception in regulation 11(2), the Commissioner would note that the Applicant expressly stated in his request that all personal or identifiable information should be fully redacted.
36. In the Commissioner's view, the Authority's arguments for relying on regulation 11(6) of the EIRs focus more on the actual disclosure of any relevant information (if it existed and were held), as opposed to confirmation or otherwise of its existence and whether it was held. Confirming or denying that the information exists, or is held, is simply that – it does not extend to disclosure of the actual content of any information (if it existed and were held).
37. In light of his findings above, the Commissioner requires the Authority to reveal to the Applicant whether the information he requested existed and was held by it when it received his request, and to provide him with a fresh review outcome in terms of regulation 16 of the EIRs.
38. If the information is held, the Commissioner requires the Authority to provide the information to the Applicant or, if it considers the information is excepted from disclosure, to justify and

explain its reliance on the applicable exception(s). If the information is not held, he requires the Authority to give notice of this, in terms of regulation 10(4)(a) of the EIRs.

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 regulation 11(6) of the EIRs to neither confirm nor deny whether it held the information requested.

The Commissioner requires the Authority to reveal to the Applicant whether the information he requested existed and was held by it when it received his request, and to provide him with a fresh review outcome in terms of regulation 16 of the EIRs. In doing so, the Authority must have regard to the conditions set out in paragraph 38.

The Commissioner requires the Authority to do this by **14 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

30 July 2026

