



Scottish Information
Commissioner
www.foi.scot

Decision Notice 236/2026

Petitions to court regarding the appropriation of Common Good property

Authority: Dumfries and Galloway Council
Case Ref: 202600067

Summary

The Applicant asked the Authority for information relating to whether it had petitioned any court under section 75(2) of the Local Government (Scotland) Act 1973. The Authority withheld information falling within the scope of the request under the exemption in section 37(1)(a)(i) of FOISA, which contains an absolute exemption covering court records. During the investigation, the Authority changed position and stated that it did not hold the information requested.

The Commissioner investigated and found that the Authority had considered the request under the wrong legislation. The requested information was environmental, and the Authority should have considered the request under the EIRs. The Commissioner also found that the Authority had failed to interpret the Applicant's request correctly. He required the Authority to carry out fresh, adequate and proportionate searches and provide the Applicant with a revised review outcome in terms of the EIRs.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2), (4) 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) (Duty to make environmental information available on request); 10(1), (2) and (4)(a) (Exceptions from duty to make environmental information available); 16 (Review by a Scottish public authority); 17(1), (2)(a), (b) and (f) (Enforcement and appeal provisions).

Background

1. On 27 October 2025, the Applicant made a request for information to the Authority. He asked for all recorded instances in which the Authority had:
 - (i) Appropriated any Common Good property, specifying in each case whether the subjects were classified as alienable or inalienable; and
 - (ii) Petitioned any court under section 75(2) of the Local Government (Scotland) Act 1973, including the dates, courts, and case references for each such petition.
2. The Authority responded on 24 November 2025 in the following terms:
 - In response to part (i), the Authority informed the Applicant that it did not hold the information requested prior to 2012 and that all formal Authority decisions, which were held digitally, relating to Common Good land were publicly available on its website and therefore exempt under section 25(1) of FOISA
 - In response to part (ii), the Authority advised that any information lodged with the courts for the purposes of proceedings was exempt, even if it held that information, under section 37(1)(a)(i) of FOISA and that the information may otherwise be obtainable from court records in any case.
3. On 5 December 2025, the Applicant wrote to the Authority requesting a review of its decision in relation to part (ii) of the request. He stated that he was dissatisfied with the decision because, while he accepted that any documentation lodged with the court may be exempt, he did not accept that information regarding instances of petitions under section 75(2) of the Local Government (Scotland) Act 1973, along with dates and other details, was exempt under FOISA.
4. The Authority notified the Applicant of the outcome of its review on 7 January 2026, which fully upheld its original decision.
5. On 12 January 2026, 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 same reasons set out in his requirement for review.

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 11 March 2026, 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 its interpretation of the request, its application of the exemption in section 37(1)(a)(i) of FOISA and whether it considered the information requested was environmental information.

9. As the Applicant only expressed dissatisfaction with the Authority's response to part (ii) of the request, the Commissioner's decision notice considers only the Authority's handling of that part of the request.

Commissioner's analysis and findings

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

FOISA or the EIRs?

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. Given the subject matter of the request, the Commissioner asked the Authority to consider whether part (ii) of the request properly fell to be handled as a request for environmental information and therefore be responded to under the EIRs.
13. The Authority explained that it had considered whether it should have responded to part (ii) of the request under the EIRs. However, following discussion, it considered it appropriate to respond in terms of FOISA as the information requested regarded property and not the interaction of that property with the environment.
14. Having considered the subject matter of the request and the Authority's submissions, the Commissioner is satisfied that the information requested is environmental information. In his view, the decision to seek court authority to appropriate Common Good land is a measure affecting or likely to affect that land in terms of paragraph (c) of regulation 2(1) of the EIRs.
15. 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

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. 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 is properly classified as environmental information.
18. 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 would outweigh any public interest in disclosing the information under FOISA.

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

19. 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.

20. On receipt of a request for environmental information, therefore, the authority must ascertain what information it holds falling within the scope of the request. Having done so, regulation 5(1) requires the authority to make that information available, unless a qualification in regulation 6 to 12 applies (regulation 5(2)(b)).
21. 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.

The Authority's change of position

22. During the investigation, the Authority stated that it did not hold a "list of instances in which we have petitioned the court" as there was no business need to hold such "a list". It said that it should have notified the Applicant that it did not hold the information requested.
23. Given the Authority's position is now that it does not hold the information requested and his conclusion that the Authority had a duty to consider part (ii) of the request in terms of the EIRs, the Commissioner will consider whether the Authority would have been entitled to rely on the exception in regulation 10(4)(a) of the EIRs.

Regulation 10(4)(a) – Information not held

24. 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.
25. 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.
26. 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.
27. The Commissioner has carefully considered the terms of part (ii) of the request and the submissions made by the Authority.
28. Part (ii) of the request sought all recorded instances in which the Authority had petitioned a court under section 75(2) of the Local Government (Scotland) Act 1973, including the dates, courts, and case references for each such petition. It was not limited to information already held in the form of a compiled list. That the information requested may be held across different records does not mean, of itself, that the information is not held by the Authority.
29. In the Commissioner's view, the relevant question was whether the Authority held recorded information falling within the scope of part (ii) of the request, irrespective of whether this information had previously been collated or compiled. He is therefore not satisfied that the Authority correctly interpreted part (ii) of the request.
30. Given his view that the Authority failed to correctly interpret part (ii) of the request, the Commissioner cannot be satisfied that the Authority has taken adequate and proportionate steps to identify whether it holds information falling within the scope of part (ii) of the request.
31. In all the circumstances, therefore, the Commissioner cannot uphold the Authority's claim, based on the submissions he has been provided, that it does not hold the information

requested in part (ii) of the request. As he is not satisfied that the Authority would have been entitled to rely on the exception in regulation 10(4)(a) of the EIRs, he is not required to go on to consider the application of the public interest test in regulation 10(1).

Regulation 16 of the EIRs

32. 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 (regulations 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)).
33. Although the Authority responded to the Applicant's requirement for review on 7 January 2026, this was entirely in terms of handling the request under FOISA, and not the EIRs.
34. It is apparent that the Authority failed to respond to the Applicant's request of 27 October 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.
35. The Commissioner therefore requires the Authority to reconsider the Applicant's request, carry out fresh, adequate and proportionate searches for the information requested in part (ii) of the request, reach a decision on the basis of those searches and notify the Applicant of the outcome (all in terms of regulation 16 of the EIRs). In doing so, the Authority must:
 - consider carefully the terms of the request and ensure that its interpretation of the request is reasonable and fully addresses the request
 - take adequate and proportionate steps to establish what information is held, using appropriate search terms and searching all locations and mediums where relevant information may be held
 - retain evidence of those searches in the event of a further appeal to the Commissioner.

Handling matters

36. The Commissioner considers it a basic requirement, when responding to an information request, that a public authority first establishes what information falling within the scope of the request is held. Only once that information has been identified can the public authority properly consider whether an exemption applies to it.
37. In this case, the Authority initially informed the Applicant in response to part (ii) of the request that any information lodged with the courts for the purposes of proceedings was exempt, even if it held that information, under section 37(1)(a)(i) of FOISA. However, it is apparent that the Authority did not take steps to establish whether it held the information requested before applying this exemption.
38. While the exemptions in section 37 of FOISA are absolute, this does not absolve public authorities of their responsibility to identify whether they hold the information requested and then assess the content of the information to determine whether the exemption actually applies. For example, the exemptions in section 37 of FOISA will only apply if the public authority holds the information solely because it is contained in a relevant document.

Decision

The Commissioner finds that the Authority failed to comply with the requirements of regulations 5(1) and 16 of the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the Applicant's information request and requirement for review.

In particular, the Commissioner finds that the Authority failed to recognise that the information requested was environmental information and therefore fell to be considered under the EIRs, and also that the Authority failed to interpret part (ii) of the request correctly.

The Commissioner therefore requires the Authority to provide a response to the Applicant's requirement for review, in terms of regulation 16 of the EIRs, by 2 November 2026. In doing so, he requires the Authority to have regard to the conditions set out in paragraph 35 above.

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

17 September 2026