Scottish Information Commissioner
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Decision Notice 247/2026

Fish killed at the Dalmagarry Burn

Authority: Scottish Environment Protection Agency
Case Ref: 202502213

Summary

The Applicant asked the Authority for information relating to an incident at the Dalmagarry Burn resulting in a number of fish being killed. The Authority withheld the information requested on the basis that disclosure would, or would be likely to, prejudice substantially its ability to conduct an inquiry of a criminal nature. The Commissioner did not accept that the Authority was entitled to withhold the information. He required the Authority to disclose the information 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 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) (Duty to make environmental information available on request); 10(1), (2) and (5)(b) (Exceptions from duty to make environmental information available); 17(1), (2)(a), (b) and (f) (Enforcement and appeal provisions).

Background

1. On 21 October 2025, the Applicant made a request for information to the Authority. Among other things, he asked:

   (i) How many fish were killed in the Dalmagarry Burn that feeds into the Findhorn?

   (ii) What was the cause of the incident that occurred on 22 August 2025?

(iii) Who was responsible for the incident?

2. The Authority did not respond to the information request.

3. On 25 November 2025, the Applicant wrote to the Authority requiring a review in respect of its failure to respond.

4. The Authority notified the Applicant of the outcome of its review on 9 December 2025. It withheld the information requested under the exception in regulation 10(5)(b) of the EIRs and explained that the information formed part of an ongoing investigation into the site.

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 disagreed that the exception in regulation 10(5)(b) of the EIRs 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 25 February 2026, the Authority was notified in writing that the Applicant had made a valid application. The Authority was asked to send the Commissioner the information withheld from the Applicant. The Authority provided the information, and 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 reasons for withholding the information from the Applicant under the exception in regulation 10(5)(b) of the EIRs.

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 8[1], 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.

[1] https://www.bailii.org/scot/cases/ScotCS/2008/CSIH_08.html

Handling in terms of the EIRs

12. "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.

13. The information requested appears to fall clearly within the scope of the definition of environmental information contained in regulation 2(1) of the EIRs.

14. The Commissioner would also note that he can see no detriment to the Applicant by considering his request under the EIRs rather than FOISA, nor has the Applicant disputed the Authority's decision to handle his request under the EIRs.

Section 39(2) of FOISA – Environmental information

15. 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.

16. In this case, the Commissioner accepts that the Authority was entitled to apply this exemption to withhold the information requested under FOISA, given his conclusion that it is properly classified as environmental information.

17. 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 this exemption (and responding to the request under the EIRs) outweighs any public interest in disclosing the information under FOISA. Both regimes are intended to promote public access to information and there would appear to be no reason why (in this particular case) disclosure of the information would be more likely under FOISA than under the EIRs.

18. The Commissioner therefore concludes that the Authority was correct to apply the exemption at section 39(2) of FOISA and consider the Applicant's information request under the EIRs.

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

19. Regulation 5(1) of the EIRs 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) of the EIRs requires the authority to provide that information to the requester, unless a qualification in regulations 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 withheld information

22. The Authority provided the Commissioner with ten separate documents that it considered comprised the withheld information.

23. Given the terms of the Applicant's request, the Commissioner considers that the Applicant is seeking answers to parts (i) to (iii) of his request, based on recorded information held by the Authority, rather than seeking the underlying recorded information itself.

24. In what follows, the Commissioner will therefore consider whether the Authority was entitled to withhold the answers requested, not whether it was entitled to withhold the underlying records from which these answers were derived.

Information disclosed during the investigation

25. During the investigation, the Commissioner drew the Authority's attention to media reporting[2] published on 15 October 2025 (i.e. predating the request) regarding the approximate number of fish killed in the incident at the Dalmagarry Burn. He asked the Authority to consider whether this publicly available information affected its application of the exception in regulation 10(5)(b) of the EIRs to the information requested in part (i) of the request.

26. The Authority subsequently disclosed to the Applicant the information it had withheld for part (i) of the request. However, it advised the Commissioner that this should not be taken as an indication that the exception in regulation 10(5)(b) of the EIRs had wrongly been applied at the time of the review outcome.

27. The Applicant confirmed receipt of the information disclosed by the Authority during the investigation in response to part (i) of his request. However, he stated that he still required a decision from the Commissioner on his application.

28. The Commissioner will therefore consider whether the Authority was entitled to apply the exception in regulation 10(5)(b) of the EIRs at the time of the review outcome for parts (i) to (iii) of the request.

Regulation 10(5)(b) – Prejudice to the ability of any public authority to conduct an inquiry of a criminal nature

29. Regulation 10(5)(b) of the EIRs 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 course of justice, the ability of a person to receive a fair trial or the ability of any public authority to conduct an inquiry of a criminal or disciplinary nature.

30. As with all exceptions under regulation 10 of the EIRs, a Scottish public authority applying this exception must interpret it in a restrictive way and apply a presumption in favour of disclosure (regulation 10(2)). Even where the exception applies, the information must be available unless, in all the circumstances, the public interest in making the information available is outweighed by that in maintaining the exception (regulation 10(1)(b)).

31. There is no definition of "substantial prejudice" in the EIRs. However, the standard to be met in applying this test is high. The word "substantial" is important here: the harm caused, or likely to be caused, by disclosure must be of real and demonstrable significance. The risk of harm must be real or very likely, not simply a remote or hypothetical possibility.

The Applicant's submissions

32. The Applicant disagreed that the exception in regulation 10(5)(b) of the EIRs applied and, in any event, considered that it would be in the public interest for the information requested to be disclosed.

[2] https://www.inverness-courier.co.uk/news/sepa-investigate-almost-200-salmon-deaths-during-work-to-rea-416799/

The Authority's submissions

33. At the time of the incident, the Authority explained that the Water Environment (Controlled Activities) (Scotland) Regulations 2011 (CAR 2011) were in force:

    - Regulation 31 of CAR 2011 provides that it is the duty of the Authority to monitor compliance with and enforce the provisions of these regulations.

    - Regulation 4 of CAR 2011 prohibits a person to carry on, or cause or permit others to carry on, any controlled activity except insofar as it is authorised under CAR 2011 and carried on in accordance with that authorisation.

    - Controlled activities are defined in regulation 3 of CAR 2011 and include a wide range of activities, such as activities liable to cause pollution of the water environment, abstraction of the water environment and the carrying out of building or engineering works in inland water or wetlands.

34. The Authority explained that the incident in question came to its attention following reports of a fish kill in the Dalmagarry Burn. It suspected that an offence may have been committed and therefore commenced an investigation under CAR 2011.

35. The Authority confirmed that licence reference CAR/L/1195087 was issued on 12 November 2021 and authorised the undertaking of controlled activities in or near the water environment at the Dalmagarry Burn including the carrying out of engineering works necessary for Project 12 (P12) of the A9 Dualling Programme.

36. The Authority noted that it was a requirement of the licence that construction works and/or temporary structures on the bed of inland waters associated with those works must not cause harm to fish. It stated it was an offence under CAR 2011 to breach this condition, and this was the offence identified as having been committed.

37. The Commissioner asked the Authority to explain, in as much specific detail as possible, why disclosure of the information requested would, or would be likely to, prejudice substantially its ability to conduct an inquiry of a criminal nature.

38. The Authority submitted that, at the time of the review outcome, the information requested related to an ongoing investigation into a pollution incident, and an enforcement decision had not yet been made. It was still considering the evidence gathered and considering what enforcement action, if any, would be appropriate.

39. The Authority considered that the information requested related directly to the main issues being considered as part of the investigation. This was not routine or administrative information: it formed part of the evidence and assessment the Authority was actively considering before reaching a final enforcement decision.

40. The Authority argued that disclosure of the suspected cause of the incident and who might have been responsible, before the investigation had concluded, could have revealed the Authority's understanding of events and matters still under consideration as part of the investigation. This would create a risk of affecting the Authority's ability to independently gather, consider and assess all relevant information before reaching a final decision. In particular, the Authority considered that disclosure of certain information into the public domain during a live investigation created a risk of affecting the evidence-gathering process and the wider assessment of the incident.

41. The Authority noted the possibility that the incident in question could be reported to the Crown Office and Procurator Fiscal Service (COPFS). In those circumstances, there was, at least potentially, the prospect of criminal proceedings. It reiterated that disclosure of factual information relating to the matters under investigation before any enforcement process had concluded created a risk of prejudice to the wider process and to the fair and independent consideration of the matter.

42. The Authority argued that officers must be able to gather and assess evidence without outside influence while an investigation was ongoing. Disclosure of specific factual information before findings had been finalised created a real risk of affecting that process and therefore prejudicing substantially the Authority's ability to conduct its inquiry. It considered disclosure, at that stage, regarding the cause of the incident and the responsible party, would, if it later discovered alternative or additional causes of the incident, naturally prejudice the Authority's ability to conduct an objective and fair investigation.

43. The Authority stated that the prejudice identified above was considered likely to be substantial, not speculative, and that it had not relied solely on the fact that, at the time of the review, the investigation remained ongoing. Rather, the assessment focused on the specific nature of the withheld information and how it related to the ongoing investigation and pending enforcement decisions.

44. The Authority explained that it considered the anticipated prejudice to be substantial because it related directly to its core role of investigating environmental incidents and reaching enforcement decisions. Any impact on the completeness or reliability of the evidence-gathering and investigation process could affect an important part of the investigation and the Authority's ability to reach informed and evidence-based conclusions.

The Commissioner's view

45. The Commissioner has carefully considered the submissions of both parties, together with the withheld information.

46. The Commissioner accepts that the Authority has, and had at the time of the request and the review outcome, the power to conduct a criminal inquiry. He also notes that the withheld information relates to a specific criminal inquiry that was ongoing at the time of the review outcome and the possibility that the matter could be reported to COPFS, meaning that there was, at least potentially, the prospect of criminal proceedings.

47. However, the exception in regulation 10(5)(b) of the EIRs can only apply if the Authority can establish that disclosure of the withheld information would, or would be likely to, prejudice substantially its ability to carry out a criminal inquiry.

48. As stated above, the Commissioner is satisfied that the Applicant is seeking answers to parts (i) to (iii) of the request based on recorded information held by the Authority, rather than seeking the underlying recorded information itself. He must therefore consider whether disclosure of these answers would, or would be likely to, cause the substantial prejudice required for the exception in regulation 10(5)(b) of the EIRs to be engaged.

Part (i) of the request

49. In relation to part (i) of the request, the Commissioner notes again that media reporting in the public domain prior to the request being made stated that almost 200 fish had been killed at the Dalmagarry Burn.

50. As stated above, the Authority stated that its decision during the investigation to disclose the number of fish killed at the Dalmagarry Burn should not be taken as indicating that the exception in regulation 10(5)(b) of the EIRs was wrongly applied at the time of the review outcome.

51. The Commissioner acknowledges that the information disclosed by the Authority during the investigation is more specific than that published in the media reporting. He also recognises that information disclosed by the Authority in response to an information request represents a new and official disclosure to the world at large – regardless of what might have been reported elsewhere.

52. However, the information disclosed by the Authority is effectively the same as that already publicly available at the time of the request. Based on the submissions provided by the Authority, the Commissioner is not satisfied that the Authority has evidenced the required substantial prejudice for the exception in regulation 10(5)(b) of the EIRs to be engaged in relation to part (i) of the request.

53. Consequently, in this case, the Commissioner is not satisfied that the information requested in part (i) of the request was properly withheld under the exception in regulation 10(5)(b) of the EIRs. Having reached that conclusion, the Commissioner is not obliged to, and has not gone on to, consider the public interest test required by regulation 10(1)(b) of the EIRs.

54. Given that the Authority disclosed to the Applicant the relevant information in response to part (i) of the request during the investigation, the Commissioner does not require the Authority to take any action in response to that part of the request.

Parts (ii) and (iii) of the request

55. In this case, the Commissioner is aware that explaining his reasoning with specific reference to the withheld information would inevitably disclose details of the withheld information. While he must be careful not to reveal the specific content of the withheld information, it is apparent from the withheld information that the Authority had received both an admission of responsibility for the incident and evidence identifying the cause of the incident.

56. While he accepts that the Authority's criminal inquiry was ongoing at the time of the review outcome, it is not apparent to the Commissioner – having carefully considered the submissions from the Authority and the specific circumstances of this case – that disclosure of this information would have caused, or would have been likely to cause, the substantial prejudice required to engage the exception in regulation 10(5)(b) of the EIRs.

57. If the Authority's own investigation later identified a different party as responsible for the incident or an additional or alternative cause, the Commissioner is not satisfied that disclosure of the information requested would, or would be likely to, impede the Authority's ability to complete its own criminal inquiry. The Authority could still gather further evidence and, if required, revise its position.

58. To the extent that the Authority is concerned that disclosure of this information might mislead or cause confusion, it can choose to provide a commentary alongside this information, which places it in context or explains its limitations as it sees fit.

59. The Commissioner is also not satisfied that the Authority has adequately demonstrated that disclosure of this information would, or would be likely to, have a material adverse effect on the Authority's ability to assess or gather evidence, consider what enforcement action, if any, would be appropriate or reach a final enforcement decision.

60. Similarly, the Commissioner is not persuaded that the Authority has provided sufficient evidence that disclosure would, or would be likely to, otherwise create a risk of prejudice to the wider process and to the fair and independent consideration of the matter by the Authority or others.

61. Based on the submissions provided by the Authority, the Commissioner is not satisfied that the Authority has evidenced the required substantial prejudice for the exception in regulation 10(5)(b) of the EIRs to be engaged. As noted above, the harm caused, or likely to be caused, by disclosure must be of real and demonstrable significance and the risk of harm must be real or very likely, not simply a remote or hypothetical possibility.

62. In principle, the Commissioner acknowledges the scope for harm from disclosure of information while a criminal inquiry is ongoing. However, it is for the Authority to provide the required evidence of harm in relation to the actual information being withheld and with regard to the specific circumstances at hand, not for the Commissioner to go out and find the harm or otherwise make the case on behalf of the Authority.

63. Consequently, in this case, the Commissioner is not satisfied that the information requested in parts (ii) and (iii) of the request was properly withheld under the exception in regulation 10(5)(b) of the EIRs. Having reached that conclusion, the Commissioner is not obliged to, and has not gone on to, consider the public interest test required by regulation 10(1)(b) of the EIRs.

64. The Commissioner therefore requires the Authority to disclose to the Applicant the information that answers parts (ii) and (iii) of the request. He will specify to the Authority the information to be disclosed.

65. The Commissioner would like to stress that his finding that information should be disclosed in one case should not be taken to imply that information of a particular type will be routinely disclosed in the future. The circumstances of each case, including the content of the specific information under consideration and the submissions made by the public authority, will be considered carefully and, where required, the public interest in each case assessed on its own merits.

Decision

The Commissioner finds that the Authority failed to comply with the Environmental Information (Scotland) Regulations 2004 (the EIRs), specifically regulation 5(1), in responding to the information request made by the Applicant.

In particular, the Commissioner finds that the Authority was not entitled to refuse to make the information requested available under regulation 10(5)(b) of the EIRs.

The Commissioner requires the Authority to disclose to the Applicant the information that answers parts (ii) and (iii) of the request, by **9 November 2026**. He will specify to the Authority the information to be disclosed.

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

23 September 2026