Scottish Information Commissioner
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Decision Notice 264/2026

Notifications of compliance issued by the Scottish Information Commissioner

Applicant: The Applicant
Authority: Orkney islands Council
Case Ref: 202600365

Summary

The Applicant asked the Authority for details of any "Notifications of Compliance Needed" issued to the Authority by the Scottish information Commissioner over a specified period. The Authority provided the Applicant with information in response to his request. The Commissioner investigated and found that the Authority had failed to accurately interpret the request and, in doing so, provided the Applicant with an incomplete response. He required the Authority to reconsider the request and issue the Applicant with a revised review outcome.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2), (4) and (6) (General entitlement); 15(1) and (2) (Duty to provide advice and assistance); 47(1) and (2) (Application for decision by Commissioner).

Background

1. On 5 January 2026, the Applicant made a request for information to the Authority concerning Notifications of Compliance Needed (NCNs) issued to the Authority by the Scottish Information Commissioner (the Commissioner). He asked for details of any NCNs issued to the Authority within the last three years and, for each NCN issued during that period, he requested:

   (i) The date the NCN was received by the Authority

(ii) The nature of the compliance issue identified

(iii) The steps taken by the Authority to address the NCN

(iv) The date on which compliance was achieved, if applicable.

2. The Applicant explained he wished to understand the Authority's experience of regulatory enforcement and the steps taken to ensure compliance with statutory Freedom of Information obligations.

3. The Authority responded on 26 January 2026. It informed the Applicant that two NCNs had been issued by the Commissioner over the specified period: Decision 043/2024[1] and Decision 249/2024[2]. It provided the Applicant with a summary of the steps the Commissioner required the Authority to take in response to these decisions and the dates it complied with these steps.

4. On 29 January 2026, the Applicant wrote to the Authority requesting a review of its decision. He stated that he was dissatisfied with the decision because he considered that the Authority had interpreted his request in an unduly narrow manner. He explained that he used the term NCNs to refer to instances where regulatory action was required in order to bring the Authority's FOI practice back into compliance, which he considered reasonably encompassed regulatory compliance activity and enforcement processes.

5. The Authority notified the Applicant of the outcome of its review on 25 February 2026, which upheld its original decision. It confirmed that the Commissioner had not issued any NCNs to the Authority within the period specified in the request.

6. On 25 February 2026, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. He stated that he was dissatisfied with the outcome of the Authority's review because he considered the Authority had interpreted his request in an unduly narrow manner, without seeking clarification, and that this had resulted in relevant information being omitted from its response.

Investigation

7. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.

8. On 9 April 2026, the Authority was notified in writing that the Applicant had made a valid application.

9. The case was subsequently allocated to an investigating officer.

10. 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 and interpretation of the request.

[1] https://www.foi.scot/decision-0432024

[2] https://www.foi.scot/decision-2492024

Commissioner's analysis and findings

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

Section 1(1) – General entitlement

12. Section 1(1) of FOISA provides that a person who requests information from a Scottish public authority which holds it is entitled to be given that information by the authority, subject to qualifications which, by virtue of section 1(6) of FOISA, allow Scottish public authorities to withhold information or charge a fee for it. The qualifications in section 1(6) of FOISA are not applicable in this case.

13. The information to be given is that held by the authority at the time the request is received, as defined by section 1(4) of FOISA.

14. 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 of probabilities lies, the Commissioner considers the scope, quality, thoroughness and results of the searches carried out by the public authority.

15. The Commissioner also considers, where appropriate, any reason 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 recorded information is (or was, at the time the request was received) actually held by the public authority.

The Applicant's submissions

16. As noted above, the Applicant considered that the Authority had interpreted his request unduly narrowly and had therefore provided him with an incomplete response.

17. The Applicant explained that on the same day as he made his request to the Authority, he had made the same request, using the same wording, to the Commissioner. He noted that the Commissioner had sought clarification, and on receiving clarification, had provided a response that disclosed information in relation to an intervention that had been opened in respect of the Authority, including the date the intervention was opened, the reason for the intervention and its status.

The Authority's submissions

18. The Authority stated that it was not familiar with the term NCNs but had interpreted it to mean any decisions issued by the Commissioner which required the Authority to take action in relation to the handling of requests it had received under FOI law. It considered it a reasonable assumption that the information requested related to decisions issued by the Commissioner that required the Authority to take action in order to comply with these decisions.

19. The Authority explained that it did not consider it necessary to seek clarification of the request because, although it was unfamiliar with the term NCNs, the intention of the Applicant appeared clear enough. Indeed, it suggested that seeking clarification may have been viewed by the Applicant as it being unduly pedantic or prevaricating in responding to the request.

20. The Authority noted that the Applicant had indicated that his use of the term NCNS was "used descriptively, to refer to instances where the Commissioner had formally intervened to require a public authority to bring its FOI practice into compliance". It believed this was, in essence, the same as a situation where the Authority had received communication from the Commissioner requiring it to take some form of action, which was the explanation it provided to the Applicant in the review outcome.

The Commissioner's view

21. The Commissioner has carefully considered the submissions of both the Applicant and the Authority, together with the terms of the request.

22. Section 15(1) of FOISA requires a Scottish public authority, so far as is reasonable to expect it to do so, to provide advice or assistance to a person who proposes to make, or has made, a request for information to it.

23. Section 15(2) of FOISA states that a Scottish public authority which, in relation to the provision of advice or assistance in any case, conforms with the Scottish Ministers' Code of Practice on the discharge of functions by Scottish public authorities under FOISA and the Environmental Information (Scotland) Regulations 2004 (the Section 60 Code[3]) is, as respects that case, to be taken to have complied with the duty to provide reasonable advice and assistance.

24. In this case, the Authority confirmed that it was not familiar with the term NCNs. This is understandable, as it is not a term used by the Commissioner. This is why the Commissioner, upon receiving same request from the Applicant, sought clarification of what he meant by NCNs before responding to it.

25. However, the Commissioner does not consider the Authority's initial interpretation of the request to be inexplicable or, necessarily, unduly narrow. However, it was clear from the terms of his requirement for review that the Applicant intended a broader interpretation than that adopted by the Authority. It is therefore difficult to understand why the Authority persisted at review stage with the interpretation it had originally adopted.

26. In the circumstances, the Commissioner finds that the Authority failed to accurately interpret the request. He therefore finds that the Authority failed to comply with section 1(1) of FOISA, and, in doing so, provided an incomplete response to the Applicant.

27. In response to the Authority's suggestion that seeking clarification may have been seen as unduly pedantic or an act of prevarication, the Commissioner would note that is appropriate for public authorities to seek clarification of requests that they consider unclear, provided the request for clarification is reasonable.

28. In this case, the Commissioner is satisfied that seeking clarification of the request would have been reasonable. The Section 60 Code is clear (at paragraph 5.5 in Part 2) that clarification should be sought as soon as reasonably possible. Following this good practice and seeking clarification only where reasonable is likely to reduce the likelihood of such a request being seen as unduly pedantic or prevaricating.

29. The Commissioner cannot stress enough the importance of ensuring that the terms of any information request received by a Scottish public authority are clear before proceeding to

[3] https://www.gov.scot/binaries/content/documents/govscot/publications/advice-and-guidance/2026/03/foi-eir-section-60-code-practice/documents/foi-eir-section-60-code-practice/foi-eir-section-60-code-practice/govscot%3Adocument/foi-eir-section-60-code-practice.pdf

respond. He would urge the Authority, and indeed all Scottish public authorities, to take steps to clarify with applicants any matter which is open to interpretation, prior to proceeding with a request.

30. The Commissioner would encourage requesters to read his Tips for Requesters[4] guidance prior to making requests and, where appropriate, to seek advice and assistance from public authorities on how best to word them. However, it remains incumbent on public authorities to engage with requesters in order to clarify unclear requests. Failure to do so, or to give sufficient regard to a subsequent clarification of the information requested is, as is apparent in this case, unproductive.

31. In the circumstances, the Commissioner concludes that, by failing to seek clarification of the Applicant's request, the Authority failed to comply with the duty in section 15(1) of FOISA to provide advice and assistance.

Next steps

32. The Commissioner requires the Authority to carry out a fresh review and to issue a revised review outcome to the Applicant (in terms of section 21 of FOISA). In doing so, the Authority must:

- provide advice and assistance to the Applicant, in terms of section 15(1) of FOISA, with a view to reaching a clear, and mutually shared, understanding of the scope of the request and, on that basis, to carry out a fresh review outcome
- take adequate and proportionate steps, on the basis of the understanding reached, to establish what information is held, using appropriate search terms and searching all locations and mediums where relevant information may be held.

Decision

The Commissioner finds that the Authority failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by the Applicant.

Specifically, the Commissioner finds that the Authority failed to comply with Part 1 of FOISA by failing to:

- seek clarification of the request, the Authority failed to comply with the duty in section 15 of FOISA to provide advice and assistance
- accurately interpret the Applicant's request and provide a response to this, the Authority failed to comply with section 1(1) of FOISA.

The Commissioner therefore requires the Authority to engage with the Applicant with a view to reaching a clear, and mutually shared, understanding of the scope of the request, to carry out adequate, proportionate searches for the information requested, reach a decision on the basis of those searches and notify the Applicant of the outcome (all in terms of section 21 of FOISA), by **14 December 2026**.

[4] https://www.foi.scot/sites/default/files/2022-03/Tips_for_Requesters.pdf

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.

Cal Richardson

Deputy Head of Enforcement

28 October 2026