Scottish Information Commissioner
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Decision Notice 267/2026

Building condition survey for specified block of flats

Authority: City of Edinburgh Council
Case Ref: 202600383

Summary

The Applicant asked the Authority for the building condition survey from 2020 for a specified block of flats and any summary documents prepared by the responsible consultant. The Authority considered the request under FOISA and withheld all of the information under an exemption. The Commissioner investigated and found that the Authority had failed to consider the request under the EIRs. The requested information was environmental information, and the Authority should have considered the request under the EIRs. The Commissioner required the Authority to issue a review outcome in terms of the EIRs.

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) (definitions of "the Act", "applicant" and "the Commissioner" and paragraphs (a), (c) and (f) of "environmental information") (Interpretation); 5(1) (Duty to make environmental information available on request); 16 (Review by Scottish public authority); 17(1), (2)(a), (b) and (f) (Enforcement and appeal provisions).

Background

1. On 25 September 2025, the Applicant made a request for information to the Authority. He asked for the building condition survey from 2020 for a specified block of flats and any summary documents prepared by the responsible consultant, including the report in full.

2. The Authority responded on 24 October 2025 in terms of FOISA. It withheld the information requested under the exemption in section 30(c) of FOISA.

3. On 27 October 2025, the Applicant wrote to the Authority requesting a review of its decision. He stated that he was dissatisfied with the Authority's decision because he considered that the Authority was not entitled to withhold the information requested under the exemption in section 30(c) of FOISA.

4. The Authority notified the Applicant of the outcome of its review on 26 November 2025, which upheld its original decision.

5. On 26 February 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 because he disagreed that the Authority was entitled to withhold the information requested under the exemption in section 30(c) of FOISA.

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 24 June 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 whether it considered the information requested was environmental information.

Commissioner's analysis and findings

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

FOISA or the EIRs?

10. "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.

11. The relationship between FOISA and the EIRs was considered at length in Decision 218/2007. Broadly, in light of this decision, the Commissioner's general position is as follows:

    (i) The definition of what constitutes environmental information should not be viewed narrowly.

(ii) There are two separate statutory frameworks for access to environmental information and an authority is required to consider the request for environmental information under both FOISA and the EIRs.

(iii) Any request for environmental information therefore must be handled under the EIRs.

(iv) In responding to a request for environmental information under FOISA, an authority may claim the exemption in section 39(2) of FOISA.

(v) If the authority does not choose to claim the section 39(2) exemption, it must, as well as dealing with the request under the EIRs, deal with the request fully under FOISA, by providing the information, withholding it under another exemption in Part 2, or claiming that it is not obliged to comply with the request by virtue of another provision in Part 1 of FOISA (or a combination of these).

(vi) The Commissioner is entitled (and indeed obliged), where he considers a request for environmental information has not been dealt with under the EIRs, to consider how it should have been dealt with under that regime.

12. Given the subject matter of the request and the nature of the withheld information, the Commissioner asked the Authority to consider whether the request properly fell to be handled as a request for environmental information and therefore be responded to under the EIRs.

13. Having reconsidered the subject matter of the request and reviewed the withheld information, the Authority accepted that the information requested is environmental information and that the request should have been considered under the EIRs.

14. The Commissioner notes that the request sought information contained in a report on the condition of a building. He is satisfied that the information requested by the Applicant falls within the definition of environmental information set out in regulation 2(1) of the EIRs, in particular paragraphs (a), (c) and (f) of that definition.

15. Given that the information requested is properly considered to be environmental information, the Authority had a duty to consider it in terms of regulation 5(1) of the EIRs. In failing to do so, the Authority 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 in 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, as stated above, the Authority responded to the Applicant's request solely under FOISA.

18. 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 was properly classified as environmental information.

19. 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 outweighs any public interest in disclosing the information under FOISA.

Regulation 16 of the EIRs

20. 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 (regulation 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)).

21. Although the Authority responded to the Applicant's requirement for review on 26 November 2025, this was only in terms of handling the request solely under FOISA and not the EIRs.

22. It is apparent that the Authority failed to respond to the Applicant's request of 25 September 2025 in terms of the EIRs and therefore it 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.

23. The Commissioner therefore requires the Authority to provide a response to the Applicant's requirement for review of 27 October 2025, in terms of regulation 16 of the EIRs.

Other matters

24. During the investigation, the Authority submitted that it considered that the exception in regulation 10(4)(d) of the EIRs applied to the information requested. This was because, while the consultant described the document as a final version, the Authority's position was that the work remained substantively incomplete and the report was not adopted or relied upon by the Authority.

25. Although the Authority submitted during the investigation that regulation 10(4)(d) of the EIRs applied, its response to the request and requirement for review were issued solely under FOISA. The Commissioner does not determine in this decision whether regulation 10(4)(d) of the EIRs applies and, as stated above, requires the Authority to provide a response to the Applicant's requirement for review in terms of regulation 16 of the EIRs.

26. However, if the Authority intends to rely on regulation 10(4)(d) of the EIRs, the Commissioner reminds the Authority that this regulation provides an exception from the duty to make environmental information available, where the request relates to material, which is still in the course of completion, to unfinished documents or to incomplete data. Where a Scottish public authority refuses to make information available on this basis, it must state the time by which the information will be finished or completed (regulation 13(d) of the EIRs).

27. The Aarhus Convention: An Implementation Guide[1] (the Guide) provides guidance (at page 85) as to the type of material this exception is intended to cover. It describes the expression "in the course of completion" as relating to the process of preparation of the information or document and not to any decision-making process for the purpose of which the information or document has been prepared. It states that the mere status of something as a draft alone does not automatically bring it within the exception.

28. The Guide also states that the words "in the course of completion" suggest that the term refers to individual documents that are actively being worked on by the public authority, and which will have more work done on them within some reasonable timeframe. Once these documents are no longer "in the course of completion" they may be released, even if they are still unfinished and even if the decision to which they pertain has not yet been resolved.

[1] https://unece.org/environment-policy/publications/aarhus-convention-implementation-guide-second-edition

29. The Commissioner would also note that, to the extent that the Authority is concerned that disclosure of the information requested 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.

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.

The Commissioner requires the Authority to provide a response to the Applicant's requirement for review, in terms of regulation 16 of the EIRs, by **21 December 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.

Cal Richardson
Deputy Head of Enforcement

4 November 2026