Scottish Information Commissioner
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Decision Notice 285/2026

Information on a house fire

Authority: Midlothian Council
Case Ref: 202501138

Summary

The Applicant asked the Authority for all correspondence, reports, and other information on the fire at a specific address on 3 March 2024. The Authority disclosed some of the information requested to the Applicant and notified him that some other information was not held. The Commissioner investigated and found that the Authority had considered the request under the wrong legislation. The requested information was environmental information, and the Authority should have considered the request under the EIRs. The Commissioner required the Authority to reconsider the Applicant's request, carry out fresh searches for the information requested and respond to the Applicant's request in accordance with regulation 16 of the EIRs.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2) and (6) (General entitlement); 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 paragraph (b) and (f) of definition of ""environmental information") (interpretation); 5(1) (Duty to make environmental information available on request); 17(1), (2)(a) and (b) (Enforcement and appeal provisions).

Background

1. On 5 March 2025, the Applicant made a request for information to the Authority. The Applicant requested all correspondence, reports, and other information held concerning the fire at a specified address, which occurred on 3 March 2024. This included all correspondence between the Authority and the Scottish Fire and Rescue Service and Scottish Power relating to the incident.

2. The Authority responded on 1 April 2025. It informed the Applicant of an instruction it provided to its gas engineer and its referral of the case to its insurance agent to consider the case independently of the Authority. The Authority informed the Applicant, in line with section 17 of FOISA, that information was not held which would fulfil the Applicant's request.

3. On 23 May 2025, the Applicant wrote to the Authority requesting a review of its decision. The Applicant questioned the position of the Authority that no correspondence was held whatsoever between itself or third parties regarding the cause of the fire. The Applicant also referred to section 3(2)(b) of FOISA, which provides that information held by another person on behalf of a Scottish public authority is to be regarded as being held by that authority for the purposes of the Act. The Applicant argued that, where information is held by a third party on behalf of a public authority, that information remains subject to a request for information as though it were held directly by the authority itself. The Applicant also suggested that the Authority should consider his information request under the Environmental Information (Scotland) Regulations 2004.

4. The Authority notified the Applicant of the outcome of its review on 15 July 2025. The Authority explained that other than communication between its Clerk of Works and its Insurance section at the time of the fire and correspondence confirming that all investigations by its Insurance Company had been concluded, it held no further information relating to the fire incident. It confirmed its original position and maintained that, in accordance with section 17 of FOISA, it was unable to fully comply with the request.

5. On 15 July 2025, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant stated that he was dissatisfied with the outcome of the Authority's review for the following reasons:

    - That it was unreasonable for the Authority to assert that it held no correspondence, reports, emails, meeting notes, incident records, or other information relating to a serious fire at one of its properties.

    - That, at a minimum, it would be reasonable to expect the Authority to hold internal reports or email correspondence concerning the incident. The Applicant also contended that the Authority had failed to properly consider section 3(2)(b) of FOISA.

    - Where the Authority had delegated the investigation or handling of the matter to a third party, such as an insurer or loss adjuster, any information generated or held by that third party on behalf of the Authority should be regarded as being held by the Authority for the purposes of FOISA and should therefore have been considered when responding to the request.

    - That the Authority had failed to conduct proper, thorough and proportionate searches across all relevant departments, or to request information from its agents or contractors.

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 13 August 2025, 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. These related to how it had established what recorded information it held falling within the scope of the request. Comments were also sought from the Authority as to why it decided to consider and respond to the request under FOISA rather than 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.

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 provisions including regulations 10 and 11 of the EIRs.

11. The relationship between FOISA and the EIRs was considered at length in Decision 218/2007[1]. Broadly, in light of that 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 any 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).

    (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, respond to 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) Where the Commissioner considers a request for environmental information has not been handled under the EIRs, he is entitled (and indeed obliged) to consider how it should have been handled under that regime.

12. Given the subject matter of the request, the Commissioner found it appropriate to consider whether the information requested by the Applicant should properly be regarded as environmental information, as defined in regulation 2(1) of the EIRs, and therefore subject to the EIRs.

13. The Authority considered the information requested was not environmental information, and it was therefore appropriate to consider both the request and the review in terms of FOISA.

[1] https://www.foi.scot/decision-2182007

It explained that, given its limited role in the fire investigation and that its insurance claim was because a building had been damaged and did not contain any environmental aspects, it was considered that the EIRs did not apply and it was therefore appropriate to consider both the request and review in terms of FOISA.

14. Having considered both the terms of the request and the withheld information, the Commissioner is satisfied, in the circumstances, that the information requested by the Applicant falls within the definition of environmental information set out in regulation 2(1) – at least to the extent that it relates to the causes of the fire and the damage caused, and most likely anything falling within scope. The information relates to a fire at a specified property and the effects of that fire on the property (i.e. the state of human health and safety and built structures in as much as they are or may be affected by the state of the elements of the environment referred to in paragraph (a) or, through those elements, by any of matters referred to in paragraph (b) (factors affecting, or likely to affect, the elements of the environment, even if not specifically listed in the definition)). As such, the Commissioner considers the information covered by the request to fall within paragraphs (b) and (f) of the definition of environmental information in regulation 2(1) of the EIRs.

15. Given that the information requested is, at least in part, environmental information, the Authority had a duty to consider it in terms of regulation 5(1) of the EIRs. By failing to do so, the Commissioner finds that the Authority failed, to comply with regulation 5(1).

16. Where the information falling within the scope of a request comprises "environmental" information, then the information must be processed in accordance with the appropriate regime.

Regulation 16 of the EIRs

17. 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)).

18. Although the Authority responded to the Applicant's requirement for review on 15 July 2025, as explained above, this was a result of the Authority considering the request solely in terms of FOISA and not, at least in part, under the EIRs.

19. It is apparent that the Authority failed to respond to the Applicant's request of 5 March 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.

20. The Commissioner, therefore, to the extent that the information requested is environmental, requires the Authority to provide a revised response to the Applicant's requirement for review of 23 May 2025 in terms of regulation 16 of the EIRs.

Information falling within the scope of the request

21. In considering whether a Scottish public authority has complied with the requirements of FOISA or the EIRs in any given case, the Commissioner must be satisfied that the authority has carried out adequate, proportionate searches in the circumstances, taking account of the terms of the request and all other relevant circumstances.

22. The Commissioner will consider the scope, quality, thoroughness and results of those searches, applying the civil standard of proof (the balance of probabilities). Where appropriate, he will also consider any reasons offered by the public authority to explain why it does not, or could not reasonably be expected to, hold the information.

23. In all cases, it falls to the public authority to persuade the Commissioner, with reference to adequate, relevant descriptions and evidence, that it does not hold the information (or holds no more information than it has identified and located in response to the request).

24. The request sought all correspondence, reports and any other information held on the fire including correspondence with the Scottish Fire Service and Scottish Power in relation to this incident.

25. The Authority has not provided any explanation on how it had interpreted the request: instead, it focused on its role following the fire incident at the specified address.

26. The Authority has not provided any evidence to demonstrate that it does not hold any recorded information falling within the scope of each part of the information request. Nor did it explain the steps taken to establish that the information is not held, or what searches were carried out for information covered by the request.

27. Although the Authority applied section 17 of FOISA in its review outcome, during the Commissioner's investigation it identified more recorded information held falling within scope of the request.

28. The Commissioner understands that this information was subsequently disclosed to the Applicant on 22 January 2026 subject to the redaction of some information under section 38(1)(b) of FOISA.

29. The Commissioner therefore finds that the Authority failed to adequately interpret the Applicant's request and given that further information was identified by the Authority during the investigation, which falls within scope of the request. In the absence of adequate submissions to evidence its position, the Commissioner finds that the Authority was not entitled to inform the Applicant that no recorded information was held.

30. Given the Authority's submissions, the Commissioner is not satisfied that it has identified all the information held and falling within the scope of the request. This must be addressed in further searches as part of the review required by this decision.

Decision

The Commissioner finds that the Authority failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) and with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by the Applicant.

Since the information requested appears to be environmental information, as defined by regulation 2(1) of the EIRs, the Commissioner finds that the Authority failed to comply with the requirements of regulations 5(1) and 16 in responding to the Applicant's information request and requirement for review.

In failing to accurately interpret the Applicant's request and in failing to satisfy the Commissioner that it did not hold any further information beyond that already identified, the Commissioner also finds that the Authority failed to comply with regulation 5(1) of the EIRs.

The Commissioner therefore requires the Authority to carry out adequate and proportionate searches for any recorded information held which would fulfil the Applicant's request, reach a decision on the basis of these searches and notify the Applicant of the outcome (all in terms of regulation 16 of the EIRs). This action should be carried out by **4 January 2027.**

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

18 November 2026