



Decision Notice 088/2024

Correspondence relating to the Musselburgh Flood Protection Scheme

Authority: East Lothian Council
Case Ref: 202200481

Summary

The Applicant asked the Authority for all emails and correspondence relating to the Musselburgh Flood Protection Scheme, including a list of any associated documents. The Authority initially stated the information was publicly available, but later accepted that only some of it was available online and stated that it would manifestly unreasonable to provide the remainder. The Commissioner investigated and found that the Authority was not entitled to claim that the information it said was available online was publicly available, but accepted that it would be manifestly unreasonable to provide the remainder of the information requested.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), 1(2), 1(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) (Interpretation) (paragraphs (a), (b), (c), (e) and (f) of definition of "environmental information"); 5(1), (2)(a) and (b) (Duty to make environmental information available on request); 6(1)(b) and (2) (Form and format of information); 9(1) and (3) (Duty to provide advice and assistance); 10(1), (2), and (4)(b) (Exceptions from duty to make environmental information available); 17(1), (2)(a), (b) and (f) (Enforcement and appeal provisions)

The full text of each of the statutory provisions cited above is reproduced in Appendix 1 to this decision. The Appendix forms part of this decision.

Background

1. On 24 February 2022, the Applicant made a request for information to the Authority. The Applicant asked for:
 - (i) a copy of all correspondence/emails etc. pertaining to the Musselburgh Flood Protection Scheme (including but not limited to Conor Price, CPE Engineering, Jacobs, SEPA, Scottish Water, Nature Scot, Dynamic Coast, Edinburgh City Council, Midlothian Council)
 - (ii) a list of any associated documents (including but not limited to maps, data, reports) which relate to the Musselburgh Flood Protection Scheme including but not limited to the OAP, modelling data and nature-based solutions reports
 - (iii) a copy of all correspondence and minutes relating to the Musselburgh Flood Protection Scheme with elected Musselburgh councillors.
2. The Authority responded on 17 March 2022 and informed the Applicant that it was applying regulation 6(1)(b) of the EIRs as information about the Musselburgh Flood Protection Scheme (MFPS) was publicly available on a dedicated website. The Authority provided a weblink¹ to the website, and invited the Applicant to make a fresh request for information should they identify information not available via this site.
3. The Applicant wrote to the Authority on the same day requesting a review of its decision. The Applicant stated that they were dissatisfied because the original response had not provided the information they had asked for. The Applicant highlighted that their request had sought the following information, which had not been published on the Authority's website:
 - all correspondence/emails (including any with Musselburgh councillors)
 - a list of associated documents, including maps, data and reports
 - minutes relating to the MFPS and Musselburgh councillors.
4. The Authority notified the Applicant of the outcome of its review on 13 April 2022. The Authority acknowledged that not all of the information requested was publicly available via the dedicated website it had linked to, but maintained that some of it was. However, the Authority stated providing the information that was not publicly available would be manifestly unreasonable, under regulation 10(4)(b) of the EIRs, because of the volume of information held and the time and cost that would be involved in complying with the request. The Authority offered to work with the Applicant to narrow the scope of a new request.
5. On 27 April 2022, 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 they were dissatisfied with the outcome of the Authority's review for the reasons set out in their review request and because:
 - the projected cost of compliance was excessive, unreasonable and intended to deter information requests

¹ <https://www.musselburghfloodprotection.com/>

- the Authority did not follow the correct procedures in handling their request.

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 31 May 2022, the Authority was notified in writing that the Applicant had made a valid application 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. These primarily related to the information the Authority considered publicly accessible, why it considered part of the request manifestly unreasonable, the advice and assistance it had provided to the Applicant and its handling of the request.

Commissioner's analysis and findings

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

Handling in terms of the EIRs

10. The Authority considered the Applicant's request under the EIRs, having concluded that the information requested was environmental information as defined in regulation 2(1) of the EIRs.
11. Where information falls within the scope of this definition, a person has a right to access it (and the public authority has a corresponding obligation to respond) under the EIRs, subject to the various restrictions and exceptions contained in the EIRs.
12. The Applicant has not disputed the Authority's decision to handle their request under the EIRs and 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).

Section 39(2) of FOISA – Environmental information

13. 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. In this case, the Commissioner accepts that the Authority was entitled to apply this exemption to the information withheld under FOISA, given his conclusion that it is properly classified as environmental information.
14. 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 should be more likely under FOISA than under the EIRs.

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

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

16. 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 is subject to the various qualifications contained in regulations 6 to 12 of the EIRs.
17. In this case, the Authority submitted that, in refusing the Applicant's request, it wished to variously rely upon regulations 6(1)(b) and 10(4)(b) of the EIRs.

Regulation 6(1)(b) – Form and format of information

18. Regulation 6(1)(b) of the EIRs states that, where an applicant requests that information is made available in a particular form or format, a Scottish public authority shall comply with that request unless the information is already publicly available and easily accessible to the applicant in another form or format.
19. In order to determine whether the Authority dealt with the Applicant's request correctly, the Commissioner must be satisfied as to whether, at the time it responded to the Applicant's request for review, some of the information held by the Authority (and which fell within the scope of the request) was both publicly available and easily accessible to the Applicant in another form or format.

The Applicant's submissions

20. The Applicant argued that very little of the information requested was available online: they noted the website signposted by the Authority to be a design and project update site which contained no detailed information on decision-making.
21. The Applicant explained that they wished to examine the decisions, competency and motives of the Authority and considered its decisions (in relation to the MFPS) would have been based on advice from consultants and consultees over time (as captured in both correspondence and minutes of meetings).
22. The Applicant argued that this, and other information requested, were not available from the website signposted by the Authority.

The Authority's submissions

23. The Authority explained that its initial response should have advised the Applicant that there was information available on the MFPS website, but then asked the Applicant to narrow the scope of their request. The Authority explained its initial response, stating simply that the information requested was otherwise accessible in terms of regulation 6(1)(b) of the EIRs, had been an error – its intention had been to issue a clarification.
24. However, the Authority accepted at review stage that not all information requested (including e-mail correspondence) was publicly available via the MFPS website.

The Commissioner's view

25. It is clear that when the Authority responded to the Applicant's review request it still considered some of the information requested was otherwise available to them, but it did not adequately signpost to this information.
26. The Commissioner asked the Authority to identify where the information it considered publicly available to the Applicant at the time of the request was located, but the Authority failed to do so. The Commissioner can only therefore conclude that the information requested was not publicly available at the time the Authority received the request, as it would need to be for regulation 6(1)(b) to apply.
27. The Commissioner cannot, therefore, accept the Authority's reliance on regulation 6(1)(b) in responding to the Applicant's request, in respect of the information it continued to consider publicly available at review stage, and he requires the Authority to disclose this information to the Applicant.

Regulation 10(4)(b) – Manifestly unreasonable

28. The Authority refused to provide the Applicant with the remainder of the information (i.e. that information it considered was not publicly available), as it considered it would be manifestly unreasonable to do so.
29. Regulation 10(4)(b) provides that a Scottish public authority may refuse to make environmental information available to the extent that the request for information is manifestly unreasonable. In considering whether the exception applies, the authority must interpret it in a restrictive way and apply a presumption in favour of disclosure. Even if it finds that the request is manifestly unreasonable, it is still required to make the information available unless, in all the circumstances, the public interest in doing so is outweighed by that in maintaining the exception.
30. The Commissioner's general approach is that the following factors are relevant when considering whether a request is manifestly unreasonable. These are that the request:
 - (i) would impose a significant burden on the public body
 - (ii) does not have a serious purpose or value
 - (iii) is designed to cause disruption or annoyance to the public authority
 - (iv) has the effect of harassing the public authority
 - (v) would otherwise, in the opinion of a reasonable person, be considered manifestly unreasonable or disproportionate.
31. This is not an exhaustive list. Depending on the circumstances, other factors may be relevant, provided the impact on the authority can be supported by evidence. The Commissioner recognises that each case must be considered on its merits, taking all the circumstances into account.

The Applicant's submissions

32. The Applicant disagreed that their request was manifestly unreasonable. The Applicant accepted a request may stretch an authority's resources, but noted the size of the Authority and disputed providing the information requested would interfere with the Authority's normal activities in any significant way.

33. The Applicant also stated that it was entirely unreasonable to claim senior managers' involvement was required, as more junior staff could locate and provide the information (e.g. via cutting and pasting from emails). The Applicant also argued that the calculation of such excessive charges was intended to dissuade requesters from seeking information.

The Authority's submissions

34. The Authority explained that it considered the cost of providing the remaining information (i.e. that it considered was not publicly available) would significantly exceed £600, as the request sought all correspondence and emails relating to the MFPS (which were held in a central folder, within the Outlook accounts and personal folders of team members and by external partners).
35. The Authority explained it considered the Applicant's information request manifestly unreasonable because it would impose a significant burden on it to comply for the following reasons:
- the MFPS project started in 2016
 - it held 32GB of data relating to the MFPS across 4,700 folders and 30,000 files, with each file requiring assessment for potential redaction
 - the MFPS project manager and another senior manager would – given their knowledge of the subject area – have to identify (and locate) in-scope information, much of which would relate to them
 - external partners also held files relating to the MFPS.
36. Based on this, the Authority estimated it would take five working days (as a minimum) for the two senior managers to supply the information and provided the following calculation:
- MFPS Project Manager (Grade 13): 21 hours * £50.10 = £1,052.10
- Service Manager Roads (Grade 13): 12 hours * £50.10 = £601.20
- 33 hours * £50.10 = £1653.30
37. The Authority explained that, given this projection, it had not accounted (or costed for) further officers' involvement in providing the information requested, given the excessive cost already involved (though it maintained the "true cost" would be far higher).
38. The Authority accepted that the information could be located by staff of a lower grade, but explained that this would take considerably longer and would still require the involvement of the two senior managers (as experts in the subject area).
39. The Authority explained that complying with the Applicant's request would therefore divert vital senior staff from post for at least five working days and would put strain on public services, not accounting for any additional administrative staff required to support this work (which it argued would cause further disruption).
40. The Authority further argued that, in all the circumstances, providing a response to this request would be considered manifestly unreasonable or disproportionate in the opinion of a reasonable person.
41. The Authority also stated that it did not charge for the information requested, as permitted under regulation 8 of the EIRs, as its policy is not to charge for information but to refuse to comply if the costs in doing so are likely to exceed £600 (the upper cost limit for complying

with information requests under FOISA, the principle of which seemed reasonable to apply to requests under the EIRs).

The Commissioner's view

42. There is no definition of "manifestly unreasonable" in the EIRs, or in Directive 2003/4/EC² from which they are derived. The Commissioner's view is that "manifestly" implies that a request should be obviously or clearly unreasonable and he notes the opinion of the Information Tribunal in *Dr Kaye Little v Information Commissioner and Welsh Assembly Government (EA/2010/0072)*³, which considers the equivalent regulation to 10(4)(b) of the (UK) Environmental Information Regulations 2004, and states:

"From the ordinary meaning of the words "manifestly unreasonable", it is clear that the expression means something more than just "unreasonable". The word "manifestly" imports a quality of obviousness. What is in issue, therefore, is a request that is plainly or clearly unreasonable. It is a more stringent test than simply "unreasonable"."
43. Whether a request is manifestly unreasonable will depend on the facts of each case. It may apply where it can be demonstrated that a request is vexatious; where compliance would incur unreasonable costs for the public authority or an unreasonable diversion of public resources, or where it would otherwise, in the opinion of a reasonable person, be considered manifestly unreasonable or disproportionate.
44. The Commissioner acknowledges that there may be circumstances where the burden of responding (in terms of its impact on the public authority's core functions) is sufficient justification for deeming a request to be manifestly unreasonable.
45. There is no cost limit for determining what is deemed to be an excessive cost of compliance under the EIRs, as there is in FOISA. Under FOISA, public authorities do not have to comply with a request if the cost of compliance exceeds £600. Even so, the Commissioner recognises that there may be cases where the time and expense involved in complying with a request for environmental information means that any reasonable person would regard them as excessive.
46. In this case, the Authority argued that the burden of responding to the Applicant's request would detrimentally impact its functions, incur significant staff time and cost well in excess of the £600 limit under FOISA.
47. Responding to information requests is a statutory duty for the Authority, and one which must be properly resourced. The Commissioner acknowledges that, in common with all other Scottish public authorities, in addition to complying with requests for information under FOISA and the EIRs, the Authority has many other demands on its time and resources. Compliance with information requests should, however, be considered as an element of the authority's core business, being a statutory requirement. Therefore, the Commissioner will not accept lightly arguments that compliance with an information request, in any given case, represents an unreasonable diversion from compliance with other statutory responsibilities.
48. The Authority also argued that providing a response to this request would be otherwise considered manifestly unreasonable or disproportionate in the opinion of a reasonable person. Factors which may be considered when assessing whether a request was otherwise

² <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32003L0004:EN:HTML>

³ [\[2010\]UKFTT EA20100072 \(GRC\) 20101230.pdf \(tribunals.gov.uk\)](#)

manifestly unreasonable or disproportionate are set out in the [Commissioner's guidance](#)⁴ (at paragraph 29), and include:

- the complexity of the request
- the volume of information requested
- the time and resources required to process a request.

49. The Authority has explained what would be involved in responding to the information request. The Commissioner accepts that this explanation is based on a reasonable assessment of the process; the request is very broad (encompassing a very large volume of data held in thousands of folders, officers' email inboxes, personal storage and by external partners), and complying with the request would require significant time and resource (and therefore diversion from, and disruption to, normal duties).
50. In the circumstances, the Commissioner accepts, given the breadth of the request and the sheer volume of information held, that the cost of complying with the request would be significant (incurring costs well above the £600 limit at which a request considered under FOISA could be refused).
51. As it currently stands, the Commissioner cannot see any other way in which the Authority could satisfy the request, and accepts that responding would, in the view of a reasonable person, be considered manifestly unreasonable or disproportionate.
52. In all of the circumstances, therefore, the Commissioner accepts that the Applicant's request (for information other than that publicly available) was manifestly unreasonable. As such, he finds that the Authority correctly applied the exception in regulation 10(4)(b) of the EIRs in this case.

EIRs: the public interest test

53. In common with all the other exceptions in the EIRs, regulation 10(4)(b) is subject to the public interest test in regulation 10(1)(b). Consequently, information can be withheld under the exception only where, in all the circumstances, the public interest in making the information available is outweighed by that in maintaining the exception.

The Applicant's submissions

54. The Applicant considered the MFPS to be the most extensive and significant project to affect Musselburgh, which would cause disruption to the town for years. The Applicant submitted that the scheme would affect more than 3,000 properties and have significant economic, social & environmental impact (e.g. by introducing 1.8m concrete walls to the area and the removal of some existing bridges and trees).
55. The Applicant stated that planning consent for the MFPS would be granted under the Flood Scheme Act⁵, which removed the usual opportunity to object provided by "standard" planning processes.
56. The Applicant argued that, as the costs of the scheme had risen significantly to around £100m, disclosure would allow the public to fully scrutinise and understand how taxpayer money was being spent.

⁴ [BriefingRegulation104bManifestlyUnreasonableRequests.pdf \(itspublicknowledge.info\)](#)

⁵ <https://www.musselburghfloodprotection.com/project/statutory-approval/>

57. The Applicant stated that information on the MFPS website was limited, provided only the information the Authority “wished to provide”, and did not include information on decision-making or modelling data (which they considered underpinned the scheme).
58. The Applicant considered public access to complete and accurate information, including that relating to decision-making, advice received by the Authority and modelling data, would enhance scrutiny of the scheme and contribute to an informed public debate on how best to manage sea and coastal risk to Musselburgh, which they argued was a matter of serious public concern.
59. The Applicant considered, in all the circumstances, that there was a significant public interest in urgent disclosure of the information as approval of the scheme would, in their view, grant the Authority significant powers over multiple private properties; they noted local councillors would vote on the scheme in January 2024, and, if approved, there would be a limited 28-day statutory objection period only.

The Authority’s submissions

60. The Authority explained that it was aware of the level of local public interest in the MFPS and, consequently, it ensured the most up-to-date information was available via its website. The Authority also submitted that its website contained all key documents and housed more information than comparable websites for a flood prevention scheme or equivalent engineering project.
61. The Authority stated that officials had also made a number of unsuccessful attempts to discuss the request with the Applicant in order to identify the exact information they required (which it would also have considered making available online).
62. The Authority argued that councils were working tirelessly on limited budgets to maintain vital services in a cost of living crisis and, in this case, it did not deem it in the public interest to divert staff away from their usual duties for an extended period.
63. The Authority submitted that, given a considerable amount of information was available to the public online and the time and overall resource required to meet the request in its current voluminous form, it did not consider it would be in the public interest for it to provide the requested information.

The Commissioner’s view

64. In the Commissioner’s view, there is an inherent public interest in disclosure of information to ensure an authority is transparent and accountable for decisions it makes on matters of public policy. This is particularly so for information relating to the MFPS, which would, if approved, affect a significant number of properties within Musselburgh, and the fabric of the town itself.
65. Against this, the Commissioner has considered the strong public interest in ensuring an authority can carry out its functions without unreasonable or disproportionate disruption.
66. As rehearsed earlier, the Commissioner has accepted that making the requested information available would be considered otherwise manifestly unreasonable or disproportionate in the view of a reasonable person, given the breadth of the request and sheer volume of information held (and therefore the cost and diversion of resources required to comply).
67. The Commissioner considers there is a public interest in ensuring the EIRs are used responsibly. While public authorities should act in a transparent and accountable way, which

benefits the public as a whole, the Commissioner also recognises that responding to requests which require them to devote excessive or disproportionate amounts of time can only be at the expense of other areas of work. While the Commissioner acknowledges the Authority's duty to respond to this request, he notes that it has a responsibility to carry out its other functions, and there is a public interest in ensuring resources are not diverted away from these tasks disproportionately.

68. Therefore, on balance, the Commissioner accepts, in all the circumstances of this case, that the public interest in favour of making the information covered by this request available is outweighed by the public interest in maintaining the exception in regulation 10(4)(b) of the EIRs. As a consequence, the Commissioner finds that the Authority was entitled to refuse to make the requested information available under this exception.

Regulation 9 – Advice and assistance

69. Regulation 9(1) of the EIRs requires Scottish public authorities to provide advice and assistance to applicants, so far as it would be reasonable to expect them do so.
70. Regulation 9(3) provides that a Scottish public authority shall be taken to have complied with this duty if it conforms to the guidance contained in the Scottish Ministers' Code of Practice on the Discharge of Functions by Scottish Public Authorities under FOISA and the EIRs (the Section 60 Code)⁶.
71. The Section 60 Code states (at paragraph 5.1.1) that authorities have a duty to provide advice and assistance at all stages of a request. The Section 60 Code also provides (at paragraph 9.5) that:
- “The authority should not assume that the applicant will know where and how the information can otherwise be obtained. If the information is already publicly available (e.g. on the authority's website) the authority should tell the applicant how to access it and provide adequate signposting, for example, providing direct links to online information. In all cases the authority should bear in mind its general duty to provide advice and assistance to applicants.”
72. In its review response, the Authority maintained some information within the scope of the Applicant's request was otherwise accessible via the MFPS website. However, when asked by the Commissioner during the investigation, the Authority failed to detail the assistance it has provided to the Applicant to access on the MFPS website the specific information they had requested.
73. The Authority also explained that it had made a number of attempts to meet with the Applicant with a view to narrowing the scope of their request.
74. The Applicant stated that they did not consider a meeting would be beneficial, but did advise the Authority that they were content to exclude from their request information relating to Nature Scotland, SEPA and Scottish Water to help reduce the burden of complying.
75. In response to this, the Authority reiterated that it remained open to discussing the request with the Applicant with a view to understanding what information was specifically required, and providing guidance on formulating a request which would provide this.

The Commissioner's view

⁶ [Code of Practice under section 60 of FOISA \(www.gov.scot\)](http://www.gov.scot)

76. The Commissioner notes that the Authority attempted to engage with the Applicant to discuss their request, with a view to refining it so that it was not considered to be manifestly unreasonable.
77. In this case, and taking into account the Authority's attempts to discuss the request with the Applicant, the Commissioner is satisfied that the Authority went some way to complying with regulation 9(1) of the EIRs.
78. However, in the absence of any information from the Authority showing where it had signposted the Applicant to information falling within the scope of their request on the MFPS website, the Commissioner considers that simply providing the Applicant with a link – without indicating where the specific information requested could be found – was not consistent with the spirit, or even the letter, of the EIRs.
79. Consequently, the Commissioner finds that the Authority failed to fully comply with regulation 9(1) of the EIRs.

Handling matters

80. The Applicant considered the Authority “did not follow the correct procedures” in this case and, in its review response, the Authority identified the following issues with its handling of the request:
 - it had responded to the request under the EIRs but had failed to explain why
 - it had issued its original response prematurely, having intended to send a clarification rather than a response
 - it considered it had failed to meet its duties under regulation 8 of the EIRs by not providing the Applicant with a schedule of fees, a fees notice, and an opportunity to pay this fee (if the cost of providing the information fell below £600, in line with its charging policies).
81. As rehearsed earlier, the Commissioner is satisfied that the request was properly handled under the EIRs by the Authority and that, in doing so, it met all the requirements of sections 1 and 39(2) of FOISA.
82. While the Commissioner is satisfied that the Authority did, ultimately, offer to support the Applicant to make a narrowed request, he agrees that it should have done so at an earlier stage. Had the Authority done so, the Applicant might have received further information of use to them – in relation to a matter of some importance – rather than only the information contained on the website the Authority had provided them a link to (where it failed to adequately signpost them to specific information).
83. The Commissioner cannot agree with the Authority's position regarding its duties under regulation 8 of the EIRs; it does not make sense to state that a fees notice should have been issued in respect of information that the Authority submits it would be manifestly unreasonable for it to provide.
84. The Commissioner would therefore like to make it clear that the purpose of issuing a fees notice under regulation 8 of the EIRs is to allow a requester the opportunity to pay that fee in order to receive the information requested. A fees notice should therefore not be issued where a public authority intends not to provide the information requested on the basis that to do so would be manifestly unreasonable.

Decision

The Commissioner finds that the Authority partially complied with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by the Applicant.

The Commissioner finds that the Authority was not entitled to notify the Applicant that some information was already publicly available and easily accessible under regulation 6(1)(b) of the EIRs.

The Commissioner also finds that, by failing to explain to the Applicant how they might access the specific information it considered publicly accessible, the Authority failed to comply with regulation 9 of the EIRs.

However, for the remaining withheld information (i.e. that which it considered was not publicly available), the Commissioner finds that, in relying on the exception in regulation 10(4)(b), the Authority complied with the EIRs.

The Commissioner therefore requires the Authority to search for and to disclose to the Applicant all information (within the scope of their request) that it considered otherwise accessible via the weblink it previously provided to them, by **1 July, 2024**.

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.

David Hamilton
Scottish Information Commissioner

15th May 2024

Appendix 1: Relevant statutory provisions

Freedom of Information (Scotland) Act 2002

1 General entitlement

- (1) A person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority.
- (2) The person who makes such a request is in this Part and in Parts 2 and 7 referred to as the “applicant.”
- ...
- (6) This section is subject to sections 2, 9, 12 and 14.

2 Effect of exemptions

- (1) To information which is exempt information by virtue of any provision of Part 2, section 1 applies only to the extent that –
 - ...
 - (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.
- (2) For the purposes of paragraph (a) of subsection 1, the following provisions of Part 2 (and no others) are to be regarded as conferring absolute exemption –
 - (a) section 25;
 - (b) section 26;
 - (c) section 36(2);
 - (d) section 37; and
 - (e) in subsection (1) of section 38 –
 - (i) paragraphs (a), (c) and (d); and
 - (ii) paragraph (b) where the first condition referred to in that paragraph is satisfied.

...

39 Health, safety and the environment

- ...
- (2) Information is exempt information if a Scottish public authority-
 - (a) is obliged by regulations under section 62 to make it available to the public in accordance with the regulations; or
 - (b) would be so obliged but for any exemption contained in the regulations.
- ...

47 Application for decision by Commissioner

- (1) A person who is dissatisfied with -
 - (a) a notice under section 21(5) or (9); or
 - (b) the failure of a Scottish public authority to which a requirement for review was made to give such a notice.

may make application to the Commissioner for a decision whether, in any respect specified in that application, the request for information to which the requirement relates has been dealt with in accordance with Part 1 of this Act.

- (2) An application under subsection (1) must -
 - (a) be in writing or in another form which, by reason of its having some permanency, is capable of being used for subsequent reference (as, for example, a recording made on audio or video tape);
 - (b) state the name of the applicant and an address for correspondence; and
 - (c) specify –
 - (i) the request for information to which the requirement for review relates;
 - (ii) the matter which was specified under sub-paragraph (ii) of section 20(3)(c);
and
 - (iii) the matter which gives rise to the dissatisfaction mentioned in subsection (1).

...

The Environmental Information (Scotland) Regulations 2004

2 Interpretation

- (1) In these Regulations –

“the Act” means the Freedom of Information (Scotland) Act 2002;

“applicant” means any person who requests that environmental information be made available;

“the Commissioner” means the Scottish Information Commissioner constituted by section 42 of the Act;

...

“the Directive” means Directive 2003/4/EC of the European Parliament and of the Council on public access to environmental information and repealing Council Directive 90/313/EEC;

“environmental information” has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on -

- (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine

areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;

- (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in paragraph (a);
- (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in paragraphs (a) and (b) as well as measures or activities designed to protect those elements;

...

- (e) costs benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in paragraph (c); and
- (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch 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 the matters referred to in paragraphs (b) and (c);

“personal data” has the same meaning as in Parts 5 to 7 of the Data Protection Act 2018 (see section 3(2) and (14) of that Act);

...

5 Duty to make available environmental information on request

- (1) Subject to paragraph (2), a Scottish public authority that holds environmental information shall make it available when requested to do so by any applicant.
- (2) The duty under paragraph (1)-

...

- (b) is subject to regulations 6 to 12.

...

6 Form and format of information

- (1) Where an applicant requests that environmental information be made available in a particular form or format, a Scottish public authority shall comply with that request unless-

...

- (b) the information is already publicly available and easily accessible to the applicant in another form or format.

...

9 Duty to provide advice and assistance

- (1) A Scottish public authority shall provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to applicants and prospective applicants.
...
- (3) To the extent that a Scottish public authority conforms to a code of practice under regulation 18 in relation to the provision of advice and assistance in a particular case, it shall be taken to have complied with the duty imposed by paragraph (1) in relation to that case.
...

10 Exceptions from duty to make environmental information available

- (1) A Scottish public authority may refuse a request to make environmental information available if-
 - (a) there is an exception to disclosure under paragraphs (4) or (5); and
 - (b) in all the circumstances, the public interest in making the information available is outweighed by that in maintaining the exception.
- (2) In considering the application of the exceptions referred to in paragraphs (4) and (5), a Scottish public authority shall-
 - (a) interpret those paragraphs in a restrictive way; and
 - (b) apply a presumption in favour of disclosure.
...
- (4) A Scottish public authority may refuse to make environmental information available to the extent that
...
 - (b) the request for information is manifestly unreasonable;
...
...

17 Enforcement and appeal provisions

- (1) The provisions of Part 4 of the Act (Enforcement) including schedule 3 (powers of entry and inspection), shall apply for the purposes of these Regulations as they apply for the purposes of the Act but with the modifications specified in paragraph (2).
- (2) In the application of any provision of the Act by paragraph (1) any reference to -
 - (a) the Act is deemed to be a reference to these Regulations;
 - (b) the requirements of Part 1 of the Act is deemed to be a reference to the requirements of these Regulations;
...

- (f) a notice under section 21(5) or (9) (review by a Scottish public authority) of the Act is deemed to be a reference to a notice under regulation 16(4); and

...