



Scottish Information
Commissioner
www.foi.scot

Decision Notice 197/2024

Public consultation on Oban Harbour Revision Order

Authority: Argyll and Bute Council

Case Ref: 202400680

Summary

The Applicant asked the Authority for copies of the text of all submissions made during the public consultation on the Oban Harbour Revision Order 2023. The Authority considered the request under FOISA and withheld the requested information on the basis that disclosure would, or would be likely to, prejudice substantially the effective conduct of public affairs. The Commissioner investigated and found that the Authority had considered the request under the wrong legislation. The requested information was environmental, and the Authority should have considered the request under the EIRs. The Commissioner required the Authority to respond to the request under 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); 30(c) (Effective conduct of public affairs); 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) (definition of “the Act”, “the applicant”, “the Commissioner” and (paragraphs (a), (b) and (c) of definition of “environmental information”) (Interpretation); 5(1) (Duty to make available environmental information on request); 16 (Review by Scottish public authority); 17(1), (2)(a), (b) and (f) (Enforcement and appeal provisions)

Background

1. On 5 February 2024, the Applicant made a request for information to the Authority. The Applicant requested copies of the text of all submissions made during the public consultation on the Oban Harbour Revision Order 2023 (OHRO), redacted as necessary to comply with the UK General Data Protection Regulation.
2. The Authority responded on 4 March 2024, refusing the request under the exemption in section 30(c) (prejudice to the effective conduct of public affairs) of FOISA.
3. On 10 March 2024, the Applicant wrote to the Authority, requesting a review of its decision for several reasons, namely that they disagreed with the application of the exemption in section 30(c) of FOISA and that the requested information should have been disclosed.
4. The Authority notified the Applicant of the outcome of its review on 9 April 2024, fully upholding its original decision.
5. On 14 May 2024, 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 requirement for review and because the Authority had failed to provide adequate justification in its review outcome for endorsing its original decision.

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 14 May 2024, and in line with section 49(3)(a) of FOISA, the Commissioner gave the Authority notice in writing of the application and asked it to send the information withheld from the Applicant.
8. The Authority provided the Commissioner with the withheld information and the case was subsequently allocated to an investigating officer.
9. The Authority was then invited to comment on the Application and to answer specific questions, including whether it considered the information requested was environmental information.

Commissioner's analysis and findings

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

FOISA or the EIRs?

11. The relationship between FOISA and the EIRs was considered at length in [Decision 218/2007](#)¹. Broadly, in the light of that decision, the Commissioner's general position is as follows:
 - The definition of what constitutes environmental information should not be viewed narrowly.
 - 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.
 - Any request for environmental information therefore must be handled under the EIRs.
 - In responding to a request for environmental information under FOISA, an authority may claim the exemption in section 39(2).
 - If the authority does not choose to claim the section 39(2) exemption, it must 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 (or a combination of these).
 - 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. As rehearsed earlier, given the subject matter of the request, 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. The Authority did not agree that the request fell to be considered under the EIRs and responded solely under FOISA. The Authority submitted that:
 - the OHRO is proposed legislation designed to regulate the use of marine craft within Oban Bay.
 - the OHRO is administrative and does not seek to protect the bay or the elements within it, but rather the operation of craft and those using them.
 - in considering whether the information requested was environmental, it took the view that the OHRO was an administrative process, undertaken in conjunction with Transport Scotland, concerned with the constitution of the HRO, by way of statutory process, which did not affect the elements and factors as set out in paragraphs (a) and (b) of regulations 2(1) of the EIRs.
14. The Commissioner has considered the terms of the OHRO, which is [publicly available](#)². Having done so, he notes that:
 - the OHRO would establish the Authority as the harbour authority for the areas set out in article 4 of the OHRO, which is a wider area of jurisdiction than the present limits

¹ <https://www.foi.scot/decision-2182007>

² <https://www.argyll-bute.gov.uk/sites/default/files/2023-12/Oban%20Harbour%20Revision%20Order%2010.1>

- Parts 2 (“Duties and Powers of the Council”) and 3 (“Harbour Regulation”) of the OHRO establish that the Authority has extensive control and responsibility for the area defined in the article 4
 - the OHRO provides, in articles 5(1) and (2), that the Authority may take steps to improve, maintain and manage the harbour (including accommodation and facilities connected to it).
15. In the Commissioner’s view, these factors mean the requested information is properly considered to be environmental information, as defined in regulation 2(1) of the EIRs (in particular paragraphs (a), (b) and (c) of that definition). This is because the requested information relates to a measure affecting or likely to affect the elements of the environment, both directly and via the factors referred to in paragraph (b).
 16. 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

17. 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.
18. In this case, as rehearsed earlier, the Authority did not agree that the request fell to be considered under the EIRs and instead responded solely under FOISA.
19. The Commissioner finds that the Authority would have been entitled to apply this exemption to the request, given his conclusion that the information requested was properly classified as environmental information.
20. 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

21. 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)).
22. Although the Authority responded to the Applicant’s requirement for review on 9 April 2024, as explained above, this was a result of the Authority considering the request solely in terms of FOISA and not under the EIRs.
23. It is apparent that the Authority failed to respond to the Applicant’s request of 5 February 2024 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.
24. The Commissioner therefore requires the Authority to provide a response to the Applicant’s requirement for review of 10 March 2024 in terms of regulation 16 of the EIRs.

25. The Commissioner's decision below states a compliance date of **28 October 2024** in line with the timescales he is required to follow. This is the latest day on which the Authority must issue a response; the deadline does not prevent the Authority from issuing one sooner.

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 **28 October 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.

Euan McCulloch
Head of Enforcement

11 September 2024