

# Decision Notice 187/2021

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## Analysis of noise recording data

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**Applicant: The Applicant**

**Public authority: Fife Council**

**Case Ref: 202100302**



Scottish Information  
Commissioner

## Summary

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The Council was asked for analysis (including decibels and frequency levels) of noise recording data from equipment located to record noise from a particular named premise.

The Council stated that, because someone with appropriate training and expertise would be required to interpret the raw data and create the information requested, it did not hold the information. It provided the Applicant with a summary of the findings produced from the noise data mentioned in the request.

The Commissioner investigated and found that the Council had partially breached the EIRs in responding to the request. He found that the Council did not hold the frequency data, but did hold the decibel data. Consequently, the Commissioner required the Council to provide the Applicant with a new review outcome on the information deemed to be held under the EIRs.

## Relevant statutory provisions

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The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (paragraphs (b) and (c) of “environmental information”) (Interpretation); 5(1) and (2)(b) (Duty to make available environmental information on request); 10(1), (2) and (4)(a) (Exceptions from duty to make environmental information available)

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

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1. On 8 January 2021, the Applicant made a request for information to Fife Council (the Council). The information requested was:
  - (i) details of the analysis (including decibels and frequency levels) of noise recording data from external noise equipment located in a particular area to record noise levels from a business in Cowdenbeath;
  - (ii) details from when it was made live until midnight on 22 December 2020, then for every full 24-hour period until the memory card was removed/changed on 29 December 2020;
  - (iii) the make and model of the equipment used.
2. The Council responded on 3 February 2021 under the EIRs, refusing the request under regulation 10(4)(a) on the basis that no information was held. It stated that the noise recording data from the equipment required specialist software to download and view. The Council gave the Applicant a summary of findings produced from the noise data.
3. On 3 February 2021, the Applicant wrote to the Council, requesting a review of its decision as he did not agree that the information was not held. He noted that a small, selective snapshot of the information had been given to him and concluded that all of the information was in fact held. He also highlighted that he had not been provided with information on the make and model of the noise recording equipment.

4. The Council notified the Applicant of the outcome of its review on 3 March 2021, upholding its original decision in relation to the noise data and explaining what an individual with the requisite technical expertise would need to do to create the information: it had provided the summary, which did not require the same input, by way of advice and assistance. The Council provided the Applicant with details of the make and model of the noise recording equipment and apologised that this had not been provided in the initial response to his request.
5. On 7 March 2021, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of the Freedom of Information (Scotland) Act 2002 (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 he was dissatisfied with the outcome of the Council's review because he did not agree with its use of regulation 10(4)(a) and its position that it did not hold the information.

## **Investigation**

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6. The application was accepted as valid. The Commissioner confirmed that the Applicant made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to him for a decision.
7. On 29 March 2021, the Council was notified in writing that the Applicant had made a valid application and the case was 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 Council was invited to comment on this application and to answer specific questions. These related to the reasons why it considered it did not hold information falling within the scope of the request.

## **Commissioner's analysis and findings**

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9. In coming to a decision on this matter, the Commissioner considered all of the withheld information and the relevant submissions, or parts of submissions, made to him by both the Applicant and the Council. He is satisfied that no matter of relevance has been overlooked.

### **Handling in terms of the EIRs**

10. Having considered the terms of the request, it is clear that any information falling in scope would be environmental information, as defined in regulation 2(1) of the EIRs. The information in question concerns noise data collected by the Council to investigate complaints from members of the public, and so the Commissioner is satisfied that it would fall within paragraphs (b) and (c) of that definition. The Applicant has not challenged the Council's application of the EIRs in this case and so the Commissioner will consider the request in what follows solely in terms of the EIRs.

### **Regulation 5(1) – Duty to make environmental information available**

11. 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 obligation relates to information that is held by the authority when it receives a request.
12. On receipt of a request for environmental information, the authority must ascertain what information it holds falling within the scope of the request. Having done so, regulation 5(1)

requires the authority to make the information available, unless a qualification in regulations 6 to 12 applies (regulation 5(2)(b)).

13. Under the EIRs, a public authority may refuse to make environmental information available if one or more of the exceptions in regulation 10 applies.

### **Regulation 10(4)(a) – Information not held**

14. Regulation 10(4)(a) of the EIRs states that a Scottish public authority may refuse to make environmental information available to the extent that it does not hold the information when the request is received.
15. 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. He 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.
16. Scottish public authorities are not required to create information in order to answer a request, but there is a distinction between creating new information and compiling information. Where a request can be answered by compiling information from readily available resources held by the public authority, this is not considered to be creating new information. However, if compiling information in order to respond to a request would require skill and complex judgement, it is less likely that the information can be said to be held for the purposes of the EIRs.
17. In a previous decision, *Decision 210/2013 Scottish Ministers*<sup>1</sup>, the Commissioner took the approach that a public authority will hold information if it has the building blocks to generate the information and no complex judgement is required to produce it.
18. The Applicant in his request for review and application highlighted that he had been provided with a summary, which in his view indicated that the information was held by the Council. He stated that he had received similar information to that requested, from the Council, several years previously.
19. The Applicant also drew attention to information of a similar type (not the same data as referred to in this request) that had been produced by a consultant and was available on the Fife Council planning portal, as evidence that information like this had been shared with others and so should be held by the Council.
20. The Council in its submissions confirmed that it had collected data from noise recording equipment as referred to in the request from the Applicant. However, it explained that, to provide the information asked for, would involve additional work and the creation of new information, requiring specialist knowledge. Therefore, it did not consider the information to be held.
21. The Council stated that it could not comment on the information the Applicant had received previously, as what was available then would have been influenced by why the data was

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<sup>1</sup> [Decision 210/2013 \(itspublicknowledge.info\)](https://itspublicknowledge.info)

collected and what analysis the specialist officers had carried out on it at the time of the previous request.

22. With regard to the information in the consultant's report on the planning portal, the Council confirmed that it had shared raw data collected by noise monitoring equipment with the consultants, who also had access to the specialist software and the skills and knowledge to carry out the subsequent analysis necessary to produce the graphs the Applicant had referred to.
23. The Council explained that specialist software was required to download and carry out any necessary analysis on noise data and that this type of work could only be carried out by a few specialists within the Council.
24. The Council explained that the summary provided to the Applicant was produced by the noise specialist listening to the sound that had been recorded and downloaded into the software package. The officer then identified particular sounds of interest and, from the data on the software, produced the summary provided to the Applicant.
25. The Council further explained that to go on and provide the decibel and frequency data, in the graphical format requested by the Applicant, required differing levels of input from the noise specialist.
26. With regard to the decibel data, a graph showing this data against time could be produced for the seven-day period without any manipulation being required, but did require skill and knowledge of the specialist software. To produce graphs for 24-hour time periods, as requested, again needed skill and knowledge of the software, in the Council's view. Each exercises would produce a line graph, which the Council considered would be relatively meaningless due to the compression of the data.
27. In order to make the data more meaningful, the noise specialist would have to carry out further analysis requiring the knowledge, skill and judgement of trained personnel, including listening to the audio recordings and viewing the graphs.
28. The Council explained that the situation with the frequency data was more complicated, with the noise specialist being required to use expertise to manipulate the data from each three-minute noise monitoring audio recording to generate charts and graphs that were currently not held.
29. The Council confirmed to the investigating officer that the type of analysis requested by the Applicant had not been carried out on the audio recording data at the time of his request (and still had not been at the time of the investigation).

#### *The Commissioner's view*

30. As previously stated, the Commissioner must consider whether the information is held for the purposes of the EIRs, bearing in mind that the legislation does not require Scottish public authorities to create new information. He has, therefore, considered the arguments put forward by the Council as to why it does not hold the data, in these terms.
31. The Commissioner accepts that specialist software requiring specialist training and knowledge is required to access any of the data collected by the noise recording equipment. He recognises, however, that the Council has staff with this knowledge and expertise and that using this software is an expected part of their professional role.

32. With regards to the frequency data, the Commissioner accepts that the degree of skill, judgement and expertise that would be required to provide the Applicant with the information requested would amount to creating new information. He therefore finds that the Council does not (and did not, on receiving the request) hold this data for the purposes of the EIRs.
33. With regards to the decibel data, the Commissioner's view is that graphs showing the decibel levels over the 24-hour periods covered by the request are held by the Council, as the same level of manipulation is not required to provide these: it would require understanding of the software, but not further skilled interpretation or adjustment. He does, however, accept that any further manipulation and interpretation of the data to make it, as the Council described, more meaningful, would involve the creation of new information. Consequently, the Commissioner does not consider that further information to be held.
34. The Commissioner finds that the Council did not deal with the Applicant's request fully in accordance with regulation 5(1) of the EIRs, and now requires the Council to provide the Applicant with a revised review outcome, disclosing the information that has been deemed to be held, or explaining why (in accordance with any relevant provision in the EIRs) the information cannot be disclosed.

## Decision

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The Commissioner finds that Fife Council 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 by the Council was entitled to give the Applicant notice, in terms of regulation 10(4)(a) of the EIRs, that it did not hold information relating to frequency analysis of noise recording data collected as referenced in the request and, to that extent, the Council complied with the EIRs.

However, the Commissioner finds that the Council was not entitled give the Applicant notice, in terms of regulation 10(4)(a), that it did not hold information relating to the decibel analysis of noise recording data collected as referenced in the request. He finds that, by doing so, the Council failed to comply with regulation 5(1) of the EIRs.

The Commissioner therefore requires the Council to provide the Applicant with a revised review outcome, disclosing the information that has been deemed to be held, or explaining why (in accordance with any relevant provision in the EIRs) the information cannot be disclosed, by **5 January 2022**.

## Appeal

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Should either the Applicant or the Council 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**

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If the Council fails to comply with this decision, the Commissioner has the right to certify to the Court of Session that the Council has failed to comply. The Court has the right to inquire into the matter and may deal with the Council as if it had committed a contempt of court.

**Margaret Keyse**  
**Head of Enforcement**

**17 November 2021**

### The Environmental Information (Scotland) Regulations 2004

#### 2 Interpretation

- (1) In these Regulations –

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"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

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...

(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;

...

#### 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.

...

#### 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
  - (a) it does not hold that information when an applicant's request is received;

...

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