

# Decision Notice 167/2019

---

## Building warrant information

---

**Applicant: The Applicant**

**Public authority: Scottish Borders Council**

**Case Ref: 201900674**



Scottish Information  
Commissioner



## Summary

---

The Council was asked about the installation of a specific sewage system and for information contained in a building warrant file. The Council responded by stating that all information had been previously provided and that no further information was held.

Following an investigation, the Commissioner found that the Council had partially complied with the EIRs in dealing with the requests. He did not require the Council to take any action.

## Relevant statutory provisions

---

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (paragraphs (b) and (c) of definition of "environmental information") (Interpretation); 5(1) (Duty to make available environmental information on request); 13 (Refusal to make information available); 16 (Review by Scottish public authority)

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

---

### Request 1

1. On 27 December 2018, the Applicant made a request for information to Scottish Borders Council (the Council). The information requested was in seven parts and, in relation to a specific drainage system, requested information regarding pipe levels and gradients, the water table, a drainage ditch, a septic tank and communications between the Council and the Scottish Environment Protection Agency.
2. The Council responded on 9 January 2019. The Council advised that the information held, and falling within the scope of the request, had been provided previously. It stated that, other than the information that it had previously provided, it held no further information falling within the scope of the Applicant's request. The response was made under the EIRs, the Council having applied the exception in section 39(2) of the Freedom of Information (Scotland) Act 2002 (FOISA).
3. On 12 January 2019, the Applicant wrote to the Council requesting a review of its decision, on the basis that she did not accept that she had been previously been provided with all of the information held by the Council.
4. The Council notified the Applicant of the outcome of its review on 6 February 2019. The Council confirmed that it held no further information, other than that previously provided.

### Request 2

5. On 27 February 2019, the Applicant wrote to the Council and asked if she could see the building warrant file for the property in question. She commented that she had not been given access to the building warrant file in 2015, as the Council had claimed in previous correspondence.

6. On 28 February 2019, the Council responded and referred to an earlier email where she had been advised that to allow access to the file would require a considerable amount of time redacting personal information. As it considered the information had already been provided, it could not agree to the request. The Applicant was also advised there was no useful purpose in continuing to correspond.
7. On 1 March 2019, the Applicant wrote to the Council requesting a review of its decision, stating that there was a useful purpose and asked again if there was a legal reason why she could not see the whole file.
8. On 7 March 2019, the Council responded and advised the Applicant could not view the file as it contained personal data. It stated that there was no legal reason to compel the Council to give her access to the entire file.
9. On 24 April 2019, the Applicant applied to the Commissioner for a decision in terms of section 47(1) of FOISA, in relation to Requests 1 and 2. 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 she was dissatisfied with the outcome of the Council's review because she believed further information should be held by the Council and that she should be given access to the building warrant file, as requested.

## **Investigation**

---

10. The application was accepted as valid. The Commissioner confirmed that the Applicant made requests for information to a Scottish public authority and asked the authority to review its responses to those requests before applying to him for a decision.
11. On 13 June 2019, the Council was notified in writing that the Applicant had made a valid application. The case was allocated to an investigating officer.
12. 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, in particular to explain the steps it had taken to identify and locate the information requested. The Council was also advised that the request to view the building warrant file of 27 February 2019 was a valid request under the EIRs for all of the information contained within that file.
13. The Council responded, advising that it had dealt with a number of previous requests where the information requested on 27 December 2018 had been provided. In an effort to resolve the matter, the Council agreed to provide the Applicant with all of the information contained in the building warrant file, subject to the redaction of personal data.
14. The Applicant acknowledged receipt of the information provided during the investigation and did not dispute the redaction of personal data. She still believed further information should be held.

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

---

15. In coming to a decision on this matter, the Commissioner considered all of 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.

## Application of the EIRs

16. It is clear from the Council's correspondence with both the Applicant and the Commissioner, and from the information itself, that the information sought by the Applicant is properly considered to be environmental information, as defined in regulation 2(1) of the EIRs. It relates to a sewage system and the installation thereof, and so the Commissioner is satisfied that it falls within either paragraph (b) or paragraph (c) of the definition in regulation 2(1) (the text of each paragraph is reproduced in Appendix 1). The Applicant has not disputed this and the Commissioner will consider the information in what follows solely in terms of the EIRs.

## Information held by the Council

17. Regulation 5(1) of the EIRs (subject to the various qualifications contained in regulations 6 to 12) requires a Scottish public authority which holds environmental information to make it available when requested to do so by any applicant. It is important to bear in mind that this obligation relates to information actually held by an authority when it receives the request, as opposed to information an applicant believes the authority *should* hold, but which is not in fact held.
18. The standard proof to determine whether a Scottish public authority holds information is the civil standard of the balance of probabilities. In determining where the balance 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 as to what information the authority should hold, ultimately the Commissioner's role is to determine what relevant information is actually held by the public authority (or was, at the time it received the request).
19. The Commissioner has taken account of the submissions provided by the Applicant, in which she provided reasons why she believed the Council should have held further information falling within the scope of her request.
20. The Council provided submissions in response to the questions put by the investigating officer on this matter. The Council confirmed the searches and enquiries it undertook to ascertain whether it held any information falling within the scope of Request 1, with evidence of the searches carried out and confirmation of the staff involved. The Council also provided the Commissioner with details of when information falling within the scope of Request 1 had previously been provided to the Applicant.
21. The Council concluded that, other than the information previously disclosed to the Applicant, it held no information falling within the scope of the Applicant's request.
22. As mentioned above, during the investigation, the Council provided the Applicant with the entire content of the building warrant file as sought in Request 2 above, subject to the redaction of personal data.
23. Having considered all relevant submissions and the terms of the requests, the Commissioner accepts that the Council identified and located all the information it held falling within the scope of Request 1 and the information contained in the building warrant file (Request 2). He is also satisfied that, during the investigation, the Applicant was provided with the information contained in the building warrant file, subject to the redaction of personal data.

## Handling of Request 2

24. As mentioned above, regulation 5(1) of the EIRs (subject to the various qualifications contained in regulations 6 to 12) requires a Scottish public authority which holds environmental information to make it available when requested to do so by any applicant.
25. Regulation 13 of the EIRs provides that, subject to regulations 10(8) and 11(6), if a request to make environmental information available is refused by a Scottish public authority in accordance with regulation 10, the refusal shall:
  - specify the reasons for the refusal including, as appropriate, any exception under regulation 10(4) or (5) or provision of regulation 11, and how the Scottish public authority has reached its decision with respect to the public interest under regulation 10(1)(b) (regulation 13(b)).
  - state the basis on which any exception relied on under regulation 10(4) or (5), or provision of regulation 11, applies if it would not otherwise be apparent (regulation 13(c)).
  - inform the applicant of the review provisions under regulation 16 and the enforcement and appeal provisions available in accordance with regulation 17 (regulation 13(e)).
26. The Commissioner considers the Applicant's email of 27 February 2019 was a valid request to view or be provided with the information contained in the building warrant file in question. The Council therefore had a duty to provide the Applicant with a response meeting the requirements of regulation 13 of the EIRs, as outlined above.
27. The Commissioner notes that, in its response of 28 February 2019, the Council merely advised the Applicant that to provide the information would require a significant amount of redaction and, as the information had previously been provided, it could not agree to the request.
28. The Commissioner finds that this response did not constitute a refusal notice meeting the requirements of regulation 13 and, therefore, that the Council failed to comply with the requirements of regulations 13 of the EIRs.
29. The Commissioner notes that the Applicant's email of 1 March 2019 required the Council to review its decision, on the basis she believed there was a useful purpose in her obtaining the information.
30. 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)).
31. Although the Council responded to the Applicant on 7 March 2019, this response did not remedy the failure to issue a refusal notice meeting the requirements of regulation 13 of the EIRs, as outlined above. As such, it is also apparent that the Council failed to carry out a review meeting the full requirements of regulation 16.
32. The Commissioner does not require the Council to take any action regarding its failures in terms of regulations 13 and 16 of the EIRs, as outlined above, although he would urge the Council to ensure that similar requests (even where part of an ongoing course of correspondence) are addressed with a greater degree of rigour in future.

## **Decision**

---

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

The Commissioner finds that, in respect of Request 1, the Council complied with the EIRs in responding to the information request made by the Applicant on 27 December 2018.

The Commissioner also finds, however, that by failing to recognise the Applicant's email of 27 February 2019 as a valid request for information under the EIRs, and thereafter provide adequate responses to either the request or the requirement for review, the Council failed to comply with regulations 13 and 16 of the EIRs.

The Commissioner does not require the Council to take any action in relation to these failures.

## **Appeal**

---

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.

**Daren Fitzhenry**  
**Scottish Information Commissioner**

**14 November 2019**

## Appendix 1: Relevant statutory provisions

---

### The Environmental Information (Scotland) Regulations 2004

#### 2 Interpretation

(1) In these Regulations –

...

"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-

...

(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.

...

#### 13 Refusal to make information available

Subject to regulations 10(8) and 11(6), if a request to make environmental information available is refused by a Scottish public authority in accordance with regulation 10, the refusal shall-

(a) be given in writing as soon as possible and in any event no later than 20 working days after the date of receipt of the request for the information;

(b) specify the reasons for the refusal including, as appropriate, any exception under regulation 10(4) or (5) or provision of regulation 11 and how the Scottish public authority has reached its decision with respect to the public interest under regulation 10(1)(b);

(c) state the basis on which any exception relied on under regulation 10(4) or (5) or provision of regulation 11 applies if it would not otherwise be apparent;

(d) if the exception in regulation 10(4)(d) is relied on, state the time by which the authority considers that the information will be finished or completed; and

(e) inform the applicant of the review provisions under regulation 16 and of the enforcement and appeal provisions available in accordance with regulation 17.



## **16 Review by Scottish public authority**

- (1) Subject to paragraph (2), an applicant may make representations to a Scottish public authority if it appears to the applicant that the authority has not complied with any requirement of these Regulations in relation to the applicant's request.
- (2) Representations under paragraph (1) shall be made in writing to the Scottish public authority no later than 40 working days after either the date that the applicant receives any decision or notification which the applicant believes does not comply with these Regulations or the date by which such a decision or notification should have been made, or any other action should have been taken, by the authority but was not made or taken.
- (3) The Scottish public authority shall on receipt of such representations-
  - (a) consider them and any supporting evidence produced by the applicant; and
  - (b) review the matter and decide whether it has complied with these Regulations.
- (4) The Scottish public authority shall as soon as possible and no later than 20 working days after the date of receipt of the representations notify the applicant of its decision.
- (5) Where the Scottish public authority decides that it has not complied with its duty under these Regulations, it shall immediately take steps to remedy the breach of duty.

**Scottish Information Commissioner**

Kinburn Castle  
Doubledykes Road  
St Andrews, Fife  
KY16 9DS

t 01334 464610

f 01334 464611

[enquiries@itspublicknowledge.info](mailto:enquiries@itspublicknowledge.info)

**[www.itspublicknowledge.info](http://www.itspublicknowledge.info)**