



Scottish Information  
Commissioner  
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# Decision Notice 111/2023

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## Information relating to harbour and port occupancy in Orkney

**Authority: Orkney Islands Council**  
**Case Ref: 202101185**

### Summary

The Applicant asked the Authority for information relating to the general occupancy of several harbours and ports in Orkney. The Authority informed the Applicant it did not hold information which would fulfil his request. The Commissioner investigated and found the Authority was entitled to notify the Applicant that it did not hold the information.

### Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) section 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 “environmental information”) (Interpretation); 5(1) and (2)(b) (Duty to make environmental information available on request); 10(1) and (4)(a) (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 25 July 2021, the Applicant made a request for information to the Authority. He asked for information relating to the Optimum Berth Occupancy (OBO) and Berth Occupancy Ratio (BOR) for several harbours and ports in Orkney. Specifically, he requested:

- The OBO for Lyness, Kirkwall, Hatson, Stromness and Copland's Dock;
  - The BOR for Lyness, Kirkwall, Hatson, Stromness and Copland's Dock in financial years 2015 to 2016, 2016 to 2017, 2017 to 2018, 2018 to 2019 and 2019 to 2020.
2. After asking the Applicant to provide more detail on what he meant by OBO, the Authority informed him on 24 August 2021 that it did not hold the information he had requested.
  3. On 27 August 2021, the Applicant wrote to the Authority, requesting a review of its decision. The Applicant stated that he was dissatisfied with the Authority's decision because it was inconceivable that it did not hold the information he had requested, as such information was essential to ensure the effective operational management of its harbours and ports, and to compile annual reports and other associated documentation.
  4. The Authority notified the Applicant of the outcome of its review on 20 September 2021. The Authority upheld its original view and reiterated that it did not hold the requested information.
  5. On 21 September 2021, 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 he was dissatisfied with the outcome of the Authority's review because he considered that the information he had requested must be held by the Authority in order for it to effectively carry out its functions.

## **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 9 November 2021, the Authority 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 Authority was invited to comment on this application and to answer specific questions. These related to whether it responded to the Applicant's information request in terms of FOISA or the EIRs and for further detail on why it could not provide the information the Applicant had requested, particularly given the Applicant's comments that OBO and BOR are internationally accepted formulae.

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

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

### ***Application of the EIRs***

10. Where information falls within the scope of the definition of "environmental information" in regulation 2(1) of the EIRs, a person has a right to access it (and the public authority a corresponding obligation to respond) under the EIRs, subject to various restrictions and exceptions contained in the EIRs.

11. The Authority originally handled the Applicant's information request under FOISA, but it revised its position during the investigation and acknowledged that it should have responded under the EIRs.
12. The Commissioner is satisfied that the information does comprise environmental information (see in particular paragraphs (a), (b) and (c) of the definition in regulation 2(1) of the EIRs) and he will therefore consider the handling of the request in what follows solely in terms of the EIRs. It must be noted that the Authority failed to comply fully with the EIRs, inasmuch as it did not deal with the request under the EIRs rather than under FOISA.

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

13. 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.
14. Under the EIRs, a public authority may refuse to make environmental information available if one or more of the exceptions in regulation 10 apply and, in all the circumstances of the case, the public interest in maintaining the exception or exceptions outweighs the public interest in making the information available.

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

15. Regulation 10(4)(a) of the EIRs provides that a Scottish public authority may refuse to make environmental information available to the extent that it does not hold that information when an applicant's request is received.
16. The Authority relied on the exception in regulation 10(4)(a) of the EIRs for the Applicant's request.
17. The Commissioner has taken account of the submissions provided by the Applicant in which he has indicated that he believes that the Authority should hold information which would fulfil his request. While the Applicant clearly has genuine reasons for believing that the Authority should hold information of the nature covered by his request, the Commissioner can only consider whether or not the Authority identified and located the information it actually held.

***Test to be applied in the use of the exception***

18. 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 lies, the Commissioner considers 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 (as indicated above) is to determine what relevant information is actually held by the public authority (or was, at the time it received the request).

***The Authority's submissions about the exception***

19. The Authority submitted that the OBO and BOR data requested by the Applicant would only provide useful information if applied to specific berths used by specific vessels.
20. The Authority noted such information could be generated by, for example, applying the OBO and BOR formulae to bulk cargo berths used for the import or export of general bulk cargos or to berths at oil terminals.

21. However, the Authority explained the berths within its remit are, in the vast majority, general user berths and therefore do not fall under specific user categorisation (thereby making the OBO and BOR formulae inapplicable).
22. The Authority provided a detailed submission from its Marine Services supporting this position: for example, it noted Hatston Terminal only has one specific berth for specific marine traffic (the Ro-Ro berth, used by Northern Isles Ferry Services), with various vessels using the numerous other berths.
23. The Authority's Marine Services explained this meant if the OBO and BOR formulae were applied to Hatston Terminal, the results could vary between 14% to 100%, depending on usage. This was because the Applicant's request could be calculated at 100% if one vessel were laid up for a full year (as was the case in one of its berths) or at 14% if the specific user berth (the Ro-Ro berth) figures were used.
24. The Authority's Marine Services submitted this showed the OBO and BOR formulae were not suitable for the general user berths under its remit and noted the OBO definition includes services, such as port services, not under its direct control which would also lead to misleading results.

*The Applicant's submissions about the exception*

25. As stated above, the Applicant was dissatisfied with the Authority's response because it was inconceivable (he said) that it did not hold the information he had requested, as such information was essential to ensure the effective operational management of its harbours and ports and to compile annual reports and other associated documentation.
26. The Applicant also explained that he failed to see how, if applied correctly, the OBO and BOR formulae could produce inaccurate data, given that they are definitions that are internationally accepted and applied.

*The Commissioner's view about the exception*

27. The Commissioner finds the submissions and explanations from the Authority cogent and persuasive and notes, in particular, the position of its specialist Marine Services that the formulae provided by the Applicant are applicable to specific user berths while the berths under its remit are, in the vast majority, general user berths.
28. After considering the respective submissions of the Authority and the Applicant, the Commissioner is persuaded, on balance, that OBO and BOR formulae are not relevant or applicable in the context of the facilities under the Authority's control and the way in which they are used. In those circumstances, there would be no reasonable expectation that the information in question, or the "building blocks" from which it could readily be derived in any meaningful form, would be held by the Authority.
29. As stated above, the Commissioner can only consider whether information is actually held by an authority, not what information it should hold, or what an applicant believes it should hold.
30. In all the circumstances, therefore, the Commissioner is satisfied, on the balance of probabilities, that the Authority does not (and did not, at the time the request was received from the Applicant) hold recorded information which would fulfil the Applicant's request. The Authority was therefore entitled to rely on the exception in regulation 10(4)(a) of the EIRs, on the basis it did not hold the information requested.
31. This exception is subject to the public interest test in regulation 10(1)(b) of the EIRs.

32. The Applicant explained that disclosure of the information he requested was in the public interest, because it would release information directly relevant to issues of great public concern; namely, the Authority's pursuit of the potential construction of a deep-water quay in Scapa Flow.
33. However, [Decision 123/2009](#)<sup>1</sup> sets out at paragraph 33 the position taken by the Commissioner where the public interest test is considered in relation to regulation 10(4)(a): he can identify no conceivable public interest in requiring disclosure of information which the Authority does not hold (naturally, he has to consider each case individually, but there would appear to be no reason for taking an alternative view here).
34. On balance, therefore, the Commissioner is satisfied that the public interest in maintaining the exception should prevail.

## Decision

The Commissioner finds that the Authority was entitled to respond to the information request made by the Applicant by stating that it did not hold the information requested, in line with regulation 10(4)(a) of the Environmental Information (Scotland) Regulation 2004 (the EIRs). However, the Authority should have dealt with the request under the EIRs in responding to the Applicant's request and requirement for review, and failed to comply with regulation 5(1) of the EIRs in responding wholly under the Freedom of Information (Scotland) Act 2002. The Commissioner requires no action by the Authority on this point.

## 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.

**Euan McCulloch**  
**Head of Enforcement**

**13 November 2023**

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<sup>1</sup> [Decision 123/2009 | Scottish Information Commissioner \(itspublicknowledge.info\)](#)

## Appendix 1: Relevant statutory provisions

### Freedom of Information (Scotland) Act 2002

#### 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;

...

“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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(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;

...

## 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.

...

- (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;

...

## **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

...