



## A guide for applicants: What happens next?

### Important information about how we investigate your application.

#### How long will it take to reach a decision?

1. We aim to complete investigations in four months, wherever possible. It might take longer if your case is complex, but we will keep you informed as to progress.

#### The investigation and the investigating officer

2. The investigating officer is responsible for examining the questions raised by your case, and making recommendations to the Commissioner for his decision. The final decision is taken by the Commissioner (or a senior officer to whom he has delegated the responsibility).
3. The investigating officer will ask the public authority to provide detailed arguments to explain why it has withheld information from you, or why it believes it does not hold the information you asked for. If your complaint is about the fee charged by the authority, the investigating officer will ask the public authority to give a detailed breakdown of the fee so that we can check whether the charge was justified. If your complaint was about any other matter – for instance, the failure of the public authority to provide you with advice and assistance, or the decision to treat your request as vexatious or repeated – the investigating officer will ask the public authority to explain its decisions or actions in relation to your request.
4. In all cases, the investigating officer will examine the reply from the public authority to see whether it raises further questions requiring an answer.
5. The investigating officer may contact you to ask about your views or for background information about the case. The investigating officer will also let you know if the public authority decides that the information should be withheld under any other provisions in the Freedom of Information (Scotland) Act 2002 (FOISA) or in the Environmental Information (Scotland) Regulations 2002 (the EIRs), besides the ones referred to in the authority's letters to you. If that happens, you will usually be given an opportunity to comment on the arguments put forward by the public authority.
6. It is important that you reply to any letters or emails sent by the investigating officer, and that you let him or her know about anything that will affect the investigation – for instance, if the public authority sends you some or all of the information you asked for during the investigation, or if you decide you don't want to carry on with the case. If you don't reply to any questions asked by the investigating officer, the Commissioner may decide that you have abandoned your application, and won't issue a decision on your case.

## **What will the Commissioner's decision cover?**

7. By law, the Commissioner is only allowed to issue a decision on the matters you have already raised with the public authority, such as the authority's decision to withhold information, or the authority's failure to respond to your request.
8. The Commissioner must decide whether the public authority has complied with FOISA or the EIRs in dealing with your request. The Commissioner will generally consider the following questions, where they apply to your case:
  - (i) Whether the public authority was wrong to withhold information from you, under the exemptions in FOISA or the exceptions in the EIRs.
  - (ii) Whether the public authority complied with the legislation in other ways: for instance, whether it replied to you within the time allowed; whether any fees notice sent to you was correctly calculated; or whether the public authority provided you with the advice and assistance required by FOISA or the EIRs.
9. The Commissioner cannot decide on any matters which are not covered by FOISA or the EIRs. This means the Commissioner **cannot** consider:
  - (i) Whether staff in the public authority should have given you their thoughts or opinions – FOISA and the EIRs only give you rights to receive recorded information held by the public authority.
  - (ii) Other complaints about the way in which staff in the public authority have treated you, except where these relate directly to the way in which your request for information was handled. You may be able to raise such complaints with the Scottish Public Services Ombudsman.
  - (iii) Whether the public authority should have recorded certain information, but failed to do so. FOISA and the EIRs do not require Scottish public authorities to keep records or create information. The Commissioner can only consider questions relating to recorded information which existed within the public authority at the time of your request.
  - (iv) Whether the information held by the public authority is accurate or correct.

## **Settlement/Resolution**

10. Sometimes it is possible for the public authority and the applicant to agree to "settle" a case without needing a decision notice from the Commissioner. This may involve some sort of compromise – for instance, the public authority may guarantee that the information will be provided at a later date; or it may offer you access to some or all of the information while still refusing to make it publicly available under FOISA or the EIRs.
11. If you accept the offer of settlement, you will be asked to withdraw your application for a decision from the Commissioner.
12. The offer of settlement may come from the public authority, or from the investigating officer, who will be able to discuss the offer with you.

## **Keeping you up to date during the investigation**

13. The investigating officer will keep you updated during the investigation. You can also ask how your case is going at any time.

14. The investigating officer will ask the public authority to provide submissions on your case. We usually can't share the actual submissions with you. They often contain specific references to the information that has been withheld and it can be a criminal offence for the investigating officer to share this information with you. However, the investigating officer will tell you, wherever possible, what arguments are being considered and give you an opportunity to comment.
15. Because the Commissioner is a Scottish public authority for the purposes of FOISA/the EIRs (see below), you have the right to ask for a copy of the submissions which a public authority has provided to the Commissioner. However, it will rarely be possible for the Commissioner to let you see the submissions, particularly during an investigation. It is also possible that making such a request will delay the investigation.

## **The Decision Notice**

16. If the case is not settled, the Commissioner will issue a decision notice which sets out his decision on whether the public authority complied with FOISA or the EIRs in dealing with your information request.
17. If a decision is issued, a copy of the decision will be published on the Commissioner's website. The published version of the decision will only name you if you have agreed to us naming you. (Even if you have agreed to us naming you in the published decision, we may decide to anonymise the decision if, in our view, naming you would breach the privacy rights of other individuals.)
18. If the Commissioner finds that the public authority was wrong to withhold information from you, he will order the authority to provide the information to you, usually within 45 days of the date of the decision notice. This period may be longer if the Commissioner has ordered release of a large amount of information. The Commissioner cannot order the public authority to provide the information before then, as both you (the applicant) and the public authority have 42 days in which to appeal against his decision to the Court of Session. However, the public authority may choose to send you the information without waiting for the deadline, if it does not intend to appeal.
19. If the Commissioner finds that the public authority failed to comply with FOISA or the EIRs in other ways (such as failing to reply to you within the timescales set down, or telling you it did not hold information when it did), the decision notice will show whether he requires the public authority to take any further action to put this right, or to make sure it does not happen again.
20. Because the Commissioner's decision looks at the legal basis for the way the public authority dealt with your request, it may be a complex document which focuses on legal arguments. Although we try to keep legal jargon to a minimum, we appreciate that the decision notice can sometimes be difficult to follow. If you have questions about the meaning of the decision notice, you can contact the investigating officer for an explanation.
21. Please remember - the investigating officer cannot discuss the rights and wrongs of the Commissioner's decision with you. Once the decision notice is issued, it cannot be changed.
22. The Commissioner's decision is legally binding, and the public authority must take any steps he orders. The only exception is in cases where the public authority successfully appeals against the Commissioner's decision – there is more information about this below.

## Appealing against the Commissioner's decision

23. Both you and the public authority have the right to appeal against the Commissioner's decision to the Court of Session. You can only appeal if you believe the Commissioner has wrongly interpreted the law or acted in a way that goes beyond what is laid down in FOISA/the EIRs.
24. If you want to appeal, you must do so within 42 calendar days. The Commissioner's office cannot help you make an appeal, and you should take independent legal advice about the process.

## What to do now

25. In the letter sent with this leaflet, you may have been asked for some additional information. Please reply as soon as possible, so that the investigation of your case is not delayed.
26. The Commissioner is a Scottish public authority for the purposes of FOISA and the EIRs, and must respond to information requests for information he holds. This means that it is possible, although unlikely, that he will receive a request from a third party asking him to disclose information about your case.
27. If this happens, the Commissioner will usually let you know and give you a chance to comment.

## Finally

28. If you have any questions about the investigation of your case, don't hesitate to contact the investigating officer.

## For information contact us at:

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