



What happens next? A guide for applicants

How we investigate your application

Introduction

1. This guide tells you what to expect now that we are investigating your application. It covers applications made to us under:
 - (i) the Freedom of Information (Scotland) Act 2002 (FOISA) and
 - (ii) the Environmental Information (Scotland) Regulations 2004 (the EIRs).
2. If you have a question that isn't answered here, feel free to contact us.

So, what happens first?

3. By law, we must notify the authority that you have made an application to us. We send a copy of your application to the authority so that it understands what your application is about.

And what happens after that?

4. If the authority holds the information you have asked for, but has refused to disclose information because it is exempt from disclosure, we will get a copy of the information from the authority. Once we have the information (this can take a few weeks), your case will be allocated to an investigator.
5. In other cases, the case can simply be allocated to an investigator.
6. The investigator will contact you to give you their name and contact details. The investigator is responsible for examining the questions raised by your case, making recommendations to the Commissioner and drafting the decision. However, the final decision is taken by the Commissioner (or other senior officer).
7. The investigator must give the authority a chance to comment on your application.
8. What happens during the investigation will depend on why you applied to the Commissioner. For example:
 - (i) if you believe the authority holds the information you have asked for, despite it telling you it doesn't, the investigation will focus on what searches were carried out by the authority and what information the authority actually holds
 - (ii) if you are unhappy that an exemption/exception has been used to withhold information, the investigation will focus on whether it was correctly applied

- (iii) if the public authority has refused to comply with your request on cost grounds or because it is vexatious or manifestly unreasonable, the investigation will focus on whether the authority should have complied with your request
9. Once we've received the authority's submissions, the investigator might contact you to ask about your views or for background information about the case. This can help us come to a decision.
 10. Unfortunately, we usually can't share the actual submissions with you. They often contain specific references to information that has been withheld and it could be a criminal offence for us to share this information. However, if it's important for the investigation, and it's possible to do so, the investigator will let you know what arguments are being considered and give you an opportunity to comment.
 11. Sometimes, a public authority will change its approach during the investigation. For example it may decide to apply a new exemption to the information. The authority has the right to do this. Where this happens, the investigator will usually give you an opportunity to comment.

Are there things the investigation can't look at?

12. Our role is to decide whether a public authority complied with FOISA or with the EIRs in dealing with your request.
13. By law, we can't issue a decision on any matters not raised in your application.
14. In addition, we can't investigate any matters not covered by FOISA or the EIRs. For example, we can't look at:
 - (i) complaints about how public authority staff have treated you – unless it relates directly to the way your information request was handled
 - (ii) whether the public authority should have recorded particular information, but failed to do so. FOISA and the EIRs don't require Scottish public authorities to keep records. The Commissioner can only consider questions relating to recorded information held by the authority at the time you made your request
 - (iii) whether the information held by the public authority is accurate or correct
 - (iv) whether a decision taken by a public authority (e.g. on a planning application) was wrong.

Settlement

15. We have the power to try to settle cases before we issue a decision. This may involve some compromise – for instance, the public authority may disclose only some of the information you asked for or may give you the information while still refusing to make it publicly available under FOISA or the EIRs.
16. You do not have to accept the offer of settlement. However, if you do, you will be asked to withdraw your application for a decision from the Commissioner.
17. The offer of settlement may come from the public authority, or from the investigator, who will be able to discuss the offer with you.

Keeping in touch

18. The investigator will keep you updated during the investigation. You can also ask how the investigation is going at any time.
19. It's really important you reply to correspondence from the investigator, and that you let them 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.
20. If you don't reply to any questions asked by the investigator, we might have to conclude you have abandoned your application. If we think you might have abandoned your application, we'll get in touch before we close the case.
21. Please make sure you let us know if your contact details change – for example, if you move house or change your email address.

How long will it take to issue a decision?

22. We try to issue decisions in four months from the date of your application. But each investigation is different. It might take longer if the case is complex and involves a lot of information. It might take less time if the case is straightforward.

Issuing the decision

23. If the case is not settled, the Commissioner will issue a decision setting out whether the public authority complied with FOISA or the EIRs in dealing with your information request.
24. If you have given us an email address, we will email the decision to you at that address. If you change your email address during the investigation, please let us know straight away.
25. If we only have a post address for you, we will need to send the decision by recorded delivery post. If you would prefer us to email the decision to you, please let us have your email address. If you change that email address during the investigation, please let us know straight away.

What will the decision require the authority to do?

26. If we decide the authority failed to comply with FOISA or the EIRs, the decision will set out what steps the authority has to take. We might, for example, order the public authority to disclose information to you. In some cases, particularly if the authority has changed its approach to the case during the investigation, we might order the authority to carry out a new review of its response.
27. If the authority has already sorted out the problem during the investigation (for example, if it disclosed the information you requested), we might find that the authority failed to comply with FOISA or the EIRs, but won't have to order the authority to take any steps.
28. By law, we must give authorities at least 42 (calendar) days to comply. We usually give them 45 days to comply.
29. The Commissioner's decision is legally binding, and the public authority must take the steps set out in the decision – unless the authority successfully appeals against the Commissioner's decision. There is more information on appeals below.

Publishing the decision

30. The decision will be published on the Commissioner's website. You will not be named in the website version. We will also take out other information from the published version of the decision if we think it would identify you or other individuals.

Understanding the decision

31. Our decisions look at whether public authorities complied with the law when responding to a request and can be appealed to the Court of Session. We try to keep legal jargon to a minimum, but we know that some decisions can be difficult to follow. If you have questions about the meaning of the decision, you can contact the investigator for an explanation.
32. However, the investigator cannot discuss the rights and wrongs of the Commissioner's decision with you. Once the decision notice is issued, it cannot be changed – except following an appeal.

Appealing against the Commissioner's decision

33. Both you and the public authority have the right to appeal against the Commissioner's decision to the Court of Session on a point of law. This means you can't appeal just because you are unhappy with the outcome of the decision. But you can appeal if you believe, for example, that the Commissioner has wrongly interpreted the law, has acted in a way that goes beyond what is laid down in FOISA or the EIRs or has failed to take account of relevant issues.
34. If you want to appeal, you must do so within 42 calendar days. The Commissioner's office cannot help you make an appeal. You should seek independent legal advice as soon as possible.

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