



Scottish Information
Commissioner
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Decision Notice 259/2024

Cladding used on the Royal Hospital for Children and Young People in Edinburgh

Authority: Scottish Ministers
Case Ref: 202200678

Summary

The Applicant asked the Authority for information relating to the type and safety of cladding used on the Royal Hospital for Children and Young People (RHCYP) in Edinburgh. The Authority disclosed some information and withheld other information under various exceptions in the EIRs. The Commissioner investigated and found that the Authority had complied with the EIRs in responding to the request.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 39(2) (Health, safety and the environment); 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" and "the Commissioner" and paragraphs (a), (b) and (c) of definition of "environmental information") (Interpretation); 5(1) (Duty to make environmental information available on request); 10(1), (2), and (4)(e) (Exceptions from duty to make environmental information available); 17(1), (2)(a), (b) and (f) (Enforcement and appeal provisions)

Background

1. On 22 March 2022, the Applicant made the following request for information to the Authority:

- (i) Any internal or external correspondence within the Authority on the topic of the type and safety of the cladding used on the new Royal Hospital for Sick Children in Edinburgh.
 - (ii) Any safety reports, analysis, or concerns raised and provided to the Authority about the safety of the cladding on the aforementioned hospital.
- 2. The Authority responded on 26 April 2022. The Authority disclosed some information and withheld other information under the exceptions in regulations 6(1)(b), 10(4)(e) and 11(2) of the EIRs. For the information withheld under the exception in regulation 10(4)(e), the Authority stated that it had concluded the public interest in maintaining the exception outweighed that in disclosure of the withheld information.
- 3. On 5 May 2022, the Applicant wrote to the Authority requesting a review of its decision. The Applicant stated that he was dissatisfied with the decision because he considered that the public interest favoured disclosure of the withheld information and because he believed significantly more information fell within the scope of his request.
- 4. The Authority notified the Applicant of the outcome of its review on 1 June 2022, which fully upheld its original decision.
- 5. On 10 June 2022, 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 that he was dissatisfied with the outcome of the Authority's review because he considered that the public interest favoured disclosure of the withheld information and because he believed significantly more information fell within the scope of his request.
- 6. The Applicant did not raise dissatisfaction with the Authority's application of the exceptions in regulations 6(1)(b) and 11(2) of the EIRs, neither of which is subject to the public interest test. Consequently, the Commissioner's investigation will only consider the Authority's application of the exception in 10(4)(e) of the EIRs and whether it identified all information relevant to the Applicant's request.

Investigation

- 7. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
- 8. On 23 August 2022, the Authority was notified in writing that the Applicant had made a valid application. The Authority was asked to send the Commissioner the information withheld from the Applicant. The Authority provided the information.
- 9. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. On 27 July 2023, the Authority was invited to comment on this application. The Authority provided submissions, and the case was subsequently allocated to an investigating officer.
- 10. During the investigation, the Applicant was invited to provide further comments on why the public interest favoured disclosure of the withheld information. The Applicant provided his comments.

Commissioner's analysis and findings

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

Application of the EIRs

12. Having considered the withheld material and the terms of the request, the Commissioner accepts the decision of the Authority to deal with the request under the EIRs rather than under FOISA.
13. The Commissioner is satisfied that the information covered by the request is environmental information, as defined in regulation 2(1) of the EIRs. He would also note that he can see no detriment to the Applicant by considering his request under the EIRs rather than FOISA, nor has the Applicant disputed the Authority's decision to handle his request under the EIRs.

Section 39(2) of FOISA – Environmental information

14. The exemption in section 39(2) of FOISA provides, in effect, that environmental information (as defined by regulation 2(1) of the EIRs) is exempt from disclosure under FOISA, thereby allowing any such information to be considered solely in terms of the EIRs.
15. In this case, the Commissioner accepts that the Authority was entitled to apply the exemption to the information withheld under FOISA, given his conclusion that it is properly classified as environmental information.
16. As there is a statutory right of access to environmental information available to the Applicant in this case, the Commissioner accepts, in all the circumstances, that the public interest in maintaining this exemption (and responding to the request under the EIRs) outweighs any public interest in disclosing the information under FOISA. Both regimes are intended to promote public access to information and there would appear to be no reason why (in this particular case) disclosure of the information should be more likely under FOISA than under the EIRs.
17. The Commissioner therefore concludes that the Authority was correct to apply section 39(2) of FOISA and consider the Applicant's information request under the EIRs.
18. In the circumstances, the Commissioner will consider this case, in what follows, solely in terms of the EIRs.

Regulation 5(1) of the EIRs – Duty to make available environmental information on request

19. 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. This obligation relates to the information held by an authority when it receives a request. Under the EIRs, a public authority may refuse to make environmental information available if one or more of the exceptions in regulation 10 apply.
20. 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 the scope, quality, thoroughness and results of the searches carried out by the public authority.
21. The Commissioner 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).

The Applicant's submissions

22. The Applicant submitted that he expected "significantly more" information falling within the scope of his request to be held by the Authority, particularly given updates around the RHCYP in Edinburgh from NHS Lothian in January 2022.

The Authority's submissions

23. The Authority explained that it had carried out searches of its corporate records management system (eRDM) for each part of the Applicant's request as follows:
- Emails containing: ("RHCYP" OR "Royal Hospital for Children and Young People" OR "sick kids") AND "Edinburgh" AND ("Cladding" OR "acm") – 167 results
 - Documents containing: ("RHCYP" OR "Royal Hospital for Children and Young People" OR "sick kids") AND "Edinburgh" AND ("Cladding" OR "acm") AND ("analysis" OR "safety" OR "concern") – 287 results
24. The Authority stated that it reviewed these results individually the information that could fall within the scope of the request. Once these results had been refined, a further detailed review was undertaken to determine the items that in fact fell within the scope of the request.
25. In addition to these searches of eRDM, the Authority also searched the Interim Deputy Director of Health Infrastructure and Sustainability's mailbox with any in scope items provided to the case handler. The Authority explained that the Interim Deputy Director of Health Infrastructure and Sustainability was the individual within the Authority who dealt with any NHS cladding issues.
26. The Authority confirmed that it was therefore satisfied that it had identified and located all information falling within the scope of the request.

The Commissioner's view

27. Having closely considered the terms of the request, it is clear to the Commissioner that it seeks information relating to the type and safety of cladding used on the Royal Hospital for Children and Young People (RHCYP) in Edinburgh where it specifically relates to that hospital.
28. In the circumstances, the Commissioner is therefore satisfied that the Authority's interpretation of the request was reasonable.
29. The Commissioner has taken account of the submissions provided by the Applicant, in which he explained why he believed the Authority should hold further information falling within the scope of his request.
30. The Commissioner considers that the searches carried out by the Authority were thorough, used appropriate keywords and encompassed all areas where information of the type covered by the Applicant's request would have been likely to be held. He is also satisfied that the member of staff involved in carrying out searches of their inbox was the most appropriate person to do so, given their role within the Authority.

31. While the Applicant believed and expected further information to be held by the Authority, the Commissioner is satisfied that this was not the case. Whether a public authority should hold information which it does not hold is not a matter for the Commissioner to decide.
32. In all the circumstances, the Commissioner is satisfied, on balance, that the Authority does not (and did not, at the time it received the request) hold any further information falling within the scope of the request.

Regulation 10(4)(e) of the EIRs – internal communications

33. Regulation 10(4)(e) of the EIRs provides that a Scottish public authority may refuse to make environmental information available to the extent that it involves making available internal communications. This is a class-based exception, meaning that there is no need to consider whether disclosure of the communication would cause harm before applying the exception
34. In order for information to fall within the scope of this exception, it need only be established that the information is an internal communication.
35. As with all the exceptions in regulation 10, a Scottish public authority applying this exception must interpret the exception in a restrictive way (regulation 10(2)(a)) and apply a presumption in favour of disclosure (regulation 10(2)(b)). Even where the exception applies, the information must be disclosed unless, in all the circumstances, the public interest in making the information available is outweighed by that in maintaining the exception (regulation 10(1)(b)).
36. The Authority explained that the withheld information is comprised of internal email exchanges between the Authority's officials and special advisers. The Authority confirmed that the withheld information had not been shared externally other than with the Commissioner as part of this investigation.
37. Having considered the information withheld under the exception in regulation 10(4)(e) of the EIRs, the Commissioner is satisfied that the information is internal communications and that the cited exception is relevant. (The Applicant has not suggested that any of the withheld information is not an internal communication.)
38. Having accepted that exception in regulation 10(4)(e) of the EIRs applies, the Commissioner must, therefore, go on to consider whether, in all of the circumstances, the public interest in making the information available is outweighed by the public interest in maintaining the exception (and withholding the information).

The Authority's submissions about the public interest

39. The Authority noted that the withheld information in this case related to discussions for lines to use in response to a media enquiry and internal discussions on the content of the briefing pack for First Minister's questions (FMQs), should the topic arise.
40. The Authority accepted that there was a public interest in disclosing the information for reasons of openness, transparency and accountability. It also acknowledged the strong presumption in favour of disclosure under the EIRs and the public interest in the subject of cladding and in the RHCYP in Edinburgh.
41. On the other hand, the Authority explained that the exception in regulation 10(4)(e) of the EIRs recognised the need for officials to have a private space within which to develop, discuss, test and revise lines before arriving at a final settled position.

42. The Authority noted that, while preparing media lines, officials and special advisers will test different approaches to consider how they might be received and whether they will have a positive or negative outcome. The Authority explained that these approaches require input to ensure that the proposed lines and handling plans accurately reflect the Authority's position and do not inadvertently mislead or misstate a position. By its nature, therefore, the production of lines was an iterative process – as a result, the final position may differ substantially from the starting point.
43. The Authority submitted that the final position, by its nature, was designed to be communicated publicly. However, the process by which that position was arrived at was not. If the means by which such a position was arrived at were disclosed, the Authority argued that all involved in the process would be less likely to provide their advice and views freely, which would, if every preliminary thought that had been recorded had to be disclosed, substantially compromise the Authority's ability to robustly test proposed positions before using them publicly.
44. In terms of the internal discussions on the briefing for FMQs, the Authority explained that the First Minister receives briefings from policy officials who lead on subject matters that may come up in that week's FMQs. Typically, the officials involved will seek to anticipate questions or issues that might be raised and ensure that the First Minister is appropriately briefed so that they can respond to whatever questions may be asked.
45. The Authority explained that, as with the preparation of media lines, this is necessarily an iterative process, with potential questions and related responses being tested and refined. The Authority submitted that the public interest test was, therefore, very similar to that for the preparation of media lines.
46. The Authority noted that much of the briefing for FMQs intended to rebut arguments likely to be made by other MSPs. However, as the arguments are not known in advance, much of the information is necessarily speculative. The Authority argued that, if all such preparatory material required to be routinely disclosed, it considered that would substantially inhibit the production of the FMQs briefing, with the result that the First Minister would be less able to participate fully in FMQs.
47. On balance, the Authority concluded that the public interest, therefore, favoured upholding the exception in regulation 10(4)(e) of the EIRs in this case.

The Applicant's submissions about the public interest

48. The Applicant noted that the Grenfell Tower disaster was one of the biggest scandals of recent time. The results of the public inquiry into the fire demonstrated how public bodies and businesses can collude and cover-up mistakes in the interests of their own reputations, rather than the safety of the public.
49. Combining the above with the ongoing concerns and the inquiry relating to the construction of both the RHCYP in Edinburgh and the Queen Elizabeth University Hospital in Glasgow, the Applicant submitted that the public interest in a clear and transparent answer on whether the cladding on the RHCYP in Edinburgh is safe was obvious.
50. The Applicant considered that there was no compelling reason to continue to withhold the information requested given the public interest in the safety of patients and the wider public. He submitted that the public interest in full disclosure, based on the principles of accountability and transparency, was clear.

The Commissioner's view on the public interest

51. Regulation 10(2)(b) of the EIRs builds in an explicit presumption in favour of disclosure, which makes it clear that where arguments are evenly balanced for withholding and disclosing the information, the information must be disclosed.
52. The starting position is, therefore, that there is a public interest in disclosure of environmental information (as expressed in the EIRs and associated EU Directive) and that only if there is a stronger competing public interest in withholding the information should exceptions be applied.
53. The Commissioner has carefully considered the submissions made by the Authority and the Applicant.
54. The Commissioner recognises that there is always a public interest in transparency and accountability and scrutiny of decisions and decision-making processes of public authorities.
55. The information withheld here is, as the Authority has categorised, lines to use in response to a media enquiry and internal discussions on the content of the briefing pack for FMQs (including attachments of the briefing). While there is a public interest in transparency of how the Authority create such media lines or brief the First Minister, this must be balanced against the public interest in the Authority being able to hold internal discussions and debate in a private space, in this case while considering how to respond to questions about the safety of the cladding used on the RHCYP in Edinburgh.
56. The Commissioner acknowledges that the ability to do so, safe in the knowledge that information will not routinely be publicly disclosed, will be required on occasion to allow open and frank exchanges to support informed decision-making. He accepts that the public interest does not lie in disclosing information that would limit such future discussion or debate, where to do so would substantially inhibit the quality of the Authority's responses to media enquiries or the ability of the First Minister to participate fully in FMQs.
57. The Commissioner also recognises that there is clearly, as described by the Applicant, a very considerable public interest in public safety – particularly in relation to the safety of a children's hospital building.
58. However, having considered the content of the withheld information, the Commissioner does not consider that disclosure of that information would contribute in any meaningful sense to the public interest in public safety described by the Applicant.
59. On balance, having examined the withheld information and the submissions from the Applicant and the Authority, the Commissioner is not satisfied that the public interest arguments in favour of making the information available are sufficiently strong as to outweigh the public interest in maintaining the exception.
60. Consequently, the Commissioner finds that the public interest in maintaining the exception outweighs that in making the information available, and he accepts that the information was properly withheld under the exception in regulation 10(4)(e) of the EIRs.

Decision

The Commissioner finds that the Authority complied with the Environmental Information (Scotland) Regulations 2004 in responding to the information request made by the Applicant.

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.

David Hamilton
Scottish Information Commissioner

12 November 2024