



Scottish Information
Commissioner
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Decision Notice 006/2025

Lauriston Castle 2022 building fabric report

Authority: City of Edinburgh Council
Case Ref: 202400923

Summary

The Applicant asked the Authority for a copy of the Lauriston Castle 2022 building fabric report. The Authority withheld the information on the basis that it comprised internal communications, where the public interest favoured non-disclosure. The Commissioner investigated and found that, while the Authority had correctly withheld the financial information in the report, it was not entitled to withhold the remainder which he required the Authority to make available to the Applicant.

Relevant statutory provisions

[Freedom of Information \(Scotland\) Act 2002](#)¹ (FOISA) section 47(1) and (2) (Application for decision by Commissioner)

[Environmental Information \(Scotland\) Regulations 2004](#)² (the EIRs) regulations 2(1) (definition of “the Act”, “applicant”, “the Commissioner” and paragraphs (a), (c) and (f) of “environmental information”) (Interpretation); 5(1) and (2)(b) (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) and (b) (Enforcement and appeal provisions)

Background

1. On 5 May 2024, the Applicant made a request for information to the Authority. He asked for a copy of the Lauriston Castle 2022 building fabric report.

¹ <https://www.legislation.gov.uk/asp/2002/13/contents>

² <https://www.legislation.gov.uk/ssi/2004/520/contents>

2. The Authority responded on 4 June 2024. It refused to provide the information requested under regulation 10(4)(e) of the EIRs, on the basis that it comprised internal communications. The Authority explained that, as Trustee, it had instructed the survey internally. It stated that the survey contained information which, if made public, would put the Trust at a significant disadvantage whereby any contractor quoting for any of the required works would likely base this on the sums included in the survey report as potential costs. Recognising the public interest in transparency and accountability, the Authority considered that this was outweighed by the public interest in being allowed to exchange views and have free and frank discussions in private, when considering matters in relation to Authority business.
3. On 5 June 2024, the Applicant wrote to the Authority requesting a review of its decision. He refuted that the Authority was Trustee of Lauriston Castle Trust (the Trust), arguing that only those Councillors nominated under section 223 of the Local Government (Scotland) Act 1994 Section 16 were Trustees. He stated that the beneficiaries of the Trust were everyone living in Scotland, there was a clear public interest in disclosure of the information, and the report related to the Trust, not to Authority business.
4. The Authority notified the Applicant of the outcome of its review on 3 July 2024, fully upholding its original decision for the reasons previously stated.
5. On 5 July 2024, 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 it had refused to provide a response, and he believed that no consideration had taken place to redacting information such as amounts or names.

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 27 August 2024, the Authority was notified in writing that the Applicant had made a valid application, and it was asked to send the Commissioner the information withheld from the Applicant. The Authority provided the information and the case was subsequently 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 focused on the Authority's justification for withholding the information in the report under regulation 10(4)(e) of the EIRs (including the public interest test), and what consideration it had given to redacting any financial information.

Commissioner's analysis and findings

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

Handling in terms of the EIRs

10. The Authority considered the Applicant's request in accordance with the EIRs, on the basis that the information requested was environmental information as defined in regulation 2(1) of the EIRs.
11. Where information falls within the scope of this definition, a person has a right to access it (and the public authority has a corresponding obligation to respond) under the EIRs, subject to the various restrictions and exceptions contained in the EIRs.
12. The Commissioner notes that the request sought information contained in a report on the condition of a building. He is satisfied that the information requested by the Applicant falls within the definition of environmental information set out in regulation 2(1) of the EIRs, in particular paragraphs (a), (c) and (f) of that definition. The Applicant has not challenged the Authority's decision to deal with the request as one for environmental information and the Commissioner will consider the handling of the request in what follows solely in terms of the EIRs.

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

13. Regulation 5(1) of the EIRs 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 information that is held by the authority when it receives a request.
14. On receipt of a request for environmental information, therefore, the authority must ascertain what information it holds falling within the scope of the request. Having done so, regulation 5(1) requires the authority to make that information available, unless a qualification in regulations 6 to 12 applies (regulation 5(2)(b)).
15. Under the EIRs, a Scottish public authority may refuse to make environmental information available if one or more of the exceptions in regulation 10 applies, but only if (in all the circumstances) the public interest in maintaining the exception or exceptions outweighs the public interest in making the information available.

Regulation 10(4)(e) – Internal communications

16. Regulation 10(4)(e) of the EIRs provides that a Scottish public authority may refuse to make environmental information available to the extent that the request involves making available internal communications.
17. In order for information to fall within the scope of this exception, it need only be established that the information is an internal communication.
18. As with all of the exceptions under regulation 10, a Scottish public authority applying this exception must interpret it in a restrictive way and apply a presumption in favour of disclosure (regulation 10(2)). 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)).

The Applicant's submissions on regulation 10(4)(e)

19. In his application to the Commissioner, the Applicant disagreed with the Authority's decision to refuse to provide the information requested. He argued that no consideration had been given to redacting information such as amounts or names. He stated that the information specifically related to the Trust, not to the Authority (which, he argued, was a separate legal entity).

The Authority's submissions on regulation 10(4)(e)

20. In its submissions to the Commissioner, the Authority confirmed that it wished to continue to rely on regulation 10(4)(e) to withhold the information requested.
21. The Authority submitted that, as a Trustee of the building, it had commissioned the building condition survey, with the intention of assessing the structural condition of the building in question at that time, and to keep a record of the building's condition. It explained that the report was authored by an Officer of the Authority, and there was no intended recipient of the survey. The Authority confirmed that access to the survey was limited to those with access to the system it was held on, and the survey has not been [shared] externally with a third party.

The Commissioner's view on regulation 10(4)(e)

22. The Commissioner has considered the submissions from both parties along with the withheld information itself.
23. He notes that the survey was commissioned by the Authority, and the resulting report written internally, with no intended recipient (this is clearly what has happened in practice, whatever the Applicant's view on the proper legal position in relation to the Trust). He has also considered the limited internal access to the report, and the fact that it has not been shared externally.
24. The Commissioner is therefore satisfied that this information comprises internal communications and is therefore subject to the exception in regulation 10(4)(e) of the EIRs.
25. The Commissioner must therefore go on to consider whether, in all the circumstances, the public interest in making the information available is outweighed by that in maintaining the exception.

The Applicant's submissions on the public interest - regulation 10(4)(e)

26. In his submissions to the Commissioner, the Applicant believed that disclosure of the information was in the public interest because it related to a property and grounds that were in trust (i.e. the Trust). In his view, the beneficiaries, who were the public living in Scotland, were entitled to know this information. He believed that by keeping it secret, the Authority, which was not the lawful Trustee, was also breaking the law under conflict of interest.

The Authority's submissions on the public interest - regulation 10(4)(e)

27. The Authority acknowledged that there was a public interest in knowing how a building, which is held in trust for the benefit of the nation, is managed and maintained, and this included achieving best value in the management of the building.
28. In support of its position that it had applied a presumption in favour of disclosure (regulation 10(2)(b)), the Authority provided the Commissioner with a copy of an internal email exchange, which took place prior to the Authority's initial response, regarding consideration of the disclosure of the information.
29. In considering where the balance of public interest lay, the Authority recognised that it was in the public interest for it to be transparent in matters relating to the management of the building which was held in Trust for the benefit of the nation. However, it also considered that it was in the public interest to achieve best value during a tendering exercise. In conclusion, the Authority believed that, given the greater scrutiny of the use of public funds at this time, the balance of public interest lay in ensuring that the Authority attained best value.

30. In relation to the consideration given to redacting the financial information in the report, the Authority believed that even disclosure of the report without the financial information would result in prejudice. It argued that contractors would be in a position, ahead of any tendering process, to determine costs based on the description of the works required. The Authority submitted that this would affect its ability to achieve best value as bids placed during a tendering exercise should be based on the information made available during that exercise alone.
31. In the Authority's view, the entire content of the report was sensitive.

The Commissioner's view on the public interest – regulation 10(4)(e)

32. The Commissioner has considered the submissions from both parties on the public interest test, in relation to the withheld information itself. He has done so with regard to the circumstances at the time of the Authority's review outcome which, he notes, was more than two years after the survey had been carried out.
33. The Commissioner notes that the report is largely factual, recording the condition of the various parts of the property surveyed at the material time, the measures required to remedy any defects, the target timescales for and priorities of the works, and the corresponding estimated costs.
34. The Commissioner has also considered the email exchange provided by the Authority in support of its position that it had applied a presumption in favour of disclosure. This email exchange clearly sets out the view of the Acting Finance and Performance Manager in Facilities Management (within the Place Directorate) that the report could be safely disclosed without the financial information, but with caveat. The Information Rights Officer in the Information Governance Unit (within the Corporate Services Directorate) appears to agree with this view. However, notwithstanding this, the FOI Reviewing Officer's subsequent decision was to fully withhold the report under regulation 10(4)(e), essentially on the basis of commercial interests.
35. The Commissioner finds this state of affairs somewhat confusing, as it is not clear, from the information provided by the Authority, why the Reviewing Officer's decision did not appear to take account of the earlier internal email exchange. He has considered the Authority's arguments against disclosing the report with the financial information redacted - i.e. that this would impede its ability to achieve best value as contractors would be able to determine costs based on the description of works in the survey – but he does not agree with the Authority's position here. In the Commissioner's view, any invitation to tender would clearly set out the works required, and contractors would need to submit bids according to the tender specifications (which, indeed, may turn out to be different from what is set out in the report, depending upon what works the Authority decided were necessary, or were a priority, at the material time(s)). The Commissioner does not accept that disclosure of the report, minus the financial information, would give contractors competitive advantage in the manner claimed by the Authority, in this case. It would hardly be in the contractors' interests to bid for work not specified in any future tender specification.
36. The Commissioner does not accept that any of the information in the report (other than the financial information) can be considered to be "sensitive" as claimed by the Authority. Many of the issues identified will clearly be in plain sight, visible to anyone with access to those areas.

37. Noting that the building and grounds are held in trust for the benefit of the people of Scotland, the Commissioner recognises that there is an inherent public interest in transparency and accountability in the disclosure of information concerning the condition of the property, and how it is being maintained. (It does not follow that the Commissioner accepts the Applicant's position with regard to the proper management of the Trust: it is not his role to determine that dispute, and such a determination is not required for the purposes of this case.)
38. He does not accept, however, the relevance of such arguments for all of the information being withheld under regulation 10(4)(e). For the financial information, the Commissioner is satisfied that there is no public interest in disclosing financial information that could impact on the Authority's ability to secure best value for any works to be instructed. He therefore finds that the Authority was entitled to withhold the financial information in the report under regulation 10(4)(e) of the EIRs.
39. For the remainder of the information being withheld under this exception, however, the Commissioner disagrees with the Authority's view that disclosure would impede its ability to achieve best value, and he is not persuaded that the public interest lies in withholding this particular information. He therefore finds that the Authority wrongly withheld this information under regulation 10(4)(e) of the EIRs.
40. The Commissioner requires the Authority to make this information available to the Applicant (i.e. the report minus the financial information).

Decision

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

The Commissioner finds that by, withholding the financial information in the report under the exception in regulation 10(4)(e) of the EIRs, the Authority complied with the EIRs.

However, the Commissioner also finds that the Authority was not entitled to withhold the remainder of the information in the report under regulation 10(4)(e) and that, in this respect, it failed to comply with regulation 5(1) of the EIRs.

The Commissioner therefore requires the Authority to make available to the Applicant the information that he has found to have been wrongly withheld by **6 March 2025**.

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.

Enforcement

If the Authority fails to comply with this decision, the Commissioner has the right to certify to the Court of Session that the Authority has failed to comply. The Court has the right to inquire into the matter and may deal with the Authority as if it had committed a contempt of court.

Euan McCulloch
Head of Enforcement

20 January 2025