



Scottish Information
Commissioner
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Decision Notice 013/2025

Feasibility surveys – potential relocation of new Lenzie Academy

Authority: East Dunbartonshire Council
Case Ref: 202400896

Summary

The Applicant asked the Authority for information about feasibility surveys in connection with the potential relocation of a new Lenzie Academy. The Authority referred the Applicant to information previously disclosed for earlier surveys, and stated that information on the most recent surveys would shortly be published. The Commissioner investigated and found that the Authority had wrongly interpreted the Applicant's request at review stage and had failed to issue a review response compliant with the EIRs. He required the Authority to carry out a fresh review, undertake full searches and issue an EIRs-compliant revised review outcome.

Relevant statutory provisions

[Freedom of Information \(Scotland\) Act 2002](#)¹ (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)

[Environmental Information \(Scotland\) Regulations 2004](#)² (the EIRs) regulations 2(1) (definition of "the Act", "applicant" and "the Commissioner" and paragraphs (a), (c) and (f) of "environmental information") (Interpretation); 5(1) (Duty to make environmental information available on request); 16(3) (Review by Scottish public authority); 17(1), (2)(a) and (b) (Enforcement and appeal provisions)

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

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

Background

1. On 15 April 2024, the Applicant made the following request for information to the Authority:

“I am writing to make a request for all the information to which I am entitled under [FOISA] and [the EIRs].

Feasibility surveys have been taking place in Whitegates Park in connection with potentially relocating a new Lenzie Academy there.

I am seeking all information currently held, sent or received by [the Authority] in connection with the aforementioned surveys.”

2. The Authority responded on 14 May 2024. It informed the Applicant that the information requested had already been provided via responses to his previous information requests, and provided the reference numbers and dates of the responses to those requests.

3. On 14 May 2024, the Applicant wrote to the Authority requesting a review of its decision. The Applicant stated that he was dissatisfied with the decision because the Authority’s responses to prior requests related to historical surveys, and it had failed to provide the information requested. He stated it was clear, from his request, that he was referring to surveys that had recently happened, as referred to in information on the Authority’s website which stated:

“A series of site surveys will be undertaken at Whitegates Park between Monday 8 April and Friday 26 April as part of the feasibility proposals for the development of the new Lenzie Academy.

The surveys are non-intrusive and will have minimum impact on the park – it will remain fully accessible to local residents and visitors during this time”.

The Applicant pointed out that the Act provided for clarification to be sought if the Authority was in any doubt what was being requested, and it had not done so.

4. The Authority notified the Applicant of the outcome of its review on 12 June 2024. It upheld its original decision for the information relating to historical surveys, on the basis that it was accurate, based on the information held as of 15 April 2024 [i.e. the date of the request]. For the recent surveys referenced on its [website](#)³, as referred to in the Applicant’s requirement for review, the Authority stated that, although they had taken place between 8 and 26 April, the results of those surveys were received at various points over the course of May/June, when the Assets and Estates Service received and reviewed the survey reports containing the findings. The Authority confirmed the information was now held, which it intended to publish shortly on its website.

5. On 1 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 he believed that:

³ <https://www.eastdunbarton.gov.uk/technical-notes-2024-issue-56-new-lenzie-academy-whitegates-park-non-intrusive-surveys>

- the review outcome was wrong in upholding the original response as the information provided was incorrect. He argued that his request was clear, by use of the present tense, that he was referring to surveys currently taking place in April 2024, whereas the information previously provided by the Authority related to 2018 and 2022.
- the Authority should have either confirmed that they were not yet in possession of the information, or that the information held was still being processed.
- the Authority should confirm it had been in possession of the information for some time since his initial request which it had refused to disclose, without justification. He argued that stating that it would make the information publicly available at some later date did not justify the Authority's refusal to disclose the information.

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 16 August 2024, the Authority was notified in writing that the Applicant had made a valid application 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 interpretation of the request and the request for review, the searches carried out to identify any relevant information and whether the request had been considered under FOISA or the EIRs.

Commissioner's analysis and findings

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

FOISA or the EIRs?

10. In [Decision 218/2007](#)⁴, the Commissioner confirmed (at paragraph 51) that, where environmental information is concerned, there are two separate statutory frameworks for access to that information and, in terms of the legislation, an authority is required to consider the request under both FOISA and EIRs.
11. As stated above, the Authority was asked whether it had considered the Applicant's request under FOISA or the EIRs, given this was not clear from its response.
12. In its submissions to the Commissioner, the Authority confirmed that it had considered the request to be a request for information under the EIRs. It explained that the information met the definition of environmental information, as it related to the proposed creation of a new school. It was therefore considered to be environmental information, on the basis that the proposals affected the built environment, and there would also be environmental considerations in the construction process and operation of the completed school building.

⁴ <https://www.foi.scot/decision-2182007>

The Authority confirmed that it was relying on the exemption in section 39(2) of FOISA, where the public interest lay in favour of applying the exemption.

13. For this exemption to apply, any information requested would require to be environmental information as defined in regulation 2(1) of the EIRs. Having considered the terms of the request and the Authority's submissions on this point, it is clear that any information falling within the scope of the request would be environmental information, as defined in regulation 2(1) of the EIRs. The information in question relates to the proposal to build a new school, which would clearly impact the landscape. As such, the Commissioner is satisfied that it would fall within paragraphs (a), (c) and (f) of the definition of environmental information in regulation 2(1) of the EIRs.
14. In this case, therefore, the Commissioner accepts that the Authority was entitled to apply the exemption in section 39(2) of FOISA, given his conclusion that the information requested is properly considered to be environmental information. This exemption is subject to the public interest test in section 2(1)(b) of FOISA.
15. As there is a separate statutory right of access to environmental information available to the Applicant in this case, the Commissioner accepts that the public interest in maintaining this exemption and dealing with the request in line with the requirements of the EIRs outweighs any public interest in disclosure of the information under FOISA. In the circumstances, he will consider this case, in what follows, solely in terms of the EIRs.
16. The Commissioner recognises that, in this case, the outcome would have been the same regardless of whether the request was dealt with under FOISA or the EIRs. He is concerned to note, however, that it was not clear, from the Authority's responses, under which regime it had considered the request. While not a breach of FOISA or the EIRs, the Commissioner considers it good practice, when a request for information has been made under both FOISA and the EIRs, for an authority to clearly explain under which regime the request has been considered. He would urge the Authority, and indeed all Scottish public authorities, to do so when responding to future information requests made under both regimes.

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

17. 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.
18. 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 provide that information to the requester, unless a qualification in regulations 6 to 12 applies (regulation 5(2)(b)).

The Authority's interpretation and handling of the request and the requirement for review

19. The Authority was asked to explain how it had interpreted the Applicant's request and his requirement for review.
20. In its submissions to the Commissioner, the Authority stated that the request was in connection with the surveys (plural) that "have been" taking place and it therefore seemed correct to include the recent surveys that had been taking place. It explained that it initially considered the scope of the request to include information relating to any and all surveys that had been taking place at the location, which included the 8-26 April surveys. The Authority stated that any information held as a result of those particular surveys would have been

within the scope of the request; however it held no information in respect of the 8-26 April surveys at the time of the initial request.

21. The Authority submitted that the older surveys referred to in the initial response were considered to fall within the scope of the request, and it was therefore appropriate to refer to these. It believed it was better to address these even if they were not required, rather than ignore them, in case they were relevant.
22. The Authority was asked to explain why, at initial response stage, it had not provided the Applicant with any information relating to the historical surveys, or had not applied any provision/exception in the EIRs to withhold that information. In response, the Authority stated that the Applicant had already been provided with copies of the feasibility survey information it held as of 15 April 2024 and so it provided references to those requests. It acknowledged, however, that this should have been accompanied by reference to the appropriate exception.
23. The Authority believed that there was no requirement to seek clarification from the Applicant as it was clear that the request sought information held, sent or received by the Authority as of 15 April 2024.
24. The Authority submitted that, at review stage, the Applicant clarified the terms of his request. It explained that it had therefore discounted, from the review, the earlier surveys and focused on the information concerning the 8-26 April surveys. The Authority confirmed that the request was then interpreted as a request for information relating to the results of these surveys that was held, sent or received by the Authority, as of 15 April 2024 [i.e. the date of the request].
25. The Authority confirmed that its position, at review stage, was that:
 - all in-scope information held had previously been disclosed to the Applicant in response to earlier information requests (this being information relating to historical surveys), and
 - while it now held information relating to the 8-26 April surveys (which had been gathered during May/June), it did not disclose this information to the Applicant at that point, and informed him that it intended to publish that information shortly.
26. The Authority agreed that its position, at review, suggested, but did not actually confirm, that it held no relevant information in relation to the 8-26 April surveys at the time of the Applicant's request. It submitted that, as the request was limited to just the information held, sent or received by it at that time, an "information not held" notice would be somewhat superfluous, especially as the response referenced that ongoing work and advised that it would be published and where it would be found. The Authority acknowledged, however, that it may have been helpful to use the exemption, in any event, if it made things clearer.

The Commissioner's view on the Authority's interpretation and handling of the request and the requirement for review

27. The Commissioner has fully considered the Authority's interpretation of the Applicant's initial request. He is satisfied that, at initial response stage, the Authority considered that both the historical surveys and the surveys taking place between 8-26 April fell within scope.
28. However, he is concerned to note that, while the Authority made reference to the information previously disclosed to the Applicant for the historical surveys, it failed to either provide that information to him (in its initial response to his request) or withhold it under a provision or exception in the EIRs.

29. He is further concerned to note that, while the Authority confirmed that it had considered the 8-26 April surveys to fall within scope, it had failed to confirm to the Applicant, in its initial response, whether or not it held any information relating to those surveys.
30. The Commissioner has recorded the above failures in his case handling system.
31. Having gone on to consider the Authority's submissions on its interpretation of the requirement for review, which included the Applicant's clarification of his request, the Commissioner is satisfied that the Authority disregarded the historical surveys as no longer falling within scope, and considered that the information requested related to the 8-26 April surveys.
32. However, the Commissioner notes that, in doing so, the Authority upheld its original decision for the historical surveys, a point which he finds somewhat confusing and unnecessary.
33. In this respect, the Commissioner is not satisfied that the Authority's review outcome was compliant with regulation 16(3) of the EIRs.
34. The Commissioner is also concerned to note that the Authority appeared to interpret the Applicant's clarified request to be limited to solely the results of the 8-26 April surveys. In his request, the Applicant clearly stated, "I am seeking all information currently held, sent or received by [the Authority] in connection with the aforementioned surveys." The Commissioner can see no indication in the request, as clarified by the Applicant in his request for review, that the information requested was limited to the results of the 8-26 April surveys. In the Commissioner's view, the scope of the request covered all information held by the Authority in connection with those surveys.
35. As such, the Commissioner cannot agree that the Authority correctly interpreted the Applicant's request, as clarified in his request for review, and in doing so, failed to comply with regulation 5(1) of the EIRs.

Whether the Authority held any relevant information

36. 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 of probabilities lies, the Commissioner considers the scope, quality, thoroughness and results of the searches carried out by the public authority. He 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 about what information the authority should hold, ultimately the Commissioner's role is to determine what relevant recorded information is (or was, at the time the request was received) actually held by the public authority.
37. In its submissions to the Commissioner, the Authority stated that the request sought all information currently held, sent or received by it in connection with the surveys (plural) that "have been taking place" in Whitegates Park, relating to the potential relocation of a new Lenzie Academy. The Authority believed that the wording of the request meant that it covered other survey work previously requested by the Applicant, and also the surveys of 8-26 April.
38. The Authority submitted that it held no information in respect of the 8-26 April surveys at the time of the initial request. Had information been held, sent or received by the Authority as a result of these surveys at the time, it would have been considered to be within the scope of the request, and would have either been released to the Applicant or refused.

39. The Authority submitted that the request for review highlighted that the information sought related to surveys carried out between 8-26 April, noting that the original request was submitted on 15 April 2024 when that work was ongoing. It stated that the information identified at review stage was not held at the time of the request and therefore did not meet the terms of the request, which asked for information “currently held, sent or received”.
40. As explained above, the Authority submitted that following the Applicant’s clarification in his request for review, it had interpreted this to relate to the results of surveys held as of 15 April 2024. The Authority submitted that, as information relating to previous surveys undertaken was held by the project team and nowhere else, no record checks were therefore required.
41. The Authority submitted that, at review, it had clearly advised the Applicant that information concerning the 8-26 April surveys was not held at the time of his request. It also advised the Applicant, at that point, of when the Authority would receive the information and that it would be published shortly, as has been the case.
42. The Authority confirmed, however, that, at the time of the Applicant’s request, it did hold some correspondence between officers relating to the commissioning and administration of services relating to the 8-26 April surveys, including site access arrangements, commercial terms, fee costs and reporting arrangements.

The Commissioner’s view on whether the Authority held any relevant information

43. In his request for information, the Applicant stated “I am seeking all information currently held, sent or received by [the Authority] in connection with the aforementioned surveys”, which he subsequently clarified in his request for review to relate to the 8-26 April surveys.
44. As stated above, the Commissioner can see nothing in the Applicant’s initial request, or his requirement for review, confirming that the information he was seeking was limited to solely the results of the 8-26 April surveys.
45. The Commissioner has considered the submissions from the Authority on whether it held any in-scope information. He accepts, from the explanations provided by the Authority, that it did not hold the results of the 8-26 April surveys at the time when the Applicant made his initial request. However, he notes that the Authority has confirmed that it held some other information, namely correspondence, relating to the 8-26 April surveys.
46. As the Authority failed to confirm to the Applicant, in its review outcome, whether or not it held (at the time it received the Applicant’s initial request) information falling within the scope of the request relating to the 8-26 April surveys, the Commissioner can only conclude that the Authority failed to issue a review outcome which was compliant with regulation 16(3) of the EIRs.

Action required by the Authority

47. The Commissioner requires the Authority to carry out a fresh review, undertake full searches for any information relating to the 8-26 April surveys (not limited to the results of those surveys) which it held at the time it received the Applicant’s initial request, and issue a revised review outcome, clearly explaining under what regime the request was considered.

Decision

The Commissioner finds that the Authority fully complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) but failed to fully comply with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by the Applicant.

The Commissioner finds that, by relying on section 39(2) of FOISA and considering the Applicant's request under the EIRs, the Authority complied with Part 1 of FOISA.

However, the Commissioner also finds that the Authority failed to comply with the EIRs by:

- 1) wrongly interpreting the Applicant's request, at review stage, to be limited to solely the results of the 8-26 April surveys, and in so doing, failed to fully comply with regulation 5(1) of the EIRs, and
- 2) failing to issue an EIRs-compliant review outcome by:
 - wrongly upholding its original decision for information which did not fall within the scope of the Applicant's request, as clarified in the requirement for review, and
 - failing to confirm or otherwise whether information was held at the time of the request, relating to the 8-26 April surveys (and not limited to solely the results of those surveys), and in doing so, it failed to comply with regulation 16(3) of the EIRs.

The Commissioner therefore requires the Authority to carry out a fresh review, undertake full searches for any information relating to the 8-26 April surveys which it held at the time it received the Applicant's initial request (and not limited to solely the results of those surveys), and issue a revised review outcome, clearly explaining under what regime the request has been considered, by **7 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

21 January 2025