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Commissioner  
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# Decision Notice 014/2025

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## Location of new Lenzie Academy – funding implications

Authority: East Dunbartonshire Council  
Case Ref: 202400897

### Summary

The Applicant asked the Authority for information relating to a precedent referred to by an employee at a Council meeting, concerning the consequences on external funding of the Authority changing their preferred option for the location of a new Lenzie Academy. The Authority stated that it did not hold the information requested.

The Commissioner investigated and found that the Authority had considered the request under the wrong legislation. As the requested information was environmental information, the Authority should have considered the request under the EIRs. The Commissioner also found that the Authority was not entitled to inform the Applicant that it held no relevant information, and had failed to provide evidence that it had carried out necessary searches for any further information falling within the scope of the request.

The Commissioner required the Authority to carry out full and thorough searches and provide the Applicant with a revised review outcome in terms of the EIRs.

### Relevant statutory provisions

[Freedom of Information \(Scotland\) Act 2002](#)<sup>1</sup> (FOISA) sections 1(1), (2), (4) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 17(1) (Notice that information is not held); 39(2) (Health, safety and the environment); 47(1) and (2) (Application for decision by Commissioner)

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

Environmental Information (Scotland) Regulations 2004<sup>2</sup> (the EIRs) regulations 2(1) (definition of “the Act”, “the applicant”, “the Commissioner” and paragraphs (a), (c) and (f) of definition of “environmental information”) (Interpretation); 5(1) (Duty to make environmental information available on request); 17(1), (2)(a) and (b) (Enforcement and appeal provisions)

## Background

1. On 15 April 2024, the Applicant made a request for information to the Authority under FOISA and the EIRs. He referred to a specific Authority meeting, during which a Councillor had questioned the consequences in relation to external funding of the Authority changing its preferred option in relation to the location of a new Lenzie Academy. The Applicant stated that a named Authority employee had responded to the Councillor that there was a precedent for this but [the employee] had not expanded on this. The Applicant asked the Authority for information in relation to the precedent referred to by the named employee.
2. The Authority responded on 14 May 2024. It informed the Applicant that, under section 17(1) of FOISA, the information requested was not held in any recorded format. The Authority explained that the response provided during the meeting was based on a professional opinion of the potential consequences of changing the preferred site option.
3. On 14 May 2024, the Applicant wrote to the Authority requesting a review of its decision. He acknowledged it was possible, but unlikely, that the Authority did not hold information about the precedent, but it had a duty under the Act to provide advice and assistance to requesters. The Applicant stated that he was dissatisfied with the Authority’s decision because it had failed to provide advice and assistance in relation to the precedent referred to by its employee and on which [the employee] had based his professional opinion.
4. The Authority notified the Applicant of the outcome of its review on 12 June 2024, fully upholding its original decision. It explained that the statement regarding a precedent was informed by discussion with external partners, namely the Scottish Futures Trust (SFT); however, there was no written record covering this, or any recording of any specific call or meeting.
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 the Authority was either refusing to disclose the information requested or the named employee had misled the Authority meeting referred to. The Applicant did not accept the Authority’s decision as he did not believe it was possible for a precedent that was being relied on not to be recorded 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.

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

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 searches undertaken by the Authority to establish whether it held any information falling within the scope of the request, and whether the Authority had considered the request under the correct legislation (i.e. FOISA or the EIRs).
9. On 21 August 2024, 4 September 2024 and 24 September 2024, the Applicant provided further submissions and evidence in support of his position that he believed the Authority held recorded information relating to the precedent referred to in his request.
10. During the investigation, on 26 September 2024, the Authority informed the Investigating Officer that it had identified some further information which made reference to precedents. However, in the Authority's view, it was unclear whether this information met the terms of the request. In light of this, the Authority stated that it was willing to issue a revised review outcome to the Applicant.
11. On 7 October 2024, the Authority issued its revised review outcome to the Applicant. It upheld its original decision that it did not hold the information requested, but acknowledged that the request should have been considered under the EIRs. The Authority stated it had identified some relevant information; however, in its view, this information did not meet the terms of the Applicant's request, although it seemed broadly relevant to the request. The Authority disclosed this information to the Applicant with the names of individuals redacted.
12. The Applicant informed the Investigating Officer on 8 October 2024 that, in his view, the information now identified by the Authority clearly fell within the scope of his request, and that he could not be certain as to whether the Authority held any further recorded in-scope information.
13. The Authority did not provide the submissions requested by the Investigating Officer.

## **Commissioner's analysis and findings**

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

### ***FOISA or the EIRs?***

15. In [Decision 218/2007](https://www.foi.scot/decision-2182007)<sup>3</sup>, 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.
16. Given the subject matter of the request, the Commissioner asked the Authority to consider whether the request properly fell to be handled as a request for environmental information, and therefore responded to under the EIRs.

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<sup>3</sup> <https://www.foi.scot/decision-2182007>

17. As stated above, the Authority failed to provide the Commissioner with any submissions in this regard.
18. Having considered the terms of the request, in the Commissioner's view, 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 requested relates to the location of a proposed new-build 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.
19. Given that the information requested is environmental information, the Authority had a duty to consider it in terms of regulation 5(1) of the EIRs. 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.
20. While the Commissioner acknowledges that, in its revised review outcome, the Authority considered the request under the EIRs, he notes that it had failed to initially recognise and respond to the request as a request for environmental information. In the absence of any submissions from the Authority to persuade him otherwise, the Commissioner must find that it failed, in this respect, to respond to the request in accordance with regulation 5(1) of the EIRs.

### ***Section 39(2) of FOISA - environmental information***

21. 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.
22. In this case, as stated above, the Authority failed to provide the Commissioner with any submissions on whether or not it wished to rely on the exemption in section 39(2) of FOISA.
23. In the absence of any such submissions in this respect, the Commissioner finds that the Authority would have been entitled to apply this exemption to the request, given his conclusion that the information requested ought to have been properly classified as environmental information. As there is a separate statutory right of access to environmental information available to the Applicant, the Commissioner also accepts that, in this case, the public interest in maintaining this exemption and in handling the request in line with the requirements of the EIRs outweighs any public interest in disclosing the information under FOISA.
24. In the circumstances, therefore, Commissioner will go on to consider this case, in what follows, solely in terms of the EIRs.

### ***Whether the Authority held any relevant recorded information***

25. 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.
26. 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 Applicant's position on whether the Authority held any relevant information*

27. In his application to the Commissioner, the Applicant did not accept the Authority's decision, at review, that it held no relevant recorded information. He did not believe it was possible for a precedent being relied on not to be recorded information.
28. During the investigation, the Applicant notified the Commissioner of a letter he had received from the Authority dated 20 August 2024, in response to concerns he had raised with a Councillor about his observations of the meeting.
29. In that letter, the Authority stated that the statement by the named employee was based on a telephone discussion between SFT officers and a colleague of the named employee.
30. In the Applicant's view, this clearly indicated that the Authority held additional information which had not been disclosed to him.
31. As the Applicant believed that recorded information would exist about any precedent, and as a consequence of the Authority's letter, the Applicant informed the Commissioner that he had made an information request to SFT for any information he was entitled to receive in that regard.
32. The Applicant subsequently provided the Commissioner with a copy of the response from SFT to his information request. This, he submitted, confirmed that the telephone conversation referred to in the Authority's letter of 20 August 2024 did not take place, but rather communication had taken place by email. The Applicant believed that the emails disclosed by SFT evidenced that the Authority did hold information relevant to the precedent which the Authority had failed to disclose.

*The Authority's position on whether it held any relevant information*

33. During the investigation, the Authority informed the Commissioner that it had identified some further information, but it was not entirely clear whether that information met the terms of the request.
34. The Authority explained that the information now identified did make reference to precedents; however, there appeared to be no recorded information which linked that information to the statement made by the named employee at the meeting of the Authority.
35. In the Authority's view, the uncertainty was due to the wording of the request. It submitted that, had the request sought all recorded information held by the Authority regarding such a precedent, the response would have been simple. At the same time, the Authority accepted, in hindsight, that there had been opportunity to clarify the terms of the request before responding, and that this should have been done.
36. In light of the additional information now identified, the Authority offered to issue a revised review outcome to the Applicant with the intention of reviewing the request.

*The revised review outcome*

37. As explained previously, the Authority issued its revised review outcome to the Applicant on 7 October 2024. It upheld its original decision that it did not hold the information requested, but acknowledged that the request should have been considered under the EIRs.
38. The revised review confirmed that some relevant information had been identified, which the Authority disclosed to the Applicant with the names of individuals redacted. However, in the

Authority's view, this information did not meet the terms of the request, although it seemed broadly relevant to the request.

39. The revised review also acknowledged that the Authority had the opportunity to clarify the terms of the request, suggesting that a slight rewording would have brought the information, now identified, into scope, and it was unfortunate that this was not picked up at the time.
40. Having received the Authority's revised review outcome, the Applicant informed the Commissioner on 8 and 9 October 2024 that, in his view, the information now identified by the Authority clearly fell within the scope of his request, as the emails now released were clearly recorded information relating to the precedent referred to. He did not accept the Authority's claim that a rewording of his request would have been necessary to bring this information, now identified, within scope. Further, he could not be certain as to whether the Authority held any further recorded in-scope information.

#### *The Commissioner's view*

41. The Commissioner has carefully considered all of the relevant information and comments provided by both parties.
42. He notes that the Authority believes that the information, identified during the investigation, does not fall within scope and does not meet the terms of the request, but is broadly relevant to the request. He also notes that the Applicant has explained why he believes the information does fall within scope.
43. Having considered the information now identified, the Commissioner notes that the email exchange took place on 25 March 2024 and the meeting of the Authority was held on 26 March 2024. Given this, along with the content of the email exchange (which, the Commissioner observes, was the same email exchange disclosed to the Applicant by SFT), the Commissioner can see no reason why this information would not fall within the scope of the request.
44. The Commissioner has also considered the Authority's view that, had the request sought all recorded information held regarding such a precedent, then it would have been a "simple answer". It is unclear to the Commissioner why the Authority believes such a rewording would have been necessary. In the Commissioner's view, it was entirely clear what the request was seeking.
45. By informing the Applicant that it did not hold any information falling within the scope of his request, the Commissioner must conclude that, in respect of the information identified during the investigation and disclosed to the Applicant on 7 October 2024, which the Commissioner considers clearly falls within the scope of the request, the Authority failed to comply with regulation 5(1) of the EIRs.
46. The Commissioner further notes that the Applicant is unable to say, either way, whether he believes the Authority might hold any further relevant recorded information.
47. In considering whether a Scottish public authority holds the requested information in any given case, the Commissioner must be satisfied that the authority has carried out adequate, proportionate searches in the circumstances, taking account of the terms of the request and all other relevant circumstances. He will consider the scope, quality, thoroughness and results of those searches, applying the civil standard of proof (the balance of probabilities). Where appropriate, he will also consider any reasons offered by the public authority to explain why it does not, or could not reasonably be expected to, hold the information.

48. In all cases, it falls to the authority to persuade the Commissioner, with reference to adequate, relevant descriptions and evidence of searches, that it does not hold the information requested (or holds no more information than it has identified and located in response to the request). In this case, in the absence of any submissions detailing any searches carried out by the Authority to establish what relevant information it held, the Commissioner can only conclude that the Authority has not achieved this.
49. In light of this, the Commissioner cannot conclude, either way, whether any further relevant information might be held in this case.
50. The Commissioner therefore requires the Authority to carry out fresh searches for the information requested by the Applicant, to confirm to the Applicant that the information identified and disclosed during the investigation does fall within scope, and to issue a revised review outcome considering the request under the EIRs.

## Decision

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

He finds that, in responding to the Applicant's information request and requirement for review, the Authority failed to consider the request as a request for environmental information and thereby failed to comply with the requirements of regulation 5(1) of the EIRs.

The Commissioner further finds that the Authority was not entitled to inform the Applicant that it held no information falling within the scope of the request, and that it failed to satisfy him that it had identified all relevant information falling within the scope of the Applicant's request. In doing so, the Authority failed to comply with regulation 5(1).

The Commissioner therefore requires the Authority to carry out full and thorough searches for the information requested, to confirm that the information identified and disclosed during the investigation does fall within scope, to undertake a fresh review and to issue a revised review outcome to the Applicant in terms of the EIRs, either disclosing any further information identified or explaining why it cannot be provided, 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**