



Scottish Information
Commissioner
www.foi.scot

Decision Notice 046/2025

Information relating to a specific provision of planning law

Authority: Scottish Borders Council
Case Ref: 202401208

Summary

The Applicant asked the Authority for information relating to a specific provision of planning law. The Authority informed the Applicant that it did not hold the information requested. The Authority informed the Applicant that it did not hold any information falling within scope of the request. The Commissioner investigated and found that the Authority held some information and had failed to interpret the request correctly. He required the Authority to carry out a fresh review and to provide the Applicant with a revised review outcome.

Background

1. On 6 June 2022, the Applicant wrote to the Authority and made a number of requests.
2. On 8 June 2022 the Authority wrote to the Applicant to confirm what information he was seeking.
3. On 9 June 2022, the Applicant confirmed he was, among other things, seeking: "All information held by the [Authority] in relation to section d including the reason why it was not included in [the Authority's response to his previous correspondence]."
4. By way of background, section 8(3) of The Planning (Listed Building and Conservation Areas) (Scotland) Act 1997 (the 1997 Act) sets out a defence to the offences contained in section 8(1) and (3). In the previous correspondence mentioned above, the Applicant suggested that the Authority had failed to comply with the 1997 Act in relation to certain works it had carried out in cemeteries. The Authority advised the Applicant that it considered the defence under section 8(3) of the 1997 Act applied, but while quoting the Act it omitted mention of section 8(3)(d) (referred to as "section d" in the request), which contains a specific element of this defence.

5. The Authority responded on 27 June 2022. It noted that it had processed the request under the Environmental Information (Scotland) Regulations 2004 (EIRs) and stated that it held no record of communications for the cases that were the subject of the Applicant's previous correspondence.
6. On the same day, the Applicant wrote to the Authority requesting a review of its decision. The Applicant stated that he was dissatisfied with the decision because his request sought "all the information" held by the Authority in relation to "section d"; it was not limited to cases covered by his previous correspondence.
7. The Authority notified the Applicant of the outcome of its review on 22 July 2022, fully upholding its original response. It explained that it had determined that "section d" referred to section 8(3)(d) of the 1997 Act and issued the Applicant with a notice, under regulation 10(4)(a) of the EIRs, that it did not hold any information falling within scope of his request.
8. On the same day, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of the Freedom of Information (Scotland) Act 2002 (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 did not consider it credible that the Authority did not hold information relevant to his request.
9. The Commissioner investigated and issued [Decision 151/2024](#)¹, which required the Authority to carry out a fresh review and to provide the Applicant with a revised review outcome.
10. On 18 July 2024, the Authority wrote to the Applicant requesting clarification of the Applicant's request.
11. On 30 July 2024, the Applicant clarified the scope of his request as being for "all information held by [the Authority] in relation to section d including the reason why it was not included in the Authority's response". (The full text of his clarified request is reproduced in Appendix 1 below.)
12. On 2 August 2024, the Authority requested further clarification from the Applicant – specifically whether (in view of other correspondence it had received from him) his request only related to headstones in cemeteries.
13. On the same day, the Applicant responded and confirmed that his request for information about section d solely related to cemeteries. However, he commented that there "may be information regarding 'the reason why it was not included in your response' that does not specifically mention cemeteries."
14. On 30 August 2024, the Authority notified the Applicant of the outcome of its fresh review, which stated that "[n]othing directly within the scope of the request was identified". However, by way of advice and assistance, it provided him with several documents to give "a wider overview to the practice adopted in relation to the headstone safety checks carried out across the Scottish Borders".
15. On 4 September 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

¹ <https://www.foi.scot/decision-1512024>

the Authority's review because he believed it held information relevant to his request, particularly since the documents it had provided to him that it thought may be of interest included information relating to section 8(3)(d) of the 1997 Act.

Investigation

16. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
17. On 22 October 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.
18. 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 related to its interpretation of the request and the searches it had carried out.

Commissioner's analysis and findings

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

Application of the EIRs

20. Where information falls within the scope of the definition of "environmental information" in regulation 2(1) of the EIRs, a person has a right to access it (and the public authority a corresponding obligation to respond) under the EIRs, subject to various restrictions and exceptions contained in the EIRs.
21. The Commissioner is satisfied that the information requested falls within the definition of environmental information in regulation 2(1) of the EIRs (particularly paragraphs (a), (c) and (f) of that definition).
22. The Applicant did not challenge the Authority's decision to deal with the request as one for environmental information. In what follows, the Commissioner will consider this case solely in terms of the EIRs.

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

23. 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 information that is held by the authority when it receives a request.
24. Under the EIRs, a public authority may refuse to make environmental information available if one or more of the exceptions in regulation 10 apply and, in all the circumstances of the case, the public interest in maintaining the exception or exceptions outweighs the public interest in making the information available.

Regulation 10(4)(a) – Information not held

25. Regulation 10(4)(a) of the EIRs provides that a Scottish public authority may refuse to make environmental information available to the extent that it does not hold that information when it received the request.
26. 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.
27. The Commissioner 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.

Interpretation of the request

28. As explained above, the Applicant clarified that his request was for information relating to section 8(3) of the 1997 Act and that his request only related to cemeteries. While the Authority asked whether the request was further limited to headstones, the Applicant specified cemeteries – without further restricting his request.
29. The Applicant also indicated he was seeking information on why section 8(3)(d) of the 1997 Act was not quoted in the previous correspondence sent to him, even if the information was not explicitly connected to cemeteries. (By way of background, this correspondence related to headstones in cemeteries.)
30. The Commissioner considers that the request can be broken down into two separate questions:
 - (i) information related to section 8(3)(d) of the 1997 Act and to cemeteries
 - (ii) information related to section 8(3)(d) of the 1997 Act and to the omission of that section being included from the reply to the Applicant's complaint (and the reason for this omission).
31. In the Commissioner's view, the Authority must, in order to respond fully and accurately to the request, consider the following questions for each item of information potentially in scope of the request:
 - Was this information created within the timeframe of the request?
 - Does the information relate to section 8(3)(d)?
 - Does the information relate to cemeteries?
 - Does the information relate to the omission of section 8(3)(d) from the reply to the Applicant's complaint or the reason for this omission?

The first question of the request

32. The Authority explained that it interpreted the request "to mean any documents or other relevant information as to how the terms of section 8(3)(d) were satisfied in relation to the works in question."

33. The Authority further explained that it had interpreted this request in this fashion because it determined that the Applicant “wished to be satisfied of the nature of these defences due to his belief that the Authority had not acted in compliance with the legislation surrounding listed buildings.”
34. Given the Applicant made clear that he did not consider the requirements of section 8(3)(d) of the 1997 Act to have been met, the Commissioner does not understand why the Authority has chosen an interpretation that assumes compliance. While he notes the Authority’s belief that the Applicant sought information on the nature of these defences, he considers that information on non-compliance would also be relevant to the request.
35. In any event, the Commissioner is aware of no communication from the Applicant suggesting he is only interested in evidence of compliance – indeed he seems especially interested in evidence of non-compliance. (For the avoidance of doubt, the Commissioner has no locus to comment on whether the Authority has complied with the requirements of section 8(3)(d) or any other element of the 1997 Act.)
36. The Commissioner also does not understand why the Authority interpreted the request as being limited to specific works. While he understands that the Applicant has concerns about specific works, the Applicant also stated in his requirement for review that his request was not limited to the specific cases he had raised in his earlier correspondence.
37. In Decision 151/2024, the Commissioner intimated that, if the Authority considered the Applicant to be particularly interested in a subset of the requested information (e.g., evidence of compliance with section 8(3)(d) of the 1997 Act in relation to cemeteries, as opposed to information relating to this section regarding cemeteries more generally), it would have been appropriate for it to have sought further clarification of the request.
38. While the Commissioner notes the Authority sought clarification on other aspects of the request, it did not seek clarification of whether the Applicant was solely interested in evidence of compliance or solely interested in specific works.
39. In the absence of any such clarification and taking into account the Applicant’s express disavowal of an exclusive interest in specific works, the Commissioner cannot agree that the Authority was correct to interpret his request as being narrowed in this way.

The second question of the request

40. In response to being asked to specifically explain how it interpreted this question, the Authority stated that section 8(3)(d) of the 1997 Act was ultimately not considered relevant to the works in question and so did not need to be included in its response to the Applicant’s complaint.
41. In the Commissioner’s view, these comments, which appear focused on justifying the underlying omission, do not clearly address how the Authority understood the Applicant’s request.
42. The Commissioner also asked the Authority to explain why it did not consider a document requesting revisions to a draft reply to be a reason for the omission. The Authority declined to specifically answer and instead referred to its explanation for the omission.
43. For the avoidance of doubt, the Commissioner has no locus to consider whether section 8(3)(d) of the 1997 Act should or should not have been quoted in the Authority’s response – his remit is to establish whether the information requested is held.

44. The Commissioner does not consider that the Authority's comments adequately address this point. Regardless of whether the omission of section 8(3)(d) of the 1997 Act from the Authority's response was justified, it was obliged to identify any recorded information that fell within the scope of the request (i.e. relating to the reason for this omission).
45. The Commissioner is not aware of any information that clearly falls within the scope of the second question of the Applicant's request. However, he is not satisfied, based on the submissions he has received and in the absence of a satisfactory explanation of how it interpreted this question of the request, that the Authority would have identified any relevant information it might hold.

The Commissioner's conclusion

46. In all of the circumstances, the Commissioner does not consider that the Authority has interpreted the Applicant's request correctly. He therefore finds that the Authority failed to comply with regulation 5(1) of the EIRs.
47. As stated above, the Authority provided documents to the Applicant that it considered may be of interest to him as part of its revised review outcome. Despite these documents containing information relating to the first question of the Applicant's request, the Authority informed him that it held no relevant information. The Commissioner must therefore find that the Authority was not entitled to rely on regulation 10(4)(a) of the EIRs.
48. While this information has been provided to the Applicant, the Commissioner notes the Applicant's concern that the Authority's failure to identify this information as falling within the scope of his request information casts doubt on the reliability of its response. Given the Authority did not identify this information as falling within the scope of the request, he cannot be satisfied that it would have identified any other instances of this information it might hold.
49. As stated above, the Commissioner is not aware of any information that clearly falls within the scope of the second question of the Applicant's request. However, based on the submissions he has received and its description of how it interpreted this question of the request, he is not satisfied that that the Authority would have identified any relevant information it might hold.
50. In all the circumstances, the Commissioner cannot conclude, based on the submissions he has received, that the Authority has identified all relevant information falling within the scope of the request.
51. Consequently, the Commissioner requires the Authority to fully reconsider the Applicant's request and issue him with a revised review outcome (in terms of regulation 16 of the EIRs). In doing so, the Authority must ensure it has identified the correct scope of the request and carry out fresh searches (which must be adequate and proportionate) for the information requested.
52. Given he has already issued a decision in respect of this request, the Commissioner is concerned that the Authority has yet to interpret the request correctly. He cannot stress enough the importance of ensuring that the terms of any information request received by a Scottish public authority are clear before proceeding to respond. He would urge the Authority, and indeed all Scottish public authorities, to take steps to clarify with applicants any matter which is open to interpretation, prior to proceeding with a request.
53. The Commissioner has (at paragraphs 30 and 31) set out his own understanding of the proper interpretation of the request. However, he would encourage the Authority to again

provide advice and assistance to the Applicant, in terms of regulation 9 of the EIRs, with a view to ensuring it has reached a clear, and mutually shared, understanding of the scope of the request before issuing its revised review outcome in terms of regulation 16 of the EIRs.

Decision

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

Specifically, the Commissioner finds that the Authority failed to comply with regulation 5(1) of the EIRs by:

- failing to accurately interpret the Applicant's request
- failing to satisfy the Commissioner that it correctly identified and located all information relevant to the request
- advising the Applicant that it held no information relevant to the request.

The Commissioner therefore requires the Authority (in terms of regulation 16 of the EIRs) to carry out adequate, proportionate, searches for the information requested, reach a decision on the basis of those searches and notify the Applicant of the outcome (which, for the first part of the request, must be otherwise than in terms of regulation 10(4)(a)), by Monday 7 April.

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 February 2025

Appendix 1: Clarification of the request

"I require all information held by the council in relation to section d including the reason why it was not included in your response."

Section d) states 'and (d)that notice in writing justifying in detail the carrying out of the works was given to the planning authority as soon as reasonably practicable.'

This may be in the form of meeting notes, emails, teams chats (if used), notes from verbal conversations and computer records that occurred from the time my initial complaint was received by the council, 28th July 2021, to the date the council sent their final response, 22 July 2022. This would include records that were sent or received or made by Planning Enforcement or any other council officer where the information pertains to Section d)."