

# Decision Notice 172/2021

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## Lighting and ventilation in an office at the Royal Infirmary Hospital, Edinburgh

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**Applicant: The Applicant**

**Public authority: Lothian Health Board**

**Case Ref: 202001566**



Scottish Information  
Commissioner

## Summary

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NHS Lothian was asked about lighting and ventilation in relation to a basement office in the Royal Infirmary Hospital, Edinburgh. NHS Lothian disclosed some information, but stated it did not hold any information specific to the named office. With the exception of some information related to lighting, supplied during the investigation, the Commissioner found that NHS Lothian held no information specific to the office.

## Relevant statutory provisions

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The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (paragraphs (b) and (f) of definition of "environmental information") (Interpretation); 5(1) (Duty to make available environmental information on request); 9(1) and (3) (Duty to provide advice and assistance); 10(1), (2) and (4)(a) (Exceptions from duty to make environmental information available)

The full text of each of the statutory provisions cited above is reproduced in Appendix 1 to this decision. The Appendix forms part of this decision.

## Background

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1. On 31 July 2020, the Applicant made a request for information to Lothian Health Board (NHS Lothian). He asked for copies of official maintenance reports / analysis / investigations / changes that relate to the lighting in the basement office room B2401B (the named room) which is based at the Royal Infirmary Hospital and the ongoing air quality official maintenance reports / analysis / investigations / changes for the period 1 January 2017 to 31 July 2020.
2. NHS Lothian responded on 8 October 2020. It disclosed a large number of reports, and but redacted the names and details of internal / external staff below a senior level.
3. On 28 October 2020, the Applicant wrote to NHS Lothian requesting a review of its decision on the basis that he was not satisfied that the information disclosed related in any way to the named room.
4. NHS Lothian notified the Applicant of the outcome of its review on 10 December 2020. It stated that the disclosed information was all that was held relevant to the named room. NHS Lothian explained that the reports cover large areas and individual rooms are not listed. Only rooms that have specific ventilation requirements, for instance isolation rooms or laboratories, have separate reports. It stated that under regulation 10(4)(a) of the EIRs, NHS Lothian does not hold any further information to answer the request.
5. On 31 December 2020, the Applicant applied for a decision in terms of section 47(1) of the Freedom of Information (Scotland) Act (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 modifications. The Applicant stated he was dissatisfied with the outcome of NHS Lothian's review because he considered the lighting and ventilation in the named room was a health and safety matter, and that the information he requested should be held.

## Investigation

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6. The application was accepted as valid. The Commissioner confirmed that the Applicant made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to him for a decision.
7. On 19 January 2021, NHS Lothian was notified in writing that the Applicant had made a valid application and the case was allocated to an investigating officer.
8. The Royal Infirmary Hospital was built under a Public Finance Initiative and is owned and operated by Consort Healthcare and Engie FM respectively.
9. NHS Lothian stated that it had provided all the information held by the contractors in paper format to the Applicant, did not retain copies of these documents, and it held nothing further.
10. On 9 March 2021, the investigating officer contacted the Applicant to enquire why he considered information, further to that already disclosed, was held by NHS Lothian. On 17 March 2021, the Applicant provided an extract of the information disclosed to him, noting that none of these reports fell within scope of his request. The Applicant also provided a copy of an email chain in which the ventilation and lighting issues were discussed.
11. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. On 22 March 2021, NHS Lothian was invited to comment on this application and to answer specific questions. These related to the searches that had taken place and why it was satisfied that the requested information was not held. NHS Lothian was also provided with a copy of the email chain provided by the Applicant. NHS Lothian responded on 6 April 2021.
12. The investigating officer engaged in correspondence with both NHS Lothian and the Applicant throughout the investigation (March to July 2021). NHS Lothian responded to questions raised and provide supporting information; this information was passed to the Applicant, who expressed dissatisfaction with the responses provided to him by NHS Lothian and the investigating officer.
13. By the end of the investigation, NHS Lothian had disclosed the following to the Applicant:
  - over 100 reports for ventilation and lighting of the site from Consort Healthcare and Engie FM.
  - minor Works Order form dated 20 February 2020 from Engie FM for the replacement of lighting in the named room.
  - an email dated 9 June 2020 from Engie FM, confirming that the work had been completed to change the lighting in the named room.
  - hygrometer readings for the named room, for the period 5 March 2020 to 7 April 2021.
  - two emails from the Health and Safety team, one dated 11 September 2019 providing findings from the visit to the named room, and the other on 3 March 2020 providing an update from a visit to the named room.
  - twenty-six pages of emails dating from 11 September 2019 to 4 March 2020 comprising of an internal discussion with the Health and Safety department as to how to overcome the lighting and ventilation issues in the named room, together with a

blank form for a Record of General Risk Assessment and Manual Handling Risk Assessment form.

- floor plan of the basement floor, in which the named room is located. NHS Lothian explained that the the room was a training room then was converted into an office.

NHS Lothian reiterated throughout the investigation that it did not hold any official reports on the ventilation and lighting specific to the named room.

14. By the end of the investigation, the Applicant was still dissatisfied with the information disclosed. He:

- expected the lighting and ventilation reports provided by the contractors to refer specifically to the named room; none of them did;
- expected the ventilation and lighting issues with the named room would have been considered under a formal Health and Safety investigation, with the issues formally documented and reports produced;
- noted that the floor plan was provided;
- identified information within the disclosed email correspondence that he considered indicated that the contractor had cleaned the ventilation system and so considered that reports should be held.

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

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15. In coming to a decision on this matter, the Commissioner considered all of the relevant submissions, or parts of submissions, made to him by both the Applicant and NHS Lothian. He is satisfied that no matter of relevance has been overlooked.

### **Application of the EIRs**

16. It is clear that any information falling within the scope of the Applicant's request, which relates to ventilation and lighting for the named room, is properly considered to be environmental information, as defined in regulation 2(1) of the EIRs, in particular paragraphs (b) and (f) of that definition (the relevant provisions are reproduced in Appendix 1 to this decision). The Applicant made no comment on NHS Lothian's application of the EIRs in this case and the Commissioner will consider the request in what follows solely in terms of the EIRs.

### **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. It is important to bear in mind that this obligation relates to information actually held by an authority when it receives the request, as opposed to information which an applicant believes the authority should hold.

19. 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)).

20. Under the EIRs, a public authority may refuse to make environmental information available if one or more of the exceptions in regulation 10 applies.

### **Information held by NHS Lothian**

21. At review, NHS Lothian stated that it held no information specific to the named room and therefore sought to rely on regulation 10(4)(a). Regulation 10(4)(a) states that a Scottish public authority may refuse to make environmental information available to the extent that it does not hold that information when the applicant's request is received.
22. 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.
23. The Commissioner notes the submissions provided by the Applicant as to why he considers NHS Lothian should hold further information, and his belief that NHS Lothian did not provide all of the information it held falling within scope of his request.

### *NHS Lothian's submissions*

24. NHS Lothian explained that the information provided in response to the initial request were the planned preventative maintenance reports (PPM) for the air handling units covering the area which included, but was not specific to, the named room. The PPMs cover large areas and individual rooms are not listed. NHS Lothian explained that only rooms with specific ventilation requirements have separate PPM reports; the named room was not one of these rooms.
25. NHS Lothian submitted that all of the information it held, falling within the scope of the Applicant's request, had been considered at the time it responded to the request and the information located had been provided to the Applicant.
26. In response to the email chains referred to by the Applicant, NHS Lothian explained that, following concerns raised about ventilation and lighting in the named room in September 2019 and March 2020, a referral was made to Occupational Health Services. In September 2019, the Health and Safety Officer recommended the changing of the light bulbs; softer focused flush to ceiling LED lights on the 13th March 2020.
27. Further guidance was provided by the Health and Safety Officer to the staff that worked in the named room. One action, taken by a member of staff, was to bring in a hygrometer to monitor the temperature and humidity in the room. Upon request, NHS Lothian also provided a copy of the hygrometer meter readings [on 8 April 2021] that had been kept, in the form of a spreadsheet. NHS Lothian stated that the hygrometer was not an official NHS Lothian item and so it was not an official NHS Lothian document. The meter readings were provided to the Applicant on 27 April 2021.
28. NHS Lothian provided a copy of a Works Order Form dated 20 February 2020 and an email dated 9 June 2020 regarding the change in lighting for the room. This information was provided in redacted form to the Applicant on 27 April 2021.

29. Following provision of this information, the Applicant submitted that there should be reports from the Health and Safety Officer and the referral made to Occupational Health Services in September 2019 and March 2020 and before these dates.
30. In discussion with the investigating officer, NHS Lothian stated that Occupational Health had provided all relevant information to the Applicant in response to an earlier request. This was reiterated to the Applicant on 17 May 2021. Furthermore, NHS Lothian stated that, the Health and Safety department confirmed no documents other than the email exchanges provided on 13 May 2021, were held.
31. NHS Lothian submitted that the Applicant had requested “official maintenance reports”, and there was no official analysis or investigations of the changes carried out, just the maintenance reports.
32. NHS Lothian explained that these maintenance work/reports were separate from information held by Health and Safety and Occupational Health Services, and information related to Health and Safety and Occupational Health did not fall within the scope of the original request.
33. NHS Lothian commented that the Applicant’s request for review did not question the non-inclusion or ask for detail in relation to Health and Safety and Occupational Health Services information. Had he done so, this would have been viewed as a new/separate request.
34. In relation to the Minor Works Order dated 20 February 2020 and an email dated 9 June 2020 about the change in lighting [and disclosed to the Applicant on 27 April 2021], NHS Lothian confirmed that these documents were held when the Applicant first enquired about the named room on 29 July 2020, but they were not viewed to be the “official maintenance reports” so were not considered as part of the Applicant’s request.
35. On 17 May 2021, NHS Lothian provided a further response to the Applicant, with a copy of the Health and Safety emails it had provided to the investigating officer regarding the named room, but reiterated that this information would not have been provided previously as it is not part of the official maintenance reports requested/provided.
36. On 24 June 2021, NHS Lothian was asked to confirm which sector the named room was located in, and provide a floor plan of the relevant sector. It provided this information, and also disclosed a copy to the Applicant on 16 July 2021, together with the Health and Safety email exchanges provided to the Investigating Officer on 22 June 2021.
37. In disclosing the above information, NHS Lothian confirmed the sector that the named room fell within (sector two).
38. The Applicant noted that none of the disclosed ventilation maintenance reports provided were in relation to sector two. He also considered that further maintenance reports should be held for the lighting. NHS Lothian responded and confirmed no further information was held.

#### Searches

39. In its initial submissions on 6 April 2021, NHS Lothian submitted that it searched its Computer Aided Facilities Management system, where all relevant information is held between 2017 and September 2020. NHS Lothian also confirmed that all relevant records held by Consort Healthcare and Engie FM (who own and run the building respectively) had, in line with their contractual obligations, been provided to NHS Lothian and supplied to the Applicant.

40. NHS Lothian confirmed that it did also hold email correspondence from the Health and Safety department. Following, a request to do so, it disclosed redacted copies of these emails to the Applicant on 16 July 2021.
41. It explained that the Estates Department had provided all the information available from the service company; the checks of the unit were provided, this contained all the checks made to the particular Air Handling Unit which services several rooms in that sector. This included the detailed PPMs to date, by whom and what was done. The Site Manager had also spoken to Engie, who confirmed that no further information was held.
42. NHS Lothian provided screen shots of its searches: records were searched by the Finance Department (the team using the named room) using the terms the search terms “humidity” and “lighting” and no further information was identified.
43. In summary, it confirmed that its Finance and Health and Safety departments held emails that related to the named room, which it had disclosed to the Applicant. The information held by its Estates department was information held by the Contractor, which had also been disclosed to the Applicant, and the information held by its Occupational Health Services department was the Applicant’s personal data and had been disclosed solely to him.

#### *The Applicant’s comments*

44. The salient points of the Applicant’s dissatisfaction with the information and responses provided by NHS Lothian during the investigation were that he:
  - expected the lighting and ventilation reports provided by the contractors to refer specifically to the named room;
  - had inspected the reports, and could find nothing that related to the named room or would have encompassed the area in which the room was located;
  - considered the ventilation and lighting issues with the named room, should have been considered a formal Health and Safety issue, with the issues formally documented, and reports and investigations taken place;
  - considered that any identified matters raised by the Health and Safety manager following his visits to the named room should have been followed up and formally documented;
  - questioned where were the Health and Safety maintenance / works reports for when the named room, was set up as an office; and
  - considered if there were no specific reports for the named room, that NHS Lothian should be able to identify which of the reports disclosed related to the relevant sector. (This matter was raised with NHS Lothian, but it confirmed no further information could be provided.)

#### **The Commissioner’s conclusions**

45. The Commissioner notes that NHS Lothian provided the Applicant with over 100 pages of reports in relation to ventilation and lighting held by its contractors for the management of the Royal Hospital, Edinburgh. These reports were held in paper, scanned and provided to the Applicant.
46. NHS Lothian stated that it had provided all the reports to the Applicant, as it was considered the most effective way of responding to the request. In its review, it stated that all relevant

information had been provided, and referred to regulation 10(4)(a) of the EIRs with respect to information specific to the named room.

47. It is clear from the Applicant's request for review that he did not consider the provision of the reports which included no references to the named room was helpful. In the absence of adequate advice and assistance, the further communication between NHS Lothian and the Applicant appears to have led to further confusion and dissatisfaction.
48. It was only towards the end of the investigation that NHS Lothian made it clear to both the Applicant and the investigating officer which area the named room was located in, and provided a floor plan. The Commissioner concludes that NHS Lothian could have made it much clearer in its initial response and review to the Applicant that there were no official on-going reports from the contractors regarding the named room, as it was not a room that would have been monitored specifically and that any reports from the contractors would cover the sector as a whole.
49. It would have been helpful, in line with regulation 9 of the EIRs (Duty to provide advice and assistance), if NHS Lothian had provided the above explanation to the Applicant in response to his request and/or requirement for review.
50. During the investigation, NHS Lothian provided copies of two documents regarding the changing of the lighting in the room, and hygrometer readings.
51. The Commissioner considers that the information related to the lighting changes should have been provided the Applicant in response to the request.
52. NHS Lothian disclosed two sets of emails to the Applicant, first on 27 April 2021, and secondly on 16 July 2021. Having read the disclosed emails in detail, the Commissioner notes that the focus is an internal discussion / progression between the senior manager in the room and the Health and Safety department as to the key matters that would affect the working environment in the room, and suggestions as to what steps could be taken to improve the situation.
53. In the Commissioner's view, the email correspondence is of a discussion between the parties, as to how to address issues raised. The Applicant expected the issues to be addressed in a formal way, through a documented process, in which every action and result was formally recorded. The Commissioner can identify nothing within the information disclosed that has led him to have a similar expectation as to the information recorded.
54. The Commissioner 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.
55. 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.
56. Having considered all the relevant submissions and the terms of the request, the Commissioner is satisfied that NHS Lothian took adequate, proportionate steps to establish whether it held any information that fell within the scope of the request. He notes that NHS Lothian involved the third party contractor in obtaining information relevant to the request



combined with internal searches. He also notes that some relevant information (the Applicant's personal data, which would have been excepted from disclosure under the EIRs) was provided to the Applicant outwith his information request. The Commissioner is satisfied that any information specific to the named room would have been identified by the searches conducted by NHS Lothian.

57. Having considered the submissions and taking account of the explanations provided, the Commissioner is satisfied that NHS Lothian does not hold any further recorded information falling within scope of the request.

#### *The public interest*

58. The exception in regulation 10(4)(a) of the EIRs is subject to the public interest test in regulation 10(1)(b) and so can only apply if, in all the circumstances of the case, the public interest in maintaining the exception outweighs that in making the information available. The question of whether or not a public authority holds information is a factual one, determined on the balance of probabilities. If a public authority does not hold the information, then there is no meaningful public interest test that can be undertaken.

59. In this case, for the reasons set out above, the Commissioner is satisfied that NHS Lothian does not hold any information covered by the request. Consequently, he accepts that there is no conceivable public interest in requiring the disclosure of such information and finds that the public interest in making information available is outweighed by that in maintaining the exception.

## **Decision**

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

The Commissioner finds that NHS Lothian failed to comply with regulation 5(1) in failing to provide the information supplied during the investigation at the time of the request. The Commissioner also finds that NHS Lothian failed to provide adequate advice and assistance in line with regulation 9 of the EIRs.

Given that all relevant information has now been provided to the Applicant, alongside further advice and assistance, the Commissioner does not require NHS Lothian to take any action in respect of these failures in response to the Applicant's application.

## **Appeal**

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Should either the Applicant or NHS Lothian 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.

**Margaret Keyse**  
**Head of Enforcement**

**27 October 2021**

## Appendix 1: Relevant statutory provisions

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### The Environmental Information (Scotland) Regulations 2004

#### 2 Interpretation

(1) In these Regulations –

...

"environmental information" has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on

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...

(b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in paragraph (a);

...

(f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in paragraph (a) or, through those elements, by any of the matters referred to in paragraphs (b) and (c);

...

#### 5 Duty to make available environmental information on request

(1) Subject to paragraph (2), a Scottish public authority that holds environmental information shall make it available when requested to do so by any applicant.

...

#### 9 Duty to provide advice and assistance

(1) A Scottish public authority shall provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to applicants and prospective applicants.

...

(3) To the extent that a Scottish public authority conforms to a code of practice under regulation 18 in relation to the provision of advice and assistance in a particular case, it shall be taken to have complied with the duty imposed by paragraph (1) in relation to that case.

...

**10 Exceptions from duty to make environmental information available–**

- (1) A Scottish public authority may refuse a request to make environmental information available if-
  - (a) there is an exception to disclosure under paragraphs (4) or (5); and
  - (b) in all the circumstances, the public interest in making the information available is outweighed by that in maintaining the exception.
- (2) In considering the application of the exceptions referred to in paragraphs (4) and (5), a Scottish public authority shall-
  - (a) interpret those paragraphs in a restrictive way; and
  - (b) apply a presumption in favour of disclosure.

...

- (4) A Scottish public authority may refuse to make environmental information available to the extent that
  - (a) it does not hold that information when an applicant's request is received;

...

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