

# Decision Notice 086/2023

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## Headstone Testing Process

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**Authority: Scottish Borders Council**

**Case Ref: 202100384**



Scottish Information  
Commissioner

## Summary

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The Authority was asked about its processes for testing cemetery headstones. It provided some information, but told the Applicant it did not hold some of the information he had asked for. The Commissioner investigated and found the Authority had disclosed all of the information it held.

## Relevant statutory provisions

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The Environmental Information (Scotland) Regulations 2004 (the EIRs) 5(1) and (2)(b) (Duty to make available environmental information on request); 6(1) (Form and format of information)

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

## Background

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1. On 28 September 2020, the Applicant made a multi-part request for information to the Authority. The request related to the Authority's processes for cemetery headstone testing. A numbered version of the request is set out in Appendix 2.
2. The Authority responded to the request on 26 October 2020 and provided some information to the Applicant.
3. On 29 October 2020, the Applicant wrote to the Authority requesting a review of its decision in respect of all parts of the request except parts 10 (in respect of which he instead made a new information request) and 17 (which he did not mention in his request for review). He considered the Authority had failed to answer his questions adequately or provide him with the information he was seeking.
4. The Authority notified the Applicant of the outcome of its review on 18 December 2020. The Authority provided some further information to the Applicant and explained that, while some of the issues raised by him were not strictly speaking requests for information, it had sought to answer where it could.
5. On 23 March 2021, 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.
6. The Applicant was dissatisfied with the outcome of the review for the following reasons:
  - (i) parts 1 to 7, 9, 11, 13 and 16: he considered the Authority had failed to answer his requests.
  - (ii) part 8: he was unhappy with the accuracy of the explanation given
  - (iii) part 12: he considered the response differed from a verbal response he had previously received to his question.

The Applicant did not raise any dissatisfaction with the remaining parts of his request.

## Investigation

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7. 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.
8. On 22 April 2021, the Authority was notified in writing that the Applicant had made a valid application and the case was allocated to an investigating officer.
9. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. On 13 July 2021, the Authority was invited to comment on this application and to answer specific questions. These related to what searches the Authority had carried out, whether the Authority actually held any recorded information in relation to the Applicant's request or whether they had simply sought to provide answers based on their own knowledge. Further submissions were sought from the Authority on 1 November 2021.
10. The Applicant was also asked to provide any comments he wished to make on his application.

### Scope of the investigation

11. Paragraph 6 sets out which parts of his request the Applicant is dissatisfied with. However, the Commissioner cannot investigate whether the information provided in response to parts 8 and 12 of the request is accurate; his role is to determine whether the Authority located all of the information falling within the scope of the Applicant's request, and not whether the information disclosed is factually accurate.)
12. The Commissioner can take into account the outcomes of previous information requests made by the Applicant to the Authority on the same subject matter as the current request. He is mindful that information has been disclosed to the Applicant by the Authority on previous occasions.
13. Regulation 6(1)(b) of the EIRs states that if the information requested by an Applicant is already easily accessible to him, then the authority does not have to make that information available. Consequently, the Authority was not obliged to provide the Applicant with the information previously provided to him in response to any previous information requests, although it would have been good practice for the Authority to have notified the Applicant that it was relying on regulation 6(1)(b).

### Submissions from the Authority

14. The Authority's submissions on each of the requests can be summarised as follows:

#### Information provided

**Parts 2, 3, 4, 5, 6, 7, 11, 13 and 16 of the request** - the information had already been provided to the Applicant in response to his previous information requests to the Authority and had been taken from recorded information held.

#### Information not held

**Part 1 of the request** - the Authority had previously disclosed the contractual information for the process to the Applicant, and explained that no separate "terms of reference/project plan"

was held because all the detail of the matter was held in the contractual information already provided to the Applicant.

**Part 9 of the request** – the Authority had followed its own procedures in the matter and so held no information as to why it had not followed its own procedures.

### **Submissions from the Applicant**

15. The Authority told the investigating officer that the health and safety inspection had been carried out in accordance with the Scottish Government's Memorial Safety Guidance<sup>1</sup> (the Guidance).
16. In the Applicant's view, the Authority had *failed* to follow the Guidance and had undertaken works in listed building sites and conservation areas without consent.

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

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17. In coming to a decision on this matter, the Commissioner considered the relevant submissions, or parts of submissions, made to him by both the Applicant and the Authority. He is satisfied that no matter of relevance has been overlooked.
18. Parts 1, 2, 4, 5, 6, 7 and 9 of the request were, the Commissioner notes, all questions asking "why?" They ask the Authority to explain why it did or did not take certain courses of action. In the context of these questions, it is unlikely that the Authority would hold recorded information consisting of explanations as to why it did or did not take one course of action or another. There may have been verbal discussions between officers but it would be very unlikely that an authority would hold recorded information justifying its actions in taking either "course A" or "course B," etc.
19. Part 3 is not a "why" question, but is connected to part 2. It asks whether a decision to decide to change the testing to include all stones was made before or after the Authority decided to hire an external contractor. At review, the Authority told the Applicant that the contractor was appointed in September 2018 and that, prior to this, ad hoc checks were carried out.
20. The Commissioner notes that, in Decision 073/2020<sup>2</sup> the Commissioner considered a wide request by the Applicant relating to the decision to test all headstones and was satisfied (see paragraph 59 of Decision 073/2020) that the Authority did not hold any recorded information in relation to that decision.
21. With regard to part 11 of the request, the Commissioner notes that the Applicant's question asking how the faceplates were tested, was answered by the Authority in its response, confirming that they had been tested using the push-test method. Therefore, the Authority has provided a response to this part of the request.
22. With regard to part 13 of the request, where the Applicant asked what the health and safety reasons for removing the faceplates were, the Commissioner notes that the Authority again provided a reasonable response to the Applicant, by its explanation that the reason was to comply with the Guidance. The Commissioner notes that the Authority did not provide the Applicant with a copy of the guidance in question. However, the Applicant subsequently

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<sup>1</sup> <https://www.fbca.org.uk/news/memorial-safety-guidance/>

<sup>2</sup> <https://www.itspublicknowledge.info/decision-0732020>

confirmed that he was aware of the Guidance and familiar with it, to the extent of stating that he felt the Authority had not actually complied with it.

23. Part 16 of the request asked why no-one from the Authority had signed-off, or even checked, the work done by Memsafe and the people who removed the stones. At review, the Authority referred the Applicant to its response to part 7 (“Why wasn’t the work of the contractor checked?”), i.e. that the works had been visually inspected by Authority staff, and to paragraph 34 of Decision 037/2020 which specifically dealt with this point.

### **Information falling in scope**

24. Regulation 5(1) of the EIRs (subject to the various qualification 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.
25. The standard proof to determine whether a Scottish public authority holds information is the civil standard of the balance of probabilities. In determining this, 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 a public authority to explain why it does not hold the information, and any reason offered by an applicant to explain why an authority is likely to hold information. While an applicant may hold views on what information should be held, ultimately the Commissioner's role is to determine what relevant information is (or was, at the time the request was received) held by the public authority.
26. The Authority submitted to the Commissioner that it had provided the Applicant with all of the information held by it falling within the scope of his request.

### **Searches carried out by the Authority**

27. The Authority explained that searches were carried out in e-Mails and excel spreadsheets by the following Authority Officers: Neighbourhood Area Manager, Environment and Infrastructure, Neighbourhood Assistant Area Manager, Environment and Infrastructure and Assistant Manager, Parks and Environment.
28. No further information was found which had not either been provided to the Applicant at the request or the review stage, or in response to his previous requests on the same subject matter.

### **The Commissioner’s conclusion**

29. With regard to parts 2, 4, 5, 6 and 7 of the request, the Commissioner notes that the Authority provided the information to the Applicant in response to a previous information request made by him.
30. Given his findings in Decision 073/2020, the Commissioner is satisfied with the Authority’s response to parts 3 and 16 of the request.
31. With regard to parts 11 and 13 of the request, the Commissioner notes that the Authority provided the information to the Applicant as part of his current information request.
32. With regard to part 1 of the request, the Commissioner notes that the Authority had previously disclosed to the Applicant the contractual information for the project in question and subsequently explained that no separate “terms of reference/project plan” was held

because all the detail of the matter was contained within that contractual information already provided to the Applicant.

33. With regard to part 9 of the request, the Authority clearly stated that it had followed its own procedures in the matter; therefore, it could not be expected to hold information as to why it had not followed its own procedures in the matter. Given these circumstances, the Commissioner accepts that it is very unlikely the Authority would hold recorded information stating why it had not followed its own procedures.
34. Having considered all relevant submissions and the terms of the Applicant's request, the Commissioner accepts that the Authority took adequate, proportionate steps to establish whether it held any information falling within the scope of the request, and he is satisfied that the Authority identified and disclosed all relevant information falling within scope of the request.

## **Decision**

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

## **Appeal**

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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.

**Daren Fitzhenry**  
**Scottish Information Commissioner**

**11 August 2023**

## Appendix 1: Relevant statutory provisions

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### The Environmental Information (Scotland) Regulations 2004

#### 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.
- (2) The duty under paragraph (1)-  
...  
(b) is subject to regulations 6 to 12.

#### 6 Form and format of information

- (1) Where an applicant requests that environmental information be made available in a particular form or format, a Scottish public authority shall comply with that request unless-  
...  
(b) the information is already publicly available and easily accessible to the applicant in another form or format.  
...

## Appendix 2: Summary of information request

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1. Why was a five-year rolling contract of works started without any terms of reference or a project plan?
2. Why was it decided to change the testing to include all stones?
3. Was this decision made before or after the Authority decided to hire an external contractor?
4. Why weren't the public informed of this change?
5. Why was over £90,000 of taxpayers' money spent on an external contractor to test stones on a project that had no project plan.
6. Why, even though the Authority knew months before work started at Peebles, were the notices pinned to the gates, on the Authority's website, and sent to the papers stating only "old and large memorials" were to be tested?
7. Why wasn't the work of the contractor checked?
8. Why does the spreadsheet provided to me by the Authority not include the stone of [named person]? This stone was broken by the Authority during "socketing".
9. Why didn't the Authority follow their own procedures, i.e. the Authority's "MEMORIAL HEADSTONE TESTING PROCESS"?
10. Why were faceplates from books removed?
11. How were faceplates even tested?
12. Who benefited financially from the removal of the faceplates of books?
13. What were the health and safety reasons for removing the faceplates?
14. Who removed the stones and who supervised the removal?
15. Why was the stone of [named person] not only taken down, but yanked so hard it split in two?
16. Why did no-one from the Authority sign off, or even check, the work done by Memsafe and the people who removed the stones?
17. Why has my notification to the Authority (form reference 951548 sent 18th May 2020) that stated I did not give the Authority, or its contractors, permission to test a selection of my stones, been ignored.



