



# Decision Notice 165/2024

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## Footways and Lighting in a Conservation Area

**Authority: Glasgow City Council**

**Case Ref: 202301043**

### Summary

The Applicant asked the Authority for information relating to the resurfacing of footways in named streets within a designated Conservation Area in Glasgow. The Authority informed the Applicant that it did not hold the information.

The Commissioner investigated and found that the Authority should have handled the request under the EIRs, but he was satisfied the Authority did not hold the information requested.

### Background

1. On 24 May 2023, the Applicant made a two-part request for information to the Authority. He asked for:
  - (i) a copy of any research carried out by the Authority prior to the resurfacing of footways in Lymedoch Crescent, Glasgow, and
  - (ii) all information held by the Authority in relation to replacement of light fittings in Park Circus, Park Terrace, Woodlands Terrace, Park Quadrant, La Belle Place, Parkgrove Terrace and Royal Terrace, Glasgow.
2. The Authority responded on 22 June 2023, giving notice, under section 17(1) of FOISA, that it did not hold the information requested. The Authority explained that it held no information relating to the request because the works that were the subject of the request were carried out more than five years ago, which exceeded its retention period for keeping records of that nature. By way of advice and assistance, the Authority provided a link to its Road Asset Management Plan to explain how it managed public road assets.

3. On 11 July 2023, the Applicant wrote to the Authority, requesting a review of its decision as he did not accept that no information was held.
4. The Authority notified the Applicant of the outcome of its review on 11 August 2023, upholding the original decision without modification.
5. On 17 August 2023, 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 there had to be some level of information associated with works that had been carried out in the past, either to the lights or the footways.

## **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 10 October 2023, and in line with section 49(3)(a) of FOISA, the Commissioner gave the Authority notice of the application in writing and invited its comments.
8. The case was subsequently allocated to an investigating officer.

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

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

### **Application of the EIRs?**

10. 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.
11. The Authority handled the Applicant's information request under FOISA, but it revised its position during the investigation and acknowledged that it should have responded under the EIRs.
12. The Commissioner is satisfied that the information requested falls within the definition of environmental information in regulation 2 of the EIRs (particularly paragraphs (a) and (c)).
13. 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**

14. 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 an applicant. 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 an applicant believes the authority should hold. The duty to comply with regulation 5(1) of the EIRs is subject to regulations 6 to 12.

15. In responding to the Applicant's request and requirement for review, the Authority failed to identify environmental information, in terms of regulation 2(1) of the EIRs. In doing so, the Authority failed to comply with regulation 5(1) of the EIRs.

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

16. Under the EIRs, a Scottish public authority may refuse to make environmental information available if one or more of the exceptions in regulation 10 applies. Regulation 10(4)(a) of the EIRs states that a Scottish public authority may refuse to make information available to the extent that it does not hold the information when it received the request.
17. The standard of proof to determine whether a Scottish public authority holds the 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 reasons 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 information is (or was, at the time the request was received) held by the public authority.
18. The Applicant submitted that he found it strange that there was no information whatsoever held by the Authority within scope of his request. He argued that there had to be some level of information associated with works that were carried out in the past within the Park Conservation Area, either to the lights or the footways.
19. The Authority explained that it had erred by stating (in its previous responses to the Applicant) that it did not hold the information as a result of the passage of time. The Authority submitted that it now considered the retention period for records to be irrelevant because it had never held the information requested, nor was it ever held by anyone else on its behalf.
20. The Authority described the searches that it carried out for the information. It stated that several officers from within its Neighbourhoods, Roads and Sustainability Department, carried out searches of their electronic mailboxes, the electronic document management system, shared drives and physical paper files within offices. It explained that these officers were responsible for identifying, planning and delivering maintenance works for roads and lighting within the areas identified in the Applicant's request.
21. The Authority submitted that, for the electronic searches, the search terms used were "Lynedoch Crescent", "Park Circus", "Park Terrace", "Woodlands Terrace", "Park Quadrant", "La Belle Place", "Parkgrove Terrace" and "Royal Terrace" and that any information held would have been recorded under the relevant street name. The Authority confirmed that there were no results returned from these searches and, it therefore concluded that it held no information and that it had never held any information within scope of the request.

#### *The Commissioner's view*

22. Given the explanations and submissions provided, the Commissioner accepts that the Authority took adequate and proportionate steps in the circumstances to establish if the information was held and he is satisfied that it does not (and did not, on receipt of the request) hold the information requested by the Applicant.

23. Although it is clear that the Applicant has a genuine interest in the information and believes it should be held, the Commissioner notes that the Applicant did acknowledge in his initial correspondence of 24 May 2023, in relation to part (i) of the request in particular, that “it appears that no due research of the Conservation Area had been carried out prior to commencement of the works”.
24. The Commissioner can only focus on what recorded information is actually held by the Authority (or was at the time of the request). While the Applicant believed and expected the specified information to be held by the Authority, the Commissioner is persuaded that this was not the case.
25. In all of the circumstances, the Commissioner is satisfied, on the balance of probabilities, that the Authority does not hold recorded information which would fulfil the Applicant’s request. The Authority was therefore entitled to rely on the exception in regulation 10(4)(a) of the EIRs, on the basis that it did not hold the information requested.
26. 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.
27. In this case, for the reasons set out above, the Commissioner is satisfied that the Authority does not (and did not, on receipt of the request) 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**

The Commissioner finds that the Authority failed to comply with the requirements of regulation 5(1) of the Environmental Information (Scotland) Regulations 2004 (the EIRs), as it failed to identify the information requested as environmental information in terms of regulation 2(1).

The Commissioner also finds that, by failing to give notice that it did not hold the requested information, the Authority failed to comply with the requirements of regulations 13(b) and (c) of the EIRs.

For the reasons set out above, the Commissioner does not require the Authority to take any action in respect of these failures in response to the Applicant's application.

## **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.

**Jennifer Ross**  
**(Acting) Deputy Head of Enforcement**

**08 August 2024**