



Decision Notice 207/2024

Authority: City of Edinburgh Council
Case Ref: 202200919

Summary

The Applicant asked the Authority for the dates that various bins/street furniture were installed at Dalry Cemetery. The Authority said it did not hold this information. The Commissioner investigated and found that the Authority had failed to provide adequate submissions to justify its position. The Commissioner required the Authority to carry out searches for the information requested by the Applicant and issue the Applicant with a new review outcome.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2) and (6) (General entitlement); 17(1) (Notice that information is not held); 21(1) (Review by Scottish public authority); 47(1) and (2) (Application for decision by Commissioner)

Background

1. On 11 April 2022, the Applicant made a request for information to the Authority. She asked for:
 - (i) Date the green shed at the entrance to Dalry Cemetery was erected (now removed), with the name of the authorising Council Officer.
 - (ii) Date the black water bins were put in place that are situated at the entrance to Dalry Cemetery with the name of the authorising Council Officer.
 - (iii) The date the grey waste bins (2) and the brown garden waste bins (3) were placed (now removed) on the pavement at the entrance to Dalry Cemetery, with the name of the authorising Council officer.

- (iv) The date the historic photograph of Dalry Cemetery Lodge was placed in the Dalry Cemetery notice board at the Dalry Cemetery entrance, with the name of the authorising Council officer.
2. The Authority responded on 4 May 2022. It provided the job titles of the authorising officers for parts (i) and (ii) and told the Applicant that the Authority's permission was not required for parts (iii) and (iv).
3. On 7 June 2022, the Applicant wrote to the Authority, requesting a review of its response. The Applicant stated she was dissatisfied with the Authority's response because it had only provided part of the information she had requested. She commented that the Authority should have disclosed the dates as well as the name(s) of the authorising officer(s).
4. The Applicant did not receive a response to her requirement for review within the statutory time frame.
5. On 21 July 2022 (and following an appeal to the Commissioner) the Authority issued a review outcome to the Applicant. It continued to withhold the name(s) of the authorising officer(s) on the grounds that it was the personal data of third parties, and it maintained that the dates of the installations were not held. It explained that the Authority was not required to give permission for the placement of the street furniture, as the items were installed by the Friends of Dalry Cemetery (the Friends).
6. On 23 August 2022, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant stated she was dissatisfied with the outcome of the Authority's review because she believed the Authority did hold information regarding the dates of the installations and was unfairly withholding it. She commented that she had previously requested and been provided with similar information.
7. During correspondence with the Commissioner's office, the Applicant stated that she was only interested in obtaining the dates of the installations, not the name(s) of the authorising officer(s). In light of this, the Commissioner will only consider the dates in this decision.

Investigation

8. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
9. On 30 September 2022, the Commissioner gave the Authority notice of the application in writing and invited its comments.
10. The Authority provided submissions, and the case was subsequently allocated to an investigating officer.
11. The investigating officer also sought the Applicant's comments on the case.

Commissioner's analysis and findings

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

Section 17(1) – Notice that information is not held

13. Section 1(1) of FOISA provides that a person who requests information from a Scottish public authority which holds it is entitled to be given that information by the authority, subject to the qualifications which, by virtue of section 1(6) of FOISA, allow Scottish public authorities to withhold information or charge a fee for it. The qualifications contained in section 1(6) are not applicable in this case.
14. The information to be given is that held by the authority at the time the request is received, as defined in section 1(4). If no such information is held by the authority, section 17(1) of FOISA requires it to give the applicant notice in writing to that effect.
15. The standard of proof to determine whether a Scottish public authority holds information is the civil standard on the balance of probabilities. In determining where the balance lies, the Commissioner must first of all consider the interpretation and scope of the request and thereafter the quality, thoroughness and results of the searches carried out by the public authority.
16. The Commissioner also considers, where appropriate, any reason offered by the public authority to explain why it does not hold the information. Ultimately, however, the Commissioner's role is to determine what relevant information is actually held by the public authority (or was, at the time it received the request).

The Authority's submissions

17. In its submissions, the Authority confirmed that the street furniture detailed in the Applicant's request (various bins and a shed) were placed there by the Friends, but it maintained that the dates these items were installed, were not held. The Authority explained that the Friends was an entirely separate organisation (to the Authority) and that while the group may give the Authority notice of its actions, it was not required to do so.
18. The Authority considered it likely that it only became aware of the placement of the items during staff visits to the cemetery, when officials witnessed members of the group working on the grounds, or in passing informal discussion.
19. The Authority stated that it did not carry out any searches for the information requested by the Applicant, as it was not information that the Authority was required to hold. The Authority reiterated that it did not hold any further information beyond the limited amount already disclosed to the Applicant in this case.

The Applicant's submissions

20. The Applicant believed that the Authority held the information and was unfairly withholding it from her. She commented that she had previously requested, and been provided with, similar information about bins, referencing her previous FOI requests [38110](#)¹ and [37384](#)².
21. The Applicant also commented on the Authority's response that no authorisation was needed for the waste bins in part (iii) of her request, hence it did not hold the dates. She observed that those bins belonged to the Authority, and she believed they must have been supplied by its waste management department.

¹ <https://edinburgh.axlr8.uk/documents/38110/38110%20response.pdf>

² <https://www.edinburgh.gov.uk/homepage/10467/freedom-of-information-foi-disclosure-log?month=2022-6>

The Commissioner's view

22. 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.
23. In all cases, it falls to the public authority to persuade the Commissioner, with reference to adequate, relevant descriptions and evidence, that it does not hold the information (or holds no more information than it has identified and located in response to the request). In this case, having considered the Authority's submissions, the Commissioner is not satisfied that the Authority has achieved this.
24. The Authority has asserted that as it was not legally obliged to hold the information, it did not consider it necessary to carry out any searches. The Commissioner disagrees with the Authority's position. In his view, just because an authority has no legal requirement to record information, does not mean that the information is not held. He considers that the Authority should have carried out searches to evidence its position that it did not hold the information.
25. The Commissioner notes the Applicant's comments about previous FOI requests she submitted and, in particular, the Authority's response to request 37384. In that request, the information sought by the Applicant included "when the new bins were installed in Dalry Cemetery". The Authority, on that occasion, provided the Applicant with a date of 11 May 2022. This would suggest that, despite the lack of legal requirement, the Authority has held some information about the placement of bins in Dalry Cemetery in the past. It is not unreasonable to conclude that the Authority may also hold information regarding the dates that the bins/shed, in this case, were installed, and that searches for this information would be required.
26. In her requirement for review, the Applicant stated that the bins she was asking about in part (iii) of her request belonged to the Authority, and she commented that they must have been supplied by the Authority's waste management department. The Commissioner considers that if these bins were supplied by the Authority's waste management department, it was possible that the Authority may hold information about when they were placed in the cemetery.
27. With regard to the date the shed was erected (part (i) of the request) the Commissioner notes that the Authority stated that the shed was erected by the Friends and authorised by two members of staff. However, the Authority did not provide any detail of how this approval was given (i.e. verbally or in writing) or address the question of whether a record was kept of the authorisation which may have included the date the shed was installed.
28. The Commissioner notes a [previous FOISA response](#)³ from the Authority which addressed the Authority's relationship with more than 70 voluntary groups including the Friends. In that response, the Authority stated:

"They all work with their Bereavement Services Officer who approves any proposals to

³ <https://edinburgh.axlr8.uk/documents/37399/37399%20Response.pdf>

ensure their aspirations align with those of the Council and adhere to our Friends Group code of conduct.”

29. Given the lack of searches carried out by the Authority in this case, and taking into account the evidence that the Authority has provided similar information in response to previous FOI requests, the Commissioner is not satisfied that the Authority has demonstrated, on the balance of probability, that it does not hold the information requested by the Applicant. He must, therefore, conclude that the Authority was not entitled to give the Applicant notice, under section 17(1) of FOISA, that the information was not held.
30. He requires the Authority to carry out fresh searches for the information requested by the Applicant, giving particular attention to:
 - (i) information kept, in whatever form, which relates to approvals (referenced in paragraph 28 above) given by the Bereavement Services Officer to voluntary group proposals, with specific reference to the Friends;
 - (ii) where the Authority kept the information used to answer the previous FOI request 37384;
 - (iii) any records held by the Authority’s waste management department relating to bins being placed in or delivered to Dalry Cemetery; and
 - (iv) examining whether, (notwithstanding the Authority’s position that it is not required to hold this information), there is any other mechanism or location whereby such information may potentially be kept and to search that.
31. Given his finding in Decision [114/2022](https://www.foi.scot/decision-1142022)⁴, (particularly paragraph 11) that at least some of the information is likely to be environmental, the Commissioner requires the review outcome to consider the environmental information 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) in responding to the information request made by the Applicant.

Specifically, the Authority has failed to satisfy the Commissioner that it does not hold information relevant to the Applicant’s request. As a result, the Commissioner finds that the Authority failed to comply with section 1(1) of FOISA.

The Commissioner therefore requires the Authority to carry out adequate, proportionate searches for the information requested, and to issue a new review outcome to the Applicant, either disclosing any further information identified or notifying the Applicant why the information cannot be provided under a provision in either FOISA or the EIRs, by **4 November 2024**.

⁴ <https://www.foi.scot/decision-1142022>

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.

Jennifer Ross
(Acting) Deputy Head of Enforcement

18 September 2024