



Decision Notice 222/2024

Work on the entrance and shared driveway at Dalry Cemetery

Authority: City of Edinburgh Council
Case Ref: 202300108

Summary

The Applicant asked the Authority for confirmation that a volunteer group had been given permission to work on the entrance/common driveway at Dalry Cemetery. The Authority provided some information to the Applicant but she was dissatisfied that the information she sought was only partially supplied. The Commissioner investigated and found that the Authority had failed to provide evidence that it had carried out the necessary searches for any further information which may fall within scope of the request. He required the Authority to carry out new searches and provide 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); 47(1) and (2) (Application for decision by Commissioner)

Background

1. On 3 November 2022, the Applicant made a request for information to the Authority. She asked the Authority to confirm that a group called the Friends of Dalry Cemetery (the Friends) had been given authority by Bereavement Services to work on the entrance/common driveway, including gates, at Dalry Cemetery.
2. The Authority responded on 15 November 2022 and provided some information to the Applicant.

3. On 12 December 2022, the Applicant wrote to the Authority requiring a review of its decision. The Applicant stated she was dissatisfied with the decision because she believed the Authority had only partially responded to her information request.
4. The Authority notified the Applicant of the outcome of its review on 25 January 2023. It apologised for the delay in responding to her requirement for review and stated that it had identified no information which indicated that the Friends had been expressly authorised to “work on the entrance/common driveway, including the gates, at Dalry Cemetery”. However, the Authority commented that ad hoc agreements and arrangements were made from time to time between itself and cemetery volunteer groups, in line with its published Guidance. The Authority provided the Applicant with a copy of this Guidance.
5. On 25 January 2023, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant stated that she was dissatisfied with the outcome of the Authority’s review because it had taken more than 20 working days to review its decision, and she believed that the Authority had given the Friends express permission to work on the shared driveway at the cemetery.

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 30 January 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 Authority provided submissions, and 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.
10. During the investigation, the Authority said that it believed it had already provided the Applicant with the information she sought because it had:
 - Confirmed [in its original response] that the Friends group was registered with the Authority’s Bereavement Services and that as a constituted group it had access to the shared driveway, and
 - Provided [in its response review outcome] the Applicant with the Guidance which explained what constituted groups could and could not do, along with further detail about how cemetery volunteer groups were managed.
11. The Guidance included a table with details of the tasks which volunteer groups were:
 - (i) Allowed to carry out without specific consent;
 - (ii) Allowed to carry out only with specific consent; and,
 - (iii) Not permitted to carry out.

12. Tasks requiring specific consent included a category called “site furniture” which meant that volunteer groups needed specific permission before they installed compost bins, tool sheds, benches, signage etc. or before they painted ironwork.
13. The Commissioner has reviewed the Authority’s review outcome, and he considers that the wording used by the Authority was unclear. In particular, he notes that in its review outcome, the Authority told the Applicant that no information was found to indicate the Friends group had received express permission to carry out the work. In his view, this seems to contradict the Authority’s position that the Applicant had been provided with the information she had requested.
14. The Commissioner accepts that the Guidance provides evidence that the Friends group had automatic permission to carry out the specific tasks listed within the Guidance document, but it does not explicitly state that the Friends had authorisation to carry out the specific works at Dalry Cemetery.
15. During the investigation, in relation to its position that it had already provided the Applicant with the confirmation she had requested, the Authority provided the Commissioner with a form of words that it was willing to share with the Applicant, to help explain its position as follows:

We understand this document [the Guidance] gives overarching permission to work in the graveyard, which extends to the boundary of the land owned by the City of Edinburgh Council. The gates and driveway are not specifically mentioned but they form part of the Cemetery owned by the Council and are covered by the guidance.
16. The Commissioner notes that while this confirms that the Guidance document gives “Friends” groups overarching permission to work in the Authority’s graveyards, it also acknowledges that gates and driveways are not specifically mentioned in the Guidance document.
17. The Commissioner asked the Authority for details of the searches it carried out to identify information that fell within the scope of the Applicant’s request.
18. In its comments on searches, which related to both this and another appeal by the same Applicant, the Authority stated that a search was not necessary as it was not legally required nor expected to hold the information. The Authority reiterated its view that the Applicant had been provided with the confirmation she sought.
19. 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.
20. 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.

21. The Authority has commented that it did not carry out any searches as it did not consider searches to be necessary. The Commissioner disagrees with the Authority's position. As noted above, in its review outcome, the Authority commented that ad hoc arrangements may be made between itself and "Friends" groups in line with the published Guidance. This implies that should a task require specific authorisation, any "Friends" group may contact the Authority to seek approval.
22. If "ad hoc arrangements" were made between a voluntary group and the Authority, the Commissioner considers it reasonable to presume that there might be a written record of such an arrangement, such as an email or file note. He further considers that the Authority should have carried out searches to determine whether any additional information was held which fell within scope of the request and not simply concluded that searches were not necessary.
23. The Commissioner has reviewed a [previous FOISA response](#)¹ issued by the Authority which addressed its 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 ensure their aspirations align with those of the Council and adhere to our Friends Group code of conduct."
24. Given that response, the Commissioner believes it is possible that further information may be held in this case, and the Authority should have carried out searches to determine if that was the case.
25. He requires the Authority to carry out fresh searches for the information requested by the Applicant, focusing on any records of ad hoc agreements or arrangements between the Friends and the Authority for work undertaken on the driveway/entrance to Dalry Cemetery, including the gates.
26. Given the subject matter of the request, the Commissioner considers it likely that at least some of the information is likely to be environmental, and he requires the review outcome to consider any environmental information under the Environmental Information (Scotland) Regulations 2004 (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 has identified all relevant information falling within the scope of 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 **18 November 2024**.

¹ <https://edinburgh.axlr8.uk/documents/37399/37399%20Response.pdf>

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
Deputy Head of Enforcement

4 October 2024