

# Decision Notice

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**Decision 197/2017: Ms Hannah Kirkpatrick and City of Glasgow College**

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**Cost of Threshold Space (Tourism Curriculum)**

Reference No: 201701581

Decision Date: 28 November 2017



Scottish Information  
Commissioner

## Summary

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The College received a request for the total cost of the threshold space relating to its Tourism curriculum study area. The College responded that it did not hold this information.

The Commissioner accepted that the College did not hold the information requested, and that the information was not held on its behalf by a third party. The Commissioner found that the College should have responded to the request in terms of FOISA rather than the EIRs, but did not require the College to take any action.

## Relevant statutory provisions

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (4) (General entitlement); 3(2)(b) (Scottish public authorities); 17(1) (Information not held)

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (definitions (a), (b), (c) and (f) of "environmental information") (Interpretation)

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. The new campus for the City of Glasgow College (the College) opened in 2016. Threshold spaces formed part of the overall design response from Glasgow Learning Quarter (GLQ) to the detailed project brief for the new campus. Each of the main curriculum areas of the College has its own threshold space, giving an indication of its identity.
2. On 16 July 2017, Ms Kirkpatrick made a request<sup>1</sup> for information to the College, which included the following:  
  
"Please advise the total cost of the threshold space formed part of GLQ's overall design response to give an indication of the curriculum area of Tourism's identity (I believe you will have this as recorded information, being the procurement authority, you will have had sight of or must hold documentation either held by yourselves or held by GLQ on your behalf in order for the college to approve the purchases). Should you not hold this information it is my understanding that there is a caveat whereby you can request this information from GLQ that formed part of the project co terms and conditions."
3. The College responded on 26 July 2017. The College explained that the threshold space formed part of GLQ's overall design response to a very detailed project brief for the new campus. As a single contract, the College did not receive a detailed breakdown that indicated costs per space or item. The items in question were not individually specified and procured by the College and, consequently, in terms of regulation 10(4)(a) of the EIRs, the College gave notice that it did not hold the requested information. The College suggested that GLQ might hold the information. (The College also supplied information to Ms Kirkpatrick relating

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<sup>1</sup> [https://www.whatdotheyknow.com/request/threshold\\_space\\_tourism\\_curriculu#incoming-1027951](https://www.whatdotheyknow.com/request/threshold_space_tourism_curriculu#incoming-1027951)

to her other three questions about the threshold space, but that information is not the subject of this decision.)

4. On 28 July 2017, Ms Kirkpatrick wrote to the College requesting a review of its decision on the basis that she believed the College was not only able, but obliged, “to request the cost of these items that GLQ are holding under the terms of the contract.” Additionally, as the items appear on the College’s asset register, Ms Kirkpatrick thought the College should have access to the value of any or all assets so that it could provide required information to the College’s insurers.
5. On 25 August 2017, the College notified Ms Kirkpatrick of the outcome of its review. The College reiterated that the threshold space formed part of GLQ’s overall design response and the College did not receive a detailed breakdown that indicated costs per space or item. The items in question were not individually specified and procured by the College. The College stated that it did not hold, and had never held, this information, nor had it requested that the information should be held on its behalf by the contractor, GLQ, so the relevant project agreement clause did not apply. There was therefore no obligation on the College to request the information from GLQ, and GLQ had no obligation to provide the College with this information. The College advised Ms Kirkpatrick that she might wish to approach GLQ directly for the information.
6. On 3 September 2017, Ms Kirkpatrick applied to the Commissioner 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. Ms Kirkpatrick was dissatisfied with the outcome of the College’s review because she believed the College held the information or, if the information was held by a third party (such as GLQ), it was held on behalf of the College and the College should be able to obtain the information to disclose it. Ms Kirkpatrick also stressed the public interest in transparency of such financial/procurement information and in this context referred to the Scottish Ministers’ Code of Practice on the Discharge of Functions by Scottish Public Authorities under FOISA and the EIRs (“the Section 60 Code”)<sup>2</sup>.

## Investigation

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7. The application was accepted as valid. The Commissioner confirmed that Ms Kirkpatrick 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. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The College was invited to comment on this application and answer specific questions including justifying its reliance on any provisions of FOISA or the EIRs it considered applicable to the information requested.

## Commissioner’s analysis and findings

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

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<sup>2</sup> <http://www.gov.scot/Resource/0051/00510851.pdf>

## EIRs or FOISA?

10. "Environmental information" is defined in regulation 2(1) of the EIRs (the relevant parts of the definition are reproduced in Appendix 1). Where information falls within the scope of this definition, a person has a right to access it under regulation 5(1) of the EIRs, subject to various restrictions and exceptions contained in the EIRs.
11. Ms Kirkpatrick asked for the total cost of the tourism curriculum threshold space. Although she did not express dissatisfaction that her request was dealt with by the College under the EIRs, rather than in terms of FOISA, the Commissioner must consider whether the correct legislation (FOISA or the EIRs) was used. The first question, therefore, is whether the information requested by Ms Kirkpatrick is environmental information.
12. The College explained that "Threshold Space", as it relates to the College's building, is a commonly used term in architecture. The dictionary definition of threshold (in addition to the physical strip of wood or metal between rooms) is the entrance, doorway or gateway to a room or in this case an area of the building. Within that project brief, the College specified that each main curriculum area of the College should have a "threshold space" which helped give an indication of its identity.
13. The College submitted that the information concerned the construction of a new campus for the College and it would fall within either paragraph (a) or (c) of the definition of environmental information in regulation 2(1) of the EIRs. The College referred to the Commissioner's previous decision (*Decision 037/2017 Dr Peter Geoghegan and City of Glasgow College*<sup>3</sup>) where information in relation to the contract for the development of the College's new campus was accepted by the Commissioner as environmental information for the purposes of the EIRs. The College thought that the information requested by Ms Kirkpatrick was similar.
14. The College was asked to describe the threshold space or supply information that would indicate what it was. The College further described the threshold space and supplied photographs of what the College would consider to be threshold spaces. The College explained that the threshold spaces have been "provided to us by the architects and are illustrative of their design concept for the whole building".
15. The College confirmed that the threshold spaces – and therefore the tourism threshold space – are internal to the building. The College supplied the architect's take on threshold space as it relates to the whole building design:

"Departmental thresholds provide visibility and maximise the opportunities for interaction with other disciplines, not just those with direct synergies like computing and business, but with the whole concept of blended learning. People always have more than one interest and by displaying the departments with each of the different threshold designs, students are invited to come in and try out different subjects. The building design directly encourages this interaction."
16. Whilst the Commissioner can understand the College's reasoning why information about the threshold space is environmental information, he has taken a different view. He is not satisfied that the information falls within the definition of environmental information in regulation 2(1) of the EIRs.

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<sup>3</sup> <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2017/201700100.aspx>

17. The information which would fall within Ms Kirkpatrick's request relates to a built structure, but it does not fall within paragraph (f) of the definition of environmental information, which applies to information about a built structure "inasmuch as it is 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)" (see Appendix 1 for the full definition). Ms Kirkpatrick's request was solely about the cost of an internal space in the College building.
18. Given that Ms Kirkpatrick's request was not for environmental information, the College was wrong to respond in terms of the EIRs and, in responding under the EIRs, failed to comply with Part 1 of FOISA.

### **Information not held**

19. Having found that the EIRs were not the correct legislation for dealing with Ms Kirkpatrick's request, the Commissioner will now decide whether the information requested by Ms Kirkpatrick was held by the College and should have been provided under FOISA.
20. The College explained that the threshold spaces are spaces indicative of the aspect of the curriculum taught adjacent to or nearby the particular space. The College explained that the threshold area was:

"...essentially one of four transition areas between other areas of the building and so it would be difficult or impractical even to define where these areas begin and end in our open plan environment. In addition to cost and provide 'total costs' for such spaces one would require to take account of all of the associated common parts such as the roof, external cladding, window, services such as plumbing and heating etc and apportion this per space area. In the same way, we would suggest, by way of further example, that you would not expect to have discrete costs for all meeting spaces or eating spaces in a large building."
21. The College stated that it did not carry out any searches for information covered by the request. From responding to previous information requests, and as advised by the then Deputy Principal who was the Project Owner for the entire project, the College was aware that it did not hold the information.
22. Ms Kirkpatrick argued that "the items detailed" appear on the College's asset register, and the College should have access to the value of any/all assets to be able to provide required information to the College's insurers.
23. The College explained that it had disclosed to Ms Kirkpatrick a room data sheet in its original response which recorded the items in the threshold space, but which did not record the value or purchase price of these assets. It commented that these items do not appear on the College's asset register, which records only significant assets.
24. Ms Kirkpatrick suggested that the College was under a duty to report on such costs to (for example) the Scottish Further and Higher Education Funding Council (the SFC). Ms Kirkpatrick had stated that she had found information disclosed<sup>4</sup> by the SFC regarding the College's "New Build conditions of grant – revised". She drew attention to page 4 section (n) of this document, which states that the College shall provide SFC with full supporting

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<https://www.whatdotheyknow.com/request/401519/response/1003342/attach/9/REVISED%20Revised%20offer%20of%20capital%20grant%20letter%20to%20CoGC%20NPD%20incorporating%20reserves.docx.pdf>

documentation on a quarterly basis (invoices, consultancy fees accounts, etc.). Ms Kirkpatrick submitted:

“... the Revenue funded proponent of the new build the college will have recorded information, and I find it exceptionally disingenuous of the college to claim that they would not hold such information from GLQ, as they will have protocols in place for approving and authorising payment to GLQ for the procurement & fit out of the new build. Due diligence and good financial governance dictate that a world class institution would clearly have recorded information on any procurement, as this is a public body, providing a public service of which The unitary and FM annual costs are being paid put of the public purse. The College must be subject to reporting of this level of financing to SFC, The Scottish Ministers and ultimately the Scottish Parliament.”

25. The College responded that, as this specific information does not exist, it cannot be reported (i.e. to the SFC, Scottish Ministers or the Scottish Parliament).
26. Ms Kirkpatrick suggested that the information, if not held by the College, was held by GLQ on behalf of the College. (Section 3(2)(b) of FOISA provides that, for the purposes of FOISA, information is held by an authority if it is held by a person other than the authority, on behalf of the authority.) Ms Kirkpatrick believed the College was not only able, but obliged, to request the information from GLQ, under the terms of its contract with GLQ.
27. The College denied that it was under any obligation to request the information from GLQ. It acknowledged that it had suggested to Ms Kirkpatrick that GLQ may hold the information, but stated that, after further consideration, GLQ would not hold it, for the reasons already discussed. The College stated that it did not hold, and had never held, the information, and had not asked GLQ to hold it on its behalf, so the relevant project agreement clause (62) did not apply.
28. The standard of proof to determine whether a Scottish public authority holds information is the civil standard of the balance of probabilities. In determining this, the Commissioner will consider the scope, quality, thoroughness and results of the searches carried out by the public authority. He will also consider, where appropriate, any reason offered by the public authority to explain why the information is not held.
29. The Commissioner is satisfied that the College does not hold the information requested by Ms Kirkpatrick.
30. The College has provided a reasonable explanation of why it does not hold information showing the total cost of the threshold space. The threshold space is an architectural term that refers to an area, in this case an interior area. Whilst the threshold space can be identified, it is unlikely to be something that is required to be quantified in terms of a specific cost that must be reported on by the College. The College is also correct to highlight that such a space will, technically, include other aspects of the building (for example, walls, floor or lighting). It may be difficult or impractical even to define where such transition areas begin and end in an open plan environment. These factors add to the likelihood that the College does not hold the information requested by Ms Kirkpatrick.
31. The Commissioner accepts that it, in the circumstances of this case, it was unnecessary for the College to carry out any searches for information in order to respond to Ms Kirkpatrick's request: those involved in responding had experience and knowledge of the subject matter of the request and, accordingly, there was less likelihood of error and misunderstanding.

32. The Commissioner accepts that the requested information is not held by the College itself. Similarly, taking into account all the submissions he has received, the Commissioner accepts that GLQ does not hold the information on behalf of the College. The Commissioner has seen nothing to suggest that GLQ would be required to hold this information on behalf of the College. GLQ is a separate legal entity from the College and has separate legal personality. The contract regulates the relationship between the College and GLQ in terms of any information that may be held by GLQ on behalf of the College. Nothing in the relevant contract clauses suggest the information requested by Ms Kirkpatrick would be held on behalf of the College.
33. Whilst Ms Kirkpatrick is correct to indicate that the College has certain obligations in terms of reporting on its finances, the Commissioner has seen nothing to indicate that such reporting would be at a level of detail which would include costs relating to a threshold area.
34. Finally, the Commissioner accepts that the College was not required to approach GLQ to obtain information covered by Ms Kirkpatrick's request. Only information held by the College (or held on its behalf) at the time of the request requires to be considered here. The Commissioner is satisfied, on the balance of probabilities, that the College does not hold information falling within Ms Kirkpatrick's request, and GLQ does not hold it on behalf of the College.
35. Under section 17(1) of FOISA, a Scottish public authority which is asked for information which it does not hold must give notice that it does not hold the information. The Commissioner accepts that, even though it responded to Ms Kirkpatrick's request in terms of the EIRs, the College gave notice that it did not hold the information she had asked for.

## Decision

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The Commissioner finds that the City of Glasgow College (the College) partially complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Ms Kirkpatrick.

The Commissioner finds that the College was correct to give notice that it did not hold the information, as required by section 17(1) of FOISA. However, the College should have dealt with the request under FOISA rather than under the Environmental Information (Scotland) Regulations 2004. In responding under the EIRs, it failed to comply in full with Part 1 of FOISA.

The Commissioner does not require the College to take any action in response to Ms Kirkpatrick's application.

## **Appeal**

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Should either Ms Kirkpatrick or the College 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**

**28 November 2017**



## Appendix 1: Relevant statutory provisions

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### Freedom of Information (Scotland) Act 2002

#### 1 General entitlement

- (1) A person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority.

...

- (4) The information to be given by the authority is that held by it at the time the request is received, except that, subject to subsection (5), any amendment or deletion which would have been made, regardless of the receipt of the request, between that time and the time it gives the information may be made before the information is given.

...

#### 3 Scottish public authorities

...

- (2) For the purposes of this Act but subject to subsection (4), information is held by an authority if it is held-

...

- (b) by a person other than the authority, on behalf of the authority.

...

#### 17 Notice that information is not held

- (1) Where-

- (a) a Scottish public authority receives a request which would require it either-

- (i) to comply with section 1(1); or  
(ii) to determine any question arising by virtue of paragraph (a) or (b) of section 2(1),

if it held the information to which the request relates; but

- (b) the authority does not hold that information,

it must, within the time allowed by or by virtue of section 10 for complying with the request, give the applicant notice in writing that it does not hold it.

...

## 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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- (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
- (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);
- (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in paragraphs (a) and (b) as well as measures or activities designed to protect those elements;

...

- (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);

...

**Scottish Information Commissioner**

Kinburn Castle  
Doubledykes Road  
St Andrews, Fife  
KY16 9DS

t 01334 464610

f 01334 464611

[enquiries@itspublicknowledge.info](mailto:enquiries@itspublicknowledge.info)

**[www.itspublicknowledge.info](http://www.itspublicknowledge.info)**