



Scottish Information
Commissioner
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Decision Notice 087/2025

Spend of cladding replacement funding

Applicant: Anonymous
Authority: Scottish Ministers
Case Ref: 202401574

Summary

The Applicant asked the Authority for information relating to the spend of £97.1 million received in Barnett consequentials to remediate certain cladding systems on certain residential buildings. The Authority informed the Applicant that it did not hold the information requested. The Commissioner investigated and found that the Authority had been entitled to inform the Applicant that it did not hold the information requested.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (2) (General entitlement) and 47(1) and (2) (Application for decision by Commissioner)

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (definition of “the Act”, “applicant”, “the Commissioner” and “environmental information”) (Interpretation); 5(1) (Duty to make environmental information available on request); 10(1), (2) and (4)(a) (Exceptions from duty to make environmental information available); 17(1), (2)(a), (b) and (f) (Enforcement and appeal provisions)

Background

1. The Scottish Government received £97.1 million in Barnett consequentials following the UK Government’s announcement in March 2020 to remediate certain cladding systems on residential buildings 18 metres and over, where leaseholders would incur the costs or where the costs were a threat to the financial stability of the social housing provider.

2. On 24 September 2024, following a previous request, the Applicant made a new request for information to the Authority. He referred to the above £97.1 million received in Barnett consequentials and said that the money had been “ringfenced by Shona Robison [MSP]”. He asked the Authority to tell him where this money had been “ringfenced to” or what it had been “used for”.
3. The Authority responded on 10 October 2024. It explained that it is for the Scottish Government to decide on the allocation of Barnett consequentials and that all decisions on capital allocations are taken as part of the budget process. It noted that these decisions are finalised in the release of the Scottish Budget, which sets out the Scottish Government’s proposed spending and tax plans for 2021 to 2022. It said this information is publicly available on the Scottish Government’s website, and provided a link to the information.
4. Later the same day, the Applicant wrote to the Authority requesting a review of its decision. He stated that he was dissatisfied with the decision, because to say the £97.1 million received in Barnett consequentials could be used for anything was “surely wrong”. He asked that the Authority tell him what this money was “used for”.
5. The Authority notified the Applicant of the outcome of its review on 17 October 2024, which fully upheld its original decision. It explained that Barnett consequentials that arise from UK spending decisions are not ringfenced – they instead increase the block grant the Scottish Government receives from the UK Government. It was therefore “not possible to show what the consequentials are used for specifically”.
6. On 2 December 2024, 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 it had not told him where the £97.1 million had been spent or when it would be “repaid to fund cladding replacement”. He said he could not understand how £97.1 million received for cladding replacement could be used for anything else.

Investigation

7. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
8. On 13 January 2025, the Authority was notified in writing that the Applicant had made a valid application. The case was subsequently 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. The Authority was invited to comment on this application and to answer specific questions regarding how it established that it did not hold the information requested.

Commissioner’s analysis and findings

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

Application of the EIRs

11. Having considered the subject matter and the terms of the request, the Commissioner accepts the decision of the Authority to deal with the request under the EIRs rather than under FOISA.
12. The Applicant has not disputed the Authority's decision to handle its request under the EIRs, and the Commissioner will consider the information in what follows solely in terms of the EIRs.

Regulation 5(1) – Duty to make environmental information available

13. Regulation 5(1) of the EIRs requires a Scottish public authority which holds the information to make it available when requested to do so by any applicant. This obligation relates to information that is held by the authority when it receives a request.
14. On receipt of a request for environmental information, the authority must ascertain what information it holds falling within the scope of the request. Having done so, regulation 5(1) requires the authority to make the information available, unless a qualification in regulation 6 to 12 applies (regulation 5(2)(b)).
15. 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) – Information not held

16. 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 information is the civil standard of the balance of probabilities. In determining where the balance lies, the Commissioner considers the scope, quality, thoroughness and results of the searches carried out by the public authority.
18. The Commissioner 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.

The Applicant's submissions

19. The Applicant explained that he was dissatisfied with the outcome of the Authority's review because it had not told him where the £97.1 million had been spent or when it would be "repaid to fund cladding replacement".
20. The Applicant said that the Authority had previously told him that only a proportion of the £97.1 million received for cladding had been spend, but he later "heard it had been ringfenced".
21. The Applicant explained that he was dissatisfied with the Authority's explanation that the £97.1 million was Barnett consequential which could be "spent anywhere". He said he could not understand how £97.1 million received for cladding replacement could be used for anything else.

The Authority's submissions

22. As stated above, the Authority received £97.1million in Barnett consequentials following the UK Government's announcement in March 2020 to remediate certain cladding systems on residential buildings 18 metres and over, where leaseholders would incur the costs or where the costs are a threat to the financial stability of the social housing provider. It said that it interpreted the request as being for information on where this £97.1 million in Barnett consequentials had been spent.
23. The Authority explained that the Scottish Government receives a capital block grant from the UK Government which is determined by a formula known as the Barnett formula. If additional public expenditure is planned in England on areas of devolved responsibility, a corresponding addition is made to funding allocated to the Scottish Government (and other devolved administrations). This additional funding is known as Barnett consequentials.
24. The Authority stated that the capital block grant is combined with capital borrowing and other smaller funding sources to make up the total capital budget for the Scottish Government. When allocating funding through the Budget process, the Scottish Government considers the capital budget in its entirety.
25. The Authority submitted that it was therefore not possible to track where funding from specific Barnett consequentials was committed (subject to an exception for Scotwind funded projects and funding for City Deals, which was not relevant to the request in this case).
26. The Authority explained that information on how the capital budget is allocated is publicly available in the Scottish Budget document and subsequent revisions and that it had provided a link to the relevant financial year's budget to the Applicant in its initial response to his request.
27. The Authority also noted that although Shona Robison MSP may have indicated that the funding would be used for cladding, no time frame was given on when the £97.1 million would be spent.
28. During the investigation, the Authority confirmed that it was retrospectively relying on the exception in regulation 10(4)(a) of the EIRs as it did not hold the information requested. It considered its response was clear that the information was not held, but it acknowledged that it had failed to apply the exception in regulation 10(4)(a). The Authority notified the Applicant that it was relying on the exception in regulation 10(4)(a) and also provided him with a link to information available on the Scottish Government website on spending on the cladding remediation programme.

The Commissioner's view

29. The Commissioner has carefully considered the submissions of both the Applicant and the Authority as well as the specific terms of the request.
30. The Commissioner agrees with the Authority that the Applicant's request sought information regarding how the £97.1 million received in Barnett consequentials to remediate certain cladding systems on certain residential buildings had been spent.
31. The Commissioner is satisfied with the Authority's explanation of why it does not hold the specific information requested. In other words, he accepts that the Authority considers the capital budget in its entirety and that it is therefore not possible (subject to an exception that does not apply in this case) for it to track where funding from specific Barnett consequentials is committed or spent.

32. The Commissioner also 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.
33. The Commissioner has considered [comments made by Shona Robison MSP in the Scottish Parliament on 12 May 2022](#)¹, specifically:
- “The terrible tragedy of Grenfell tower exposed the risk that many tall buildings might be clad in materials that make the consequences of fire much worse and the cost of remediation huge. I therefore move to the issue of funding. We received £97.1 million in consequential in 2021-22, and the Government is committed to ensuring that every penny of that and any additional funding that is received for the programme will be invested in assessing buildings and making unsafe buildings safe.”
34. The Commissioner therefore understands why the Applicant believed and expected the specified information to be held by the Authority. However, for the reasons set out above, he is satisfied that this was not the case. He has no locus, in this context, to determine what information an authority ought to record, or how: he is concerned with what information the authority actually holds.
35. The Commissioner therefore concludes that the Authority was correct to give the Applicant notice, in terms of regulation 10(4)(a) of the EIRs, that it did not hold the information requested.
36. While he accepts that the Authority does not (and did not, on receipt of the request) hold the information requested by the Applicant, the Commissioner is nevertheless satisfied the Authority, by providing links to the information relating to the Scottish Budget and the Scottish Government’s proposed spending plans for 2021 to 2022 and to information available on the Scottish Government’s website on spending on the cladding remediation programme, offered appropriate advice and assistance to attempt to provide him with information that might be of interest to him.

The public interest

37. 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.
38. 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.
39. In this case, for the reasons set out above, the Commissioner is satisfied that the Authority does not hold any information covered by the request, and did not do so on receipt of 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.

¹ <https://www.parliament.scot/api/sitecore/CustomMedia/OfficialReport?meetingId=13739>

Decision

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

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.

Euan McCulloch
Head of Enforcement

23 April 2025