



Scottish Information
Commissioner
www.foi.scot

Decision Notice 097/2025

Complaints about sewage in graveyard

Authority: Scottish Borders Council
Case Ref: 202200879

Summary

The Applicant asked the Authority for information held regarding complaints made by the public about sewage erupting in Kirkurd Graveyard. The Authority disclosed information to the Applicant. The Commissioner investigated and found that the Authority had failed to comply with the EIRs in responding to the request. However, he was satisfied that the Authority held no further information relevant to the request beyond that it had already disclosed to the Applicant.

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)

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

Background

1. On 10 December 2021, the Applicant made a request for information to the Authority. She asked the Authority to:

“...supply all documentary evidence/letters/records etc., that surrounds the Kirkurd Graveyard, where the public have/had complained about sewage erupting in the graveyard, where I believe the [Authority] would have been involved mainly during the period 2018-2019, but these dates are not exclusive.”

2. The Authority responded on 12 January 2022, in terms of the EIRs. It provided the Applicant with information “that surrounds the Kirkurd Graveyard, where the public has complained”.
3. On the same day, the Applicant wrote to the Authority requesting a review of its decision. She stated that she was dissatisfied with the decision because she did not believe she had been provided with all information held by the Authority falling within the scope of her request. In particular, she was unhappy that she had not received any complaint responses.
4. On 13 January 2022, the Authority sought clarification of the Applicant's requirement for review and advised her if she was requesting the complaint responses this would be treated as a new request. The Applicant responded the following day to state that she did not consider the Authority had interpreted the scope of her request correctly, but she was prepared to accept the Authority treating the request for complaint responses as a new request.
5. The Applicant advised the Authority that her request had not been interpreted correctly but accepted that the request for complaint responses would be treated as a new request.
6. The Authority notified the Applicant of the outcome of its review on 11 February 2022, which related only to the complaints received by the Authority. It advised the Applicant that there had been four complaints, and that this information had been provided to her as part of its initial response.
7. The Authority responded on 14 February 2022 to the Applicant's request for complaint responses. It did so in terms of FOISA and provided her with the relevant complaint responses in relation to the official complaints it had already disclosed to her.
8. On 15 February 2022 and 22 February 2022, the Applicant sought a review of the Authority's response. She stated that she was dissatisfied with the decision because she did not believe that she had been provided with all information held by the Authority falling within the scope of her request.
9. The Authority notified the Applicant of the outcome of its review on 8 April 2022. This outcome related to her request for complaint responses but it also provided a further review response to her request for complaints received by the Authority. In relation to both requests, the Authority disclosed some further information to the Applicant.
10. On 8 August 2022, 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 she was dissatisfied with the outcome of the Authority's reviews because she did not believe she had been provided with all information held by the Authority falling within the scope of her request.

Investigation

11. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
12. On 20 September 2022, and in line with section 49(3)(a) of FOISA, the Commissioner gave the Authority notice in writing of the application and invited its comments. The Authority provided its comments.

13. The case was subsequently allocated to an investigating officer.
14. The Authority was invited to provide any further comments and to answer specific questions. These related to its interpretation of the request and searches undertaken.

Commissioner's analysis and findings

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

Application of the EIRs

16. 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.
17. The Commissioner is satisfied that the information requested falls within the definition of environmental information in regulation 2(1) of the EIRs.
18. The Authority handled the initial request in terms of the EIRs but handled the request relating to complaint responses in terms of FOISA. However, during the investigation, it accepted this was an error and that it should have also considered this information under the EIRs.
19. Given that the request for complaint responses is properly considered to be for environmental information, the Authority had a duty to consider it in terms of regulation 5(1) of the EIRs. In failing to do so, the Authority failed to comply with regulation 5(1).
20. In what follows, the Commissioner will therefore consider this case solely in terms of the EIRs.

Interpretation of the request

21. As rehearsed earlier, the Applicant and Authority had differing interpretations of the scope of the request.
22. During the investigation, the Authority was asked to comment on its interpretation of the request. It explained that at the time of the Applicant's request it was "in several conversations" with her and that the focus of her correspondence related to the volume and content of complaints with no indication that she was interested in complaint responses.
23. In that context, the Authority said it focused on the wording of the request which sought information "where the public had complained". It accepted this interpretation could be considered narrow but explained this matched with the correspondence with the Applicant at that time. It added that it was "perhaps reasonable to consider that if responses were desired, the request could easily have included this element".
24. The Commissioner has carefully considered the wording of the Applicant's request, which asked for "all documentary evidence/letters/records etc., that surrounds the Kirkurd Graveyard, where the public have/had complained about sewage erupting in the graveyard..."
25. The Commissioner acknowledges the Authority's submissions, and he does not regard its interpretation of the request inexplicable. However, he considers the request was intended to also encompass responses to complaints made by the public regarding sewage erupting

in Kirkurd Graveyard. In his view, a more reasonable interpretation of the request would therefore have included this information.

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

26. Regulation 5(1) of the EIRs (subject to the various qualifications contained in regulations 6 to 12) requires a Scottish public authority which holds environmental information to make it available when requested to do so by any applicant. This obligation relates to the information held by an authority when it receives a request. Under the EIRs, a public authority may refuse to make environmental information available if one or more of the exceptions in regulation 10 apply.
27. 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.
28. The Commissioner also considers, where appropriate, any reason 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 as to what information the authority should hold, ultimately 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 Applicant's submissions

29. In her appeal, the Applicant explained that she still did not believe she had been provided with all the information she requested. She considered complaints/responses made from other complainants and/or their MPs/MSPs were missing.
30. During the investigation, the Applicant provided the Commissioner with an email sent to the Authority on 4 April 2012 relating to problems caused by sewage leaking into Kirkurd Graveyard. She considered that the Authority would have had this document on file, but that it had failed to disclose it in response to her request. She raised concerns that the Authority had withheld other complaints letters from her.

The Authority's submissions

31. The Authority explained that the initial search was undertaken by officers from Building Standards, Cemeteries and Resilient Communities. It said it was aware of the context of the request from previous correspondence and requests from the Applicant and it considered Building Standards and Cemeteries would be the most suitable areas to search, along with the corporate complaints system (using the keyword "Kirkurd").
32. When further information was received from the Applicant, the Authority undertook further searches that included individual officers within Neighbourhood Services (which has some responsibility for cemeteries), personal assistants to the Chief Executive and a Senior Business Support Officer. It explained it did this to determine if the complaints to which the Applicant had referred had been responded to as "business as usual", meaning they would not be recorded within the corporate complaints system.
33. The Authority stated that both staff worked email accounts, and the corporate complaints system had therefore been searched to identify relevant information.

34. The Authority advised that at the time of the request its corporate complaints system was “email notification based to work-based computers”. This was to ensure information was circulated to relevant officers. This is why relevant individual officers were asked to check their email accounts. It submitted there was no question of information being held locally or on computer hard drives.
35. The Authority explained that the corporate complaints system at that time was the document storage facility to log and manage complaints. It should therefore have contained all information relevant to the request, which is why the initial searches had focused on this system. However, as stated above, it identified some further information after undertaking further searches to identify complaints that might predate the corporate complaints system or have been responded to as “business as usual”.
36. The Authority also advised that it followed the Scottish Council on Archives (SCARRS) retention schedules. As such, the retention period for complaints was five years.

The Commissioner's view

37. The Commissioner has taken account of the submissions provided by the Applicant, in which she explained why she believed that the Authority held further information falling within the scope of her request.
38. As stated above, the Authority notified the Applicant on 11 February 2022 of its review outcome regarding complaints received. However, it later issued a further review outcome on 8 April 2022 regarding both the complaints received and the responses provided. As part of this further review outcome, it disclosed some further information regarding complaints received.
39. In this respect, the Commissioner must find that the Authority failed to comply with regulation 5(1) of the EIRs. This information should have been identified, located and provided (at the latest) as part of the Authority’s review outcome on 11 February 2022.
40. Having considered all relevant submissions and the nature of the information requested, the Commissioner accepts that (by the time of its 8 April 2022 review outcome) the Authority took adequate, proportionate steps in the circumstances to establish what information it held falling within the scope of the request.
41. The Commissioner considers that the Authority’s searches were reasonable, in the sense of who it asked to carry out the searches and the locations searched; he finds that they would be capable of locating the information requested.
42. As stated above, the Applicant provided the Commissioner with an email dated from 2012 regarding a complaint made by a member of the public about sewage erupting in Kirkurd Graveyard. She believed this information should have been disclosed in response to her request. However, the Authority has provided evidence that it disclosed a redacted version of this email to the Applicant. This followed her providing further details regarding information she believed had been omitted from the Authority’s response.
43. Whether the email dated from 2012 should have been retained (in view of the Authority’s submissions on the retention schedules it follows) is not a matter for the Commissioner: his remit is limited to establishing what records exist and the extent to which the information actually requested is held.
44. As stated above, the Commissioner is satisfied that the Authority has taken adequate, proportionate steps in the circumstances to establish what information it held falling within

the scope of the request. He accepts, notwithstanding the email dated from 2012, that the reason the Authority does not hold more historical information falling within the scope of the request is likely because such information has been destroyed in accordance with its retention schedules, and therefore it no longer holds that information.

45. While the Applicant believed and expected further information to be held by the Authority, the Commissioner is satisfied that this was not the case. Whether a public authority should hold information which it does not hold is not a matter for the Commissioner to decide
46. In all the circumstances, the Commissioner is satisfied, on the balance of probabilities, that the Authority does not (and did not, on receipt of the request) hold further information falling within scope of the Applicant's request, beyond that already disclosed to her.
47. The Commissioner is aware that this decision relates to one of many requests made to the Authority for similar information in the same subject area, in relation to issues which have been in contention between the Applicant and the Council for a long time. The failure of the Authority's information holdings to meet the Applicant's expectations, in particular, appears to be a recurring theme (but not one, in the circumstances, which the Commissioner is really in any position to address). In all the circumstances, it is not entirely clear to the Commissioner how continuing requests in this area are bringing the issues in question (which the Commissioner acknowledges are of genuine concern to the Applicant, and others) any closer to resolution. The Commissioner would urge the Applicant to consider this carefully before making further requests – and, indeed, consider whether continuing requests for information are the most effective way of taking these matters forward.

Decision

The Commissioner finds that the Authority failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 and with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by the Applicant.

The Commissioner finds that the Authority failed to comply with regulation 5(1) of the EIRs by failing to:

- recognise and respond to the request for complaint responses as a request for environmental information
- identify, locate and provide all relevant information it held in response to the Applicant's request for complaint responses.

Given that the Authority identified and located all the relevant information it held by the close of the investigation (which it has disclosed to the Applicant), the Commissioner does not require the Authority to take any action regarding 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.

Euan McCulloch
Head of Enforcement

25 April 2025