



Scottish Information
Commissioner
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Decision Notice 161/2025

Property information

Applicant: The Applicant
Authority: City of Edinburgh Council
Case Ref: 202400930

Summary

The Applicant asked the Authority for communications between the Authority's officials and personnel of a named company concerning the sale of land, property development and planning applications relating to the former "Smithies" public house at 49-51 Eyre Place and the adjacent land. The Authority disclosed some information but withheld other information under exceptions in the EIRs. The Commissioner investigated and was satisfied that the Authority did not hold any further recorded information that fell within scope of the Applicant's request.

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") (Interpretation); 5(1) (Duty to make environmental information available on request); 10(1) and (5)(e) (Exceptions from duty to make environmental information available); 17(1), (2)(a), (b) and (f) (Enforcement and appeal provisions).

Background

1. On 2 April 2024, the Applicant made a request for information to the Authority. He asked for:
"copies of all communication and correspondence, including letters, emails, meeting minutes, notes of meetings and other electronic communications between [the Authority's] officials

and [named persons], and other principals, staff, contractors and representatives of Eyre Place Properties Ltd. during the period 1st January 2024 to 31st March 2024 concerning the sale of land, property development and planning applications relating to the former 'Smithies' public house at 49-51 Eyre Place and the adjacent land 20m north east of 74 Eyre Place, Edinburgh."

2. The Applicant had made a previous request to the Authority on 24 January 2024 for similar information, though with a different date range. The previous request was the subject of the Commissioner's [Decision 274/2024](#)¹.
3. The Authority responded to the Applicant's request on 30 April 2024. It provided some information to the Applicant but withheld other information under the exceptions in regulations 10(5)(f) and 11(2) of the EIRs.
4. On 12 May 2024, the Applicant wrote to the Authority requesting a review of its decision. He stated that he was dissatisfied with the Authority's decision because he was "unsatisfied that all the relevant information held by the [Authority] has in fact been identified and released."
5. The Authority notified the Applicant of the outcome of its review on 27 June 2024. It identified some further information that had been omitted from the original response. It also identified several documents that were marked as "public" were not actually viewable via the public portal and explained that it had rectified this so these documents could now be accessed.
6. On 6 July 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 he was still not satisfied that the Authority had identified and provided him with all relevant information falling within the scope of his request.

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 26 May 2024, 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.

Commissioner's analysis and findings

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

¹ <https://www.foi.scot/decision-2742024>

Scope of the investigation

11. Although the Authority withheld information under the exceptions in regulations 10(5)(f) and 11(2) of the EIRs, the Applicant's requirement for review expressed dissatisfaction only in relation to his belief that the Authority had failed to identify all relevant information falling within the scope of his request.
12. Any issues raised in an application which were not raised by an applicant in their requirement for review (unless it relates to an issue first raised in the review outcome) cannot be considered by the Commissioner. He therefore cannot reach a decision on the Authority's application of the exceptions in regulations 10(5)(f) and 11(2) of the EIRs as these were not challenged in the Applicant's requirement for review.
13. The Commissioner's decision notice in this case will therefore only consider whether the Authority has identified all relevant information falling within the scope of the Applicant's request.

Application of the EIRs

14. Having considered the information requested (which relates to a specified planning application), the Commissioner is satisfied that the information sought by the Applicant is properly considered to be environmental information, as defined in regulation 2(1) of the EIRs (in particular, paragraphs (a) and (c) of that definition).
15. The Applicant has not disputed the Authority's decision to handle the 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 available environmental information on request

16. Regulation 5(1) of the EIRs (subject to the qualifications 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 information held by the authority when it receives a request.
17. Under the EIRs, a public authority may refuse to make environmental information available if one or more of the exceptions in regulation 10 apply and, in all the circumstances of the case, the public interest in maintaining the exception or exceptions outweighs the public interest in making the information available.
18. The standard of proof to determine whether a Scottish public authority holds the information is the civil standard of the balance of probabilities. In determining where the balance of probabilities lies, the Commissioner considers the scope, quality, thoroughness and results of the searches carried out by the public authority.
19. 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

20. The Applicant was concerned that all the information held by the Authority that fell within his request had not been identified by the Authority. Despite his request relating to the sale of

land owned by the Authority, the information supplied by the Authority contained (in the Applicant's opinion) "very limited or no information or correspondence" concerning:

- the land sale process, including legal or contractual aspects, sales advertising, competitive sale vs direct award processes, draft/proposed contract conditions, phasing timetable/longstop date etc
- neighbour notification and consultation
- complaints handling.

21. The Applicant commented that this land sale was subject to numerous formal complaints to the Authority by residents and MSP/MP correspondence with the Authority's Chief Executive. He also referred to a submission having been made to the Scottish Public Services Ombudsman (SPSO) about the case.

22. The Applicant explained that his main concern was that the Authority appeared to have misinterpreted the wording of his request, which was not limited to specific individuals. He emphasised that his request was for:

"...copies of all communication and correspondence, including letters, emails, meeting minutes, notes of meetings and other electronic communications between [the Authority's] officials and [named persons] and other principals, staff, contractors and representatives of Eyre Place Properties Ltd".

23. The Applicant added that he would also have expected the Authority to have identified and provided correspondence between it and all representatives of Eyre Place Properties Ltd, not just the named individuals – and especially with any legal representatives of Eyre Place Properties Ltd (albeit with relevant redaction).

24. Following the issue of Decision 274/2024, the Applicant provided further comments to the Commissioner that he asked to be taken into consideration as part of his decision notice in this case. He referred to paragraph 24 of Decision 274/2024, which he paraphrased as follows:

"The Authority stated there was no reasonable need to extend the search beyond [the 'case management folder'] as a 'full set of information' was required to be retained at service level."

25. The Applicant believed it most unlikely that the respective officers assigned to the project were limited to those working within the Authority's Planning and Estates departments. He suggested that many of the legal aspects of the case would be handled by staff within the Authority's own legal team. The absence of any information of a legal nature would suggest that these were held elsewhere, thus necessitating a wider search to identify relevant information for release.

26. The Applicant also referred to the following extract from paragraph 27 of Decision 274/2024:

"The Authority confirmed that all information in scope had been provided. It explained that information relating to the sale was discussed in public at the Authority's Finance and Resource Committee..."

27. The Applicant said that the sale of land at Eyre Place was noted as approved in the minutes of the Authority's [Finance and Resource Committee](#)² on 26 January 2023. However, there is no record of any public discussion having taken place, either in the minutes or in the [webcast](#)³ of the meeting (which appears to end without the item having been raised).
28. The Applicant also noted that paragraph 31 of Decision 274/2024 stated that the Authority considered "any internal correspondence of a legal nature" fell outwith the scope of the request.
29. The Applicant submitted that this suggested the Authority considered external correspondence of a legal nature (i.e. that with representatives of Eyre Place Properties Ltd) to be within the scope of the request. However, the Authority did not provide any information of this nature covering a period of three years. He considered it would be reasonable to expect that the sale of public land would require communication between Authority officials, including their legal team, and Eyre Place Properties Ltd's legal representatives (which should have been released, albeit with necessary redactions).
30. The Applicant concluded that:

"Taken together, the issues outlined above call into question some of the evidence provided to the Commissioner in the Authority's submissions. Due to these inconsistencies, I would be very grateful if the Commissioner was able to review the reasonableness of the Authority's interpretation of the request".

The Authority's submissions

31. During the investigation, the Authority was asked how it had established what recorded information was covered by the Applicant's request and to describe the searches carried out, including the records searched and any keywords or search parameters used.
32. The Authority's submissions were similar to those provided for as part of Decision 274/2024. The Authority confirmed that it had used the same methodology for interpreting and assessing the present request and that its submissions and clarifications for the previous request were equally applicable to the request in this case.
33. The Authority said that it had contacted its Planning and Estates departments and discussed the Applicant's request with the officers assigned to the specific project. Those officers advised that, as part of business-as-usual processes, all relevant information for the sale of Authority-owned land and subsequent planning development was held within a "case management folder" as a "full set of information" was required to be retained at a service level. As a result, there was no reasonable need to extend the search beyond this to identify the information within scope.
34. The Authority as acknowledged that it had received several complaints about this development, a point made by the Applicant, some of which were appealed to the SPSO. It submitted that the respective services in the Authority were therefore fully aware of what information was held, by which officers and where it was held. It also noted that it was aware of ongoing complaints. However, given its interpretation of the request, it considered that information fell outwith the scope of the request. It also explained that there may have been

² <https://democracy.edinburgh.gov.uk/documents/s55594/4.1%20-%20Minute%20of%2026%20January%202023%20-%20FR.pdf>

³ https://edinburgh.public-i.tv/core/portal/webcast_interactive/739099/start_time/147000

communication between Authority officials, which it also considered would have fallen outwith the scope of the request.

35. The Authority explained that the Applicant's request was interpreted as seeking communications between the named individuals and others associated with Eyre Place Properties Ltd and the Authority. It stated that "all such information was provided". It stated that the staff involved worked closely on this project and were aware of the persons associated with Eyre Place Properties Ltd..
36. The Authority clarified that its reference to a "full set of information" meant all the information that was required for business purposes. It also confirmed that all communication and correspondence, including letters, emails, meeting minutes, notes of meetings and other electronic communications" would have been retained to the case management folder, and that the officers assigned to the project in question were the only officials of the Authority who had communicated with Eyre Place Properties Ltd in relation to the matter specified in the request.
37. During the investigation, the Authority was asked to comment on the specific points raised by Applicant which explained why he considered more information was held by the Authority than identified and disclosed. The Authority confirmed that all information in scope had been provided. It explained that information relating to the sale was discussed in public at the Authority's Finance and Resource Committee, and all planning matters, including neighbour notification and consultation, were in the public domain.
38. The Authority suggested that the Applicant might have felt the scope of his request was wider than it was. It explained that it interpreted the request in line with its specific terms, which asked for communication and correspondence between the Authority's officials and named persons (and other principals, staff, contractors and representatives) of Eyre Place Properties Ltd.
39. The Authority was asked to clarify further the type of information it had excluded as not falling within the scope of the request, but that may have been expected by the Applicant (as suggested by the dissatisfaction expressed in the Applicant's application to the Commissioner) to have fallen within the scope of his request.
40. The Authority responded that it interpreted the request as seeking communications between officials of the Authority and persons (not limited to those specifically named) of Eyre Place Properties Ltd between the dates specified in the request only. It considered the following information fell outwith the scope of the request:
 - any internal emails (e.g. communications between officials of the Authority)
 - any information (if held) relating to discussion of any complaint
 - any internal correspondence of a legal nature
 - recorded information that related to other third parties (i.e. not to those involved with Eyre Place Properties Ltd).
41. The Authority confirmed that no other correspondence or communications from "other principals, staff, contractors and representatives of Eyre Place Properties Ltd" was omitted from its searches, which included all the terms in the request, all the names specified and Eyre Place Properties Ltd to ensure completeness.

42. The Authority repeated that it was likely it held information relating to legal/contract elements of this project. However, it stated this information would not fall within the scope of the Applicant's request, as it would not be between Authority officers and Eyre Place Properties Ltd. It did not interpret the request to include correspondence between internal offices – if it had, more information might have been considered within scope and subsequently made available to the Applicant (e.g. between officers within the Planning and Estates and Legal teams).
43. The Authority was asked specifically about one document that it had disclosed to the Applicant (and which was available on its FOI disclosure log) from agents acting on behalf of Eyre Place Properties Ltd. The Authority was asked to confirm that it held no further information from these agents falling within the scope of the Applicant's request. The Authority responded that it had discussed the matter with the Head of Estates (who led on the project in question and the subsequent information requests) who had confirmed that no further correspondence from the agents had been identified in the searches undertaken by the Authority.
44. Regarding the Applicant's point about the Authority's Finance and Resource Committee on 26 January 2023, the Authority commented that this qualified as a "public discussion". The matter of the proposed sale of the land in question was a "routine decision" item on the agenda, therefore, unless an elected member flagged it for discussion at committee or a member of the public asked to speak under deputations, it would not have been discussed. However, there was an opportunity for both an elected member and the public to make representations on the item if they chose to do so.

The Commissioner's view

45. The Commissioner has taken account of the submissions provided by the Applicant, in which he explained why he believed that the Authority held further information falling within the scope of his request.
46. Having closely considered the terms of the request and the submissions provided by the Authority, the Commissioner is satisfied that the Authority's interpretation of the request was reasonable and not unduly narrow.
47. The Commissioner also accepts that the Authority took adequate and proportionate steps to establish the information it held which fell within the scope of the Applicant's request and he is satisfied, on the balance of probabilities, that it does not (and did not, on receipt of the request) hold any further relevant information. He considers the Authority's searches were reasonable in the sense of those tasked to carry them out and the locations searched.
48. Having considered the case in detail, in particular the submissions provided by the Authority and the subject matter and scope of the request, the Commissioner is satisfied that the Authority does not (and did not, at the time the request was received) hold any further recorded information. While the Applicant believed and expected further information to be held by the Authority, the Commissioner is satisfied that this was not the case.
49. In all the circumstances, therefore, the Commissioner is satisfied, on the balance of probabilities, that the Applicant has received all the information held by the Authority that falls within the scope of his request. He therefore finds that, in this respect, the Authority complied with regulation 5(1) of the EIRs in responding to the request.

Decision

The Commissioner finds that the Authority complied with the Environmental Information (Scotland) Regulations 2004 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

26 June 2025