



Scottish Information
Commissioner
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Decision Notice 023/2026

Relocation of Lenzie Academy and Scape Scotland

Applicant: The Applicant

Authority: East Dunbartonshire Council

Case Ref: 202400931

Summary

The Applicant asked the Authority for information held, sent or received by it in relation to Scape Scotland. After initially withholding some information, the Authority informed the Applicant that it did not hold any information falling within the scope of his request. The Commissioner investigated and found that some of the information initially identified by the Authority might fall within the scope of the Applicant's request and required the Authority to reconsider this and provide a revised 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).

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (definition of "the Act", "applicant" and "the Commissioner" and paragraphs (a) and (c) of definition of "environmental information") (Interpretation); 5(1) (Duty to make environmental information available on request); 9(1) and (3) (Duty to provide advice and assistance); 10(1), 10(4)(a) (exceptions from duty to make environmental information available); 17(1), (2)(a) and (b) (Enforcement and appeal provisions).

Background

1. On 28 February 2024, the Applicant made a multi-part request for information to the Authority. He noted that at the full Council meeting on 14th December 2023, the Authority

made public a document relating to the relocation of Lenzie Academy to Whitegates Park, Lenzie and that the document (Scape Scotland) referred to the following;

- (i) A Site Investigation (SI) document carried out during the ASN school feasibility study.
- (ii) The open space strategy (seeking a link to the OSS being referred to).
- (iii) The Holmes Miller study being referred to.
- (iv) The Authority's application for LEIP funding

And that he was seeking all information held, sent or received by the Authority in relation to these documents and a copy of the documents, and in addition

(v) all information held, sent or received by the Authority in relation to Scape Scotland.

2. The Authority responded on 27 March 2024 when it provided the information held in relation to parts (i) to (iii) above, alongside a link to information which would fulfil part (iv) of the request. It also provided a link to general information regarding Scape Scotland. In relation to information from Scape Scotland to any officers in the Authority regarding the proposed Lenzie Academy development at Whitegates Park (part (v) of the request), the Authority considered this information to be exempt from disclosure under sections 30(b)(i) and (ii) of the Freedom of Information (Scotland) Act 2002 (FOISA), as it contained the views and opinions of officers that were provided in confidence, without the expectation that they would be made public. The Authority considered the balance of the public interest to lie in maintaining the exemptions in this case. as the effective delivery of this and other similar major projects required officers to freely share and exchange information.
3. On 6 April 2024, the Applicant wrote to the Authority requesting a review of its decision. The Applicant stated that he was dissatisfied with the decision because he did not agree with the Authority's reliance on sections 30(b)(i) and (ii) of FOISA, as he considered, in the circumstances, that the balance of public interest favoured release and outweighed the Authority's refusal to release the information.
4. The Authority notified the Applicant of the outcome of its review on 9 May 2024. It noted its understanding that the request related to the Lenzie Academy project. The Authority referred to the link provided to Scape Scotland's website and noted that Scape Scotland provided direct award frameworks for appointing contractors. The Authority also explained that it had an existing arrangement with Scape Scotland that predated the Lenzie Academy project and as such no correspondence with Scape Scotland was required to utilise their frameworks to appoint contractors for this project. The Authority stated that having reviewed the records there were none that met the request, and the Applicant should have been advised under regulation 10(4)(a) of the Environmental Information (Scotland) regulations 2004 (EIRs) that the information was exempt as it was not held by the Authority. It therefore partially upheld the initial response in that all relevant records had been provided, but that it had erred in that the initial response sought to apply exemptions under FOISA rather than the EIRs.
5. On 7 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 he was dissatisfied with the outcome of the Authority's review because he believed information he originally requested was held and was being withheld, as the Authority had confirmed in its initial response the information it held related to "the free and frank provision of advice or exchange of views for the purposes of

deliberation". He did not consider that the information the review claimed was not held (that related to appointment of contractors) was the same information. He also did not agree with the Authority's public interest argument (in relation to its initial reliance on section 30(b)(i) and (ii) of FOISA).

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 8 October 2024, the Authority was notified in writing that the Applicant had made a valid application. The Authority was asked to send the Commissioner the information withheld from the Applicant (at the time of its response to his request). The Authority provided the information and the case was allocated to an investigating officer.
8. 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. These related to why it considered the information requested by the Applicant to be environmental, why it considered that the information initially identified in its response to the Applicant's request did not fall within the scope of the request and why it considered it did not hold any (further) information within the scope of part (v) of the request. Submissions were also sought from the Authority on its consideration of the application of the public interest test.

Commissioner's analysis and findings

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

Application of the EIRs

10. In its initial response the Authority processed and responded to the Applicant's request under the FOISA, but then in its review response determined that the request should have been responded to under the EIRs, having concluded that the information was environmental information as defined in regulation 2(1) of the EIRs.
11. Where information falls within the scope of the definition "environmental information" in regulation 2(1) of the EIRs, a person has a right of access to it (and the public authority a corresponding obligation to respond) under the EIRs, subject to various restrictions and exceptions contained within the EIRs.
12. The Authority considered that the request related to the development of a new school, which would have clear impacts on the environment. It also noted that Scape Scotland supported the procurement of resources for building and development projects, and as such their work related to projects that would affect the environment, most notably the built environment.
13. The Applicant has not disputed the Authority's decision to handle the request under the EIRs.
14. The Commissioner is satisfied, in the circumstances, that the information requested by the Applicant falls within the definition of environmental information set out in regulation 2(1). In particular he would consider the request to fall within paragraphs (a) (Elements of the

environment) and (c) (Measures and activities) as the request related to information associated with the design, development and building of a new school and the awarding of contracts related to that. The building and land associated with it would be an element of the environment and the planning and activities around engaging contractors would fall within the measures and activities associated with such a project.

15. In the circumstances, the Commissioner will consider the case, in what follows, solely in terms of the EIRs.

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

16. Regulation 5(1) of the EIRs 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 that is held by the authority when it receives a request.
17. On receipt of a request for environmental information, therefore, 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 that information available, unless a qualification in regulations 6 to 12 applies (regulation 5(2)(b)).
18. Under the EIRs, a public authority may refuse to make environmental information available if one of the exceptions in regulation 10 apply and, in all the circumstances, the public interest in making the information available is outweighed by that in maintaining the exception.
19. In this case, the Authority submitted that it was relying on the exception in regulation 10(4)(a) of the EIRs as it did not consider that it held recorded information falling within the scope of part (v) of the Applicant's request.

Regulation 10(4)(a) – Information not held

20. Regulation 10(4)(a) of the EIRs states that a Scottish public authority may refuse to make environmental information available to the extent that it does not hold that information when the applicant's request is received.
21. 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 lies, the Commissioner considers the scope, quality, thoroughness and results of the searches carried out by the public authority.

Withheld information

22. In its initial response to the Applicant, the Authority identified information it had deemed to fall within the scope of part (v) of the Applicant's request, which it withheld (albeit under FOISA rather than the EIRs). In its review outcome, its position changed and it determined that it held no information falling within the scope of part (v) of the Applicant's request.
23. The Commissioner has seen the information that was initially identified as being within scope, comprising 11 documents.

The Authority's submissions

24. The Authority submitted that its interpretation of part (v) of the Applicant's request was that the information requested was specific to correspondence exchanged between it and Scape Scotland in relation to the Lenzie Academy project. It noted that whilst it had overarching agreements in place to deliver projects through Scape Scotland, it did not require anything specifically to be exchanged between parties for the Lenzie Academy project.

25. The Authority considered that it had not required any searches to be undertaken as the initial response had been given by the Service manager with responsibility for delivering capital projects through Scape Scotland, who had a detailed knowledge of how the mechanism was administered and worked in practice.
26. The Authority's view was that the information identified at the time of its response was not information that was exchanged between it and Scape Scotland with regard to the Lenzie Academy project and so was not within the scope of part (v) of the request. It noted that should the Applicant require information on the Authority's wider relationship with Scape Scotland, it was happy to process such a request for information.

The Applicant's submissions

27. The Applicant noted in his application to the Commissioner that he was not able to disagree with the Authority's position that regulation 10(4)(a) applied to "information about the appointment of contractors", as the information the Authority had confirmed to him that it held in its initial response related to the "free and frank provision of advice or exchange of views for the purposes of deliberation". He did not believe the information the Authority claimed not to hold in its review outcome was the same as the information it had withheld in its initial response. He did not agree with the Authority's position that all relevant records had been provided to him.
28. The Applicant highlighted that he did not consider the Authority's review outcome addressed his request for all information held, sent or received by it in relation to Scape Scotland. He noted that its review outcome only related to information about the appointment of contractors, and that it did not respond in respect of information held or otherwise which did not relate to contractors. In addition, he mentioned that no information had been provided about the claimed "existing arrangement with Scape Scotland" or the significance of that arrangement pre-dating the Lenzie Academy project.

The Commissioner's view

29. The Commissioner can understand the Applicant's perspective, in that information the Authority initially considered to fall within the scope of part (v) of his request was identified and withheld in its original response to him. The use of the exemptions in section 30(b)(i) and (ii) of FOISA by the Authority, which consider information is exempt information if its disclosure would or would be likely to inhibit substantially the free and frank provision of advice and/or exchange of views for the purposes of deliberation, may have led the Applicant to form a view, rightly or wrongly, as to the content of this information.
30. The fact that the Authority, correctly, determined at review that the request fell to be considered under the EIRs rather than FOISA does not alter that its initial response led the Applicant to believe that some information relating to Scape Scotland and the Lenzie Academy project existed and was held by it.
31. The Commissioner recognises that the Authority's interpretation of part (v) of the Applicant's request in its review outcome focused solely on whether it held correspondence between it and Scape Scotland on the appointment of contractors in relation to the Lenzie Academy project.
32. The Commissioner agrees with the Applicant that this is a very narrow interpretation and he considers this forms only part of what was actually asked for, which was all information held, sent or received by the Authority in relation to Scape Scotland. The Commissioner's view is that this is wider than correspondence between the Authority and Scape Scotland and may

also have included any discussions and/or correspondence within the Authority relating to Scape Scotland and the Lenzie Academy project.

33. The Commissioner can accept, given the Authority's explanation of the framework, that no correspondence between it and Scape Scotland in relation to the Lenzie Academy project was held.
34. However, the Commissioner has considered the information that was initially identified by the Authority as falling within the scope of part (v) of the Applicant's request and is of the view that some of this appears to fall within scope of this part of the request.
35. He also notes that, given the Authority's interpretation of the scope of the request, it had not considered searches, in addition to any carried out at the time of the initial response, were necessary. The Commissioner has not seen any evidence of these searches, and therefore cannot be satisfied, on the balance of probabilities, that the Authority holds no further information falling within the scope of part (v) of the Applicant's.
36. The Commissioner therefore, finds that the Authority was not correct to rely on regulation 10(4)(a) with regard to information which would fulfil part (v) of the Applicant's request and he requires the Authority to carry out further searches and to reconsider the information provided to the Commissioner, in light of an appropriately wider interpretation of this part of the Applicant's request, and provide a new review outcome in this respect.
37. As the Commissioner finds that the Authority was not entitled to rely on regulation 10(4)(a) of the EIRs, he is not required to go on to consider the application of the public interest test in regulation 10(1).

Regulation 9 – Duty to provide advice and assistance

38. Regulation 9 of the EIRs requires a Scottish public authority to provide advice and assistance to applicants, so far as it would be reasonable to expect it to do so.
39. Regulation 9(3) of the EIRs provides that a Scottish public authority shall be taken to have complied with this duty if it conforms with the relevant Code of Practice (in relation to the provisions of advice and assistance).
40. The Scottish Ministers' Code of Practice on the discharge of functions by Scottish public authorities under FOISA and the EIRs ([the Section 60 Code](#)¹) states (at paragraph 5.1 in Part 2):

“Authorities should offer advice and assistance at all stages of a request.

Authorities have a duty to provide advice and assistance at all stages of a request. It can be given either before a request is made, or to clarify what information an applicant wants after a request has been made, whilst the authority is handling the request, or after it has responded.”

41. The purpose of the review process is to allow a Scottish public authority to reconsider the way it has responded to a request for information and decide whether it has complied with its duties, or whether any steps are necessary to remedy any breaches of these duties. The Authority did alter its position in its review outcome, which it was entitled to do. However, it did not explain to the Applicant why it now considered the EIRs was the more appropriate legislation or why it believed no information was held which would fulfil part (v) of the request,

¹ <https://www.gov.scot/publications/foi-eir-section-60-code-of-practice/>

when initially it had identified and withheld some information. Furthermore, the Authority failed to set out its consideration of the application of the public interest test in regulation 10(1)(b), in respect of its reliance on regulation 10(4)(a) of the EIRs.

42. During the investigation, the Authority provided submissions to the Commissioner as to why correspondence between it and Scape Scotland relating to the Lenzie Academy project would not have been necessary. The Commissioner considers that, in line with paragraph 9.3.1 of the Section 60 Code, the Authority could also have provided further explanation to the Applicant on these reasons in its review outcome, to allow him to better understand its position.
43. As appropriate explanations were provided during the investigation, as recorded in this decision at paragraph 24, the Commissioner does not require the Authority to take any further action in relation to this.

Decision

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

The Commissioner finds that by relying on regulation 10(4)(a) with regard to part of the Applicant's request relating to correspondence between it and Scape Scotland associated with the Lenzie Academy project, the Authority complied with the EIRs.

However, by relying on regulation 10(4)(a) with respect to the rest of part (v) of the Applicant's request (when it was not entitled to do so, in breach of regulation 5(1)), and by failing to provide reasonable advice and assistance in accordance with regulation 9(1) and (3), the Authority failed to comply with the EIRs.

The Commissioner therefore requires the Authority to:

- reconsider whether any of the information it identified in its initial response (documents provided to the Commissioner as withheld information) fall within part (v) of the Applicant's request,
- to carry out further searches for information within scope (and retain evidence of these), and
- provide the Applicant with a revised review outcome (in terms of regulation 16 of the EIRs) in respect of part (v), either disclosing the information which falls within scope or explaining why (in accordance with any relevant provision in the EIRs, except regulation 10(4)(a)) the information cannot be disclosed.

The Commissioner requires the Authority to do this by **7 April 2026**.

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.

Euan McCulloch
Head of Enforcement

20 February 2026