

Decision Notice 075/2022

Cost of cleaning up cigarette butts

Applicant: The Applicant

Public authority: University of Edinburgh

Case Ref: 202101276



Scottish Information
Commissioner

Summary

The University was asked about the cost of cleaning up cigarette butts. The University notified the Applicant that it held no recorded information which would fulfil the request. Following an investigation, the Commissioner was satisfied that the University did not hold the information requested. However, he also found that the University should have considered the request under the EIRs and not under FOISA.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 39(2) (Health, safety and the environment); 47(1) and (2) (Application for decision by Commissioner)

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

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

1. On 20 September 2021, the Applicant made a three-part request for information to the University of Edinburgh (the University). In part 3 of the request (which is the subject of this Decision Notice), the Applicant asked for information on the cost of cleaning up cigarette butts around the University sites, including QMRI (Queen's Medical Research Institute).
2. The University responded on 24 September 2021, stating it did not record information about the cost of clearing cigarette butts. As the extent of the cleaning process (to which clearing cigarette butts was dedicated) was not known or recorded, the University explained that it would be impossible to break down the wider costs of cleaning to identify the costs of these tasks. As such, the University did not hold the information required to answer this part of the request.
3. On 24 September 2021, the Applicant wrote to the University asking it to review the cost of the uncleaned site area.
4. The University notified the Applicant of the outcome of its review on 11 October 2021, fully upholding its original decision for part 3 of the request. It confirmed it did not hold information about the overall cost of clearing cigarette butts, or about costs at any single University location.
5. The University explained that its team of cleaners covered multiple campuses. As the time spent at each location on any given day or week varied, based on the specific cleaning requirements at the time, it was not possible to break down costs by location. As costs were not broken down by task, it was therefore impossible to identify, from its records, the cost of carrying out the specific task identified in the request. The University further confirmed it had no responsibility for clearing areas outside QMRI.

6. On 11 October 2021, 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 she was dissatisfied with the outcome of the University's review in respect of its failure to provide the information sought in part 3 of her request.

Investigation

7. The application was accepted as valid. The Commissioner confirmed that the Applicant had made a request for information to a Scottish public authority and had asked the authority to review its response to that request before applying to him for a decision.
8. On 6 December 2021, the University was notified in writing that the Applicant had made a valid application and 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 University was invited to comment on this application and to answer specific questions. These focussed on the searches and enquiries undertaken by the University to establish what information it held falling within the scope of part 3 of the Applicant's request. The University was also asked whether the request should have been handled as a request for environmental information under the EIRs.
10. The University provided submissions to the Commissioner. These are considered below.

Commissioner's analysis and findings

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

Application of the EIRs

12. In [Decision 218/2007](#)¹, the Commissioner confirmed (at paragraph 51) that, where environmental information is concerned, there are two separate statutory frameworks for access to that information and, in terms of the legislation, an authority is required to consider the request under both FOISA and EIRs.
13. As stated above, the University was asked whether it believed the request ought to have properly been considered under the EIRs, given the nature of the information requested.
14. In its submissions to the Commissioner, the University explained it had considered part 3 of the Applicant's request in the context of the other parts, and the wider costs of cleaning services at the University. In retrospect, it agreed that, taking into account the references to health and safety in the Applicant's request for review, and to the environment in her application to the Commissioner, this part of the request should have been more appropriately dealt with under the EIRs.

¹ <https://www.itspublicknowledge.info/decision-2182007>

15. The University confirmed that it now wished to rely on the exemption in section 39(2) of FOISA, acknowledging the public interest in openness and transparency. It considered that the public interest in withholding any relevant information under FOISA was outweighed by the public's statutory right to environmental information under the EIRs, and that there was no public interest in dealing with the same request under two different regimes.
16. For this exemption to apply, any information requested would require to be environmental information as defined in regulation 2(1) of the EIRs. The University agreed that discarded cigarette butts could have a bearing on human health, and any costs associated with a clearing programme would therefore comprise environmental information.
17. Having considered the terms of the request and the University's submissions on this point, it is clear that any information falling within the scope of part 3 of the request would be environmental information, as defined in regulation 2(1) of the EIRs. The information in question concerns measures affecting emissions into the air which may affect the state of human health, and, as such, the Commissioner is satisfied that it would fall within paragraphs (a), (b), (c) and (f) of the definition of environmental information in regulation 2(1) of the EIRs (reproduced in Appendix 1 to this decision).
18. In this case, therefore, the Commissioner accepts that the University was entitled to apply the exemption in section 39(2) of FOISA, given his conclusion that it is properly considered to be environmental information. This exemption is subject to the public interest test in section 2(1)(b) of FOISA.
19. As there is a separate statutory right of access to environmental information available to the Applicant in this case, the Commissioner accepts that the public interest in maintaining this exemption and dealing with the request in line with the requirements of the EIRs outweighs any public interest in disclosure of the information under FOISA. In the circumstances, he will consider this case, in what follows, solely in terms of the EIRs.
20. However, as the University failed to recognise and respond to the request as a request for environmental information, the Commissioner must find that it failed, in this respect, to respond in accordance with regulation 5(1) of the EIRs.

Does the University hold any relevant information?

21. 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. It is important to bear in mind, however, that this obligation relates to information actually held by an authority when it receives the request, as opposed to information an applicant believes the authority should hold but which is not, in fact, held at that time.
22. 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 provide that information to the requester, unless a qualification in regulations 6 to 12 applies (regulation 5(2)(b)).
23. Under the EIRs, a public authority may refuse to make environmental information available if one or more of the exceptions in regulation 10 applies, but only if (in all the circumstances) the public interest in maintaining the exception or exceptions outweighs the public interest in making the information available. If no such information is held by the authority, regulation 10(4)(a) of the EIRs permits the authority to give an applicant notice to that effect.

24. In her application to the Commissioner, the Applicant argued that the University operated on a supposedly smoke-free site, but which was littered by cigarette butts. As the University claimed to have care of environmental standards and equality legislation matters, and had a duty to transparency, she believed it should have an answer about the cost of cleaning.
25. The Commissioner has taken account of the Applicant's submissions in which she explains why she believes the University should hold information falling within the scope of her request. While these may be genuine reasons for believing so, the Commissioner can only consider whether or not the University identified and located any relevant information it actually held.
26. 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. He 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 (as indicated above) is to determine what relevant information is actually held by the public authority (or was held, at the time it received the request).
27. In its submissions to the Commissioner, the University confirmed that it now wished to rely on the exception in regulation 10(4)(a) of the EIRs, as it held no information falling within the scope of part 3 of the request. It explained, that, while it did hold information on the costs of cleaning at its buildings and properties, this could not be divided by specific task.
28. In relation to the searches undertaken by the University to identify whether it held any relevant information, the University explained that enquiries were made with staff in the Estates department who, in turn, consulted colleagues within the Waste Office. The Waste Office confirmed that the requested information was not recorded. On receipt of the Applicant's requirement for review, Estates were asked further questions about recording information by location and the University's responsibility for cleaning outside areas. The University provided the following submissions (paragraphs 29-31) which were confirmed by its Waste and Furniture Manager.
29. The University explained that outside cleaning teams operated at multiple campuses, including Central Campus, King's Buildings, the Edinburgh College of Art and Easter Bush Campus, ensuring that gardens and other areas were kept clean and tidy. However, as the time spent at any location or on any given task was never the same on any given day or week, it would be impossible to break down the associated costs to identify the information requested.
30. Turning to the interpretation of the request, the University confirmed that it had considered the request covered information about the clearing of cigarette butts outside, not inside, buildings for the whole of its estate. However, no information was recorded for any University building showing the cost of clearing up cigarette butts.
31. The University explained that the reference to QMRI in its review outcome was due to this building being specified in the Applicant's request. While cleaners did operate at QMRI, and would clear up any cigarette butts within their designated areas, no record of this was made or held. The University further explained that there were no outside cleaning teams operating around QMRI and confirmed that the areas around QMRI were not its responsibility.

32. The Commissioner has fully considered all relevant submissions and the terms of the request. He accepts that the University took adequate, proportionate steps with a view to identifying and locating any relevant information falling within the scope of the request under consideration here. He is satisfied that any such information held would have been identified as a result of these searches and enquiries. He is therefore satisfied that the exception in regulation 10(4)(a) applies.
33. As stated above, the Commissioner can only consider whether information is actually held by an authority, not what information it should hold, or what an applicant believes it should hold.
34. The exception in regulation 10(4)(a) is subject to the public interest test in regulation 10(1)(b) of the EIRs and can only be upheld if, in all the circumstances, the public interest in maintaining the exception outweighs the public interest in making the information available.
35. In its submissions to the Commissioner, the University acknowledged the public interest in openness, transparency and scrutiny of the way in which it managed its buildings. However, it did not hold information on the cost of clearing up cigarette butts as it was impossible to identify this from wider cleaning costs.
36. The Commissioner is satisfied that the University does not (and did not, on receiving the request) hold the information in question. Consequently, he does not consider there to be any conceivable public interest in requiring that information be made available. The Commissioner therefore concludes that the public interest in making the requested information available is outweighed by that in maintaining the exception in regulation 10(4)(a) of the EIRs.

Decision

The Commissioner finds that the University of Edinburgh (the University) failed to comply with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to part 3 of the information request made by the Applicant. He finds that, by failing to recognise that this part of the request fell to be considered under the EIRs, the University failed to comply with regulation 5(1) of the EIRs in this respect.

However, the Commissioner is satisfied that, the University was entitled to inform the Applicant that it did not hold any information falling within the scope of part 3 of the request.

The Commissioner does not require the University to take any action in respect of this failure in response to the Applicant's application.

Appeal

Should either the Applicant or the University of Edinburgh 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**

19 July 2022

Appendix 1: Relevant statutory provisions

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.
- (2) The person who makes such a request is in this Part and in Parts 2 and 7 referred to as the “applicant.”
- ...
- (6) This section is subject to sections 2, 9, 12 and 14.
- ...

2 Effect of exemptions

- (1) To information which is exempt information by virtue of any provision of Part 2, section 1 applies only to the extent that –
 - ...
 - (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.
- ...

39 Health, safety and the environment

- ...
- (2) Information is exempt information if a Scottish public authority-
 - (a) is obliged by regulations under section 62 to make it available to the public in accordance with the regulations; or
 - (b) would be so obliged but for any exemption contained in the regulations.
- ...

47 Application for decision by Commissioner

- (1) A person who is dissatisfied with -
 - (a) a notice under section 21(5) or (9); or
 - (b) the failure of a Scottish public authority to which a requirement for review was made to give such a notice.

may make application to the Commissioner for a decision whether, in any respect specified in that application, the request for information to which the requirement relates has been dealt with in accordance with Part 1 of this Act.

- (2) An application under subsection (1) must -
 - (a) be in writing or in another form which, by reason of its having some permanency, is capable of being used for subsequent reference (as, for example, a recording made on audio or video tape);
 - (b) state the name of the applicant and an address for correspondence; and
 - (c) specify –

- (i) the request for information to which the requirement for review relates;
 - (ii) the matter which was specified under sub-paragraph (ii) of section 20(3)(c); and
 - (iii) the matter which gives rise to the dissatisfaction mentioned in subsection (1).
- ...

The Environmental Information (Scotland) Regulations 2004

2 Interpretation

(1) In these Regulations –

“the Act” means the Freedom of Information (Scotland) Act 2002;

“applicant” means any person who requests that environmental information be made available;

“the Commissioner” means the Scottish Information Commissioner constituted by section 42 of the Act;

...

“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 –

- (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);
- ...

5 Duty to make available environmental information on request

- (1) Subject to paragraph (2), a Scottish public authority that holds environmental information shall make it available when requested to do so by any applicant.
- (2) The duty under paragraph (1)-
 - ...
 - (b) is subject to regulations 6 to 12.
 - ...

10 Exceptions from duty to make environmental information available—

- (1) A Scottish public authority may refuse a request to make environmental information available if-
 - (a) there is an exception to disclosure under paragraphs (4) or (5); and
 - (b) in all the circumstances, the public interest in making the information available is outweighed by that in maintaining the exception.
- (2) In considering the application of the exceptions referred to in paragraphs (4) and (5), a Scottish public authority shall-
 - (a) interpret those paragraphs in a restrictive way; and
 - (b) apply a presumption in favour of disclosure.
- ...
- (4) A Scottish public authority may refuse to make environmental information available to the extent that
 - (a) it does not hold that information when an applicant's request is received;
 - ...

17 Enforcement and appeal provisions

- (1) The provisions of Part 4 of the Act (Enforcement) including schedule 3 (powers of entry and inspection), shall apply for the purposes of these Regulations as they apply for the purposes of the Act but with the modifications specified in paragraph (2).
- (2) In the application of any provision of the Act by paragraph (1) any reference to-
 - (a) the Act is deemed to be a reference to these Regulations;
 - (b) the requirements of Part 1 of the Act is deemed to be a reference to the requirements of these Regulations;
 - ...
 - (f) a notice under section 21(5) or (9) (review by a Scottish public authority) of the Act is deemed to be a reference to a notice under regulation 16(4); and
 - ...

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