

Decision Notice 037/2020

Headstone safety programme

Applicant: The Applicant

Public authority: Scottish Borders Council

Case Ref: 201900634



Scottish Information
Commissioner

Summary

The Council was asked for a range of information about its headstone safety programme.

The Commissioner investigated and found that the Council had failed to identify and disclose all the information falling within the scope of the request.

By the end of the investigation, the Commissioner was satisfied that the Council had carried out appropriate searches to identify the information falling within the scope of the request.

Relevant statutory provisions

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(2) (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)

The full text of each of the statutory provisions cited above is reproduced in Appendix 1 to this decision. Both Appendices form part of this decision.

Background

1. Scottish Borders Council (the Council) contracted out its headstone safety programme to Memsafe Ltd in July 2018 and published details about the programme on its website¹. This contract was in connection with all Council maintained cemeteries and was not exclusive to Peebles Cemetery. The purpose of the programme within Peebles Cemetery was not to repair damaged headstones, but to ensure that they were safe.
2. On 21 February 2019, the Applicant asked the Council for a range of information about its headstone safety programme at Peebles cemetery. The requests are set out in full in Appendix 2.
3. The Council responded on 12 March 2019. The Council provided information and explanations in response to parts of the request and stated that it did not hold information in response to other parts of the request.
4. On 13 and 14 March 2019, the Applicant emailed the Council requesting a review of its decision on the basis that the Council had not answered parts of request and further information could be provided. The Applicant sought a review of parts 2, 6a, 6bii, 6biii, 7, 8, 10, 11, 12 and 13 of his request.
5. The Council notified the Applicant of the outcome of its review on 3 April 2019. The Council explained that the purpose of the programme was not to repair damaged headstones, but to ensure that they were safe. The Council provided the following responses to the Applicant's request:
 - (i) parts 2 and 7: the Council confirmed that it had provided all of the information held;
 - (ii) part 6a: the Council explained to the Applicant that it had appointed a company to carry out the works and, in terms of the procurement process, the Council held general

¹ https://www.scotborders.gov.uk/info/20013/environment/869/headstone_testing/2

qualifications to ensure that the company is a competent contractor. The Council supplied these to the Applicant but confirmed that it did not hold information regarding the identity of the personnel;

- (iii) part 6bii: the Council confirmed that no specific data was recorded, but its officers had confirmed that it had made headstones safe;
- (iv) part 6biii: the Council confirmed that notices were not placed on individual stones; and
- (v) parts 10, 11, 12 and 13: the Council offered further clarification and explanations.

6. On 11 April 2019, the Applicant applied to the Commissioner for a decision in terms of section 47(1) of the Freedom of Information (Scotland) Act 2002 (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 Council's review. He was dissatisfied on the following grounds:

- (i) he believed he had not been provided with the procedures requested, highlighting a distinction between the process he was provided and the practical steps that would be set out in a procedure (part 2);
- (ii) he did not accept the Council did not hold the qualifications of the assessors (part 6a);
- (iii) he argued he had not been provided with the full report for Peebles Cemetery, he referred to information that he had been provided that suggested more information was held (part 7); and
- (iv) he did not accept the accuracy of the figures provided to him response to parts 11,12 and 13 of his request (the Applicant believed that information was held by the Council that would indicate that the figures provided were inaccurate).

Investigation

- 7. The application was accepted as valid. The Commissioner confirmed that the Applicant made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to him for a decision.
- 8. On 13 June 2019, the Council was notified in writing that the Applicant had made a valid application. The case was allocated to an investigating officer.
- 9. The investigating officer contacted the Applicant to confirm the matters that would be investigated. In response, on 3 July 2019, the Applicant confirmed that he was also dissatisfied with the Council's response to parts 6bii and 6biii of the request as he was not satisfied that he was provided with all the information falling within scope of these parts of the request.
- 10. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Council was invited to comment on this application and answer specific questions about the information it held, searches it had conducted. The Council responded on 25 July 2019.
- 11. On 6 September 2019, the Council disclosed further information to the Applicant that fell within the scope of his request.

Commissioner's analysis and findings

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

Information falling in scope

13. The Applicant argued that he had not been provided with all of the information falling within parts 2, 6a, 6bii, 6biii and 7 of his request.
14. Regulation 5(1) of the EIRs (subject to the various qualification 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.
15. The standard proof to determine whether a Scottish public authority holds information is the civil standard of the balance of probabilities. In determining this, 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 a public authority to explain why it does not hold the information, and any reason offered by an applicant to explain why an authority is likely to hold information. While it may be relevant as part of this exercise to explore what information should be held, 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.

Searches

16. The Council provided details of the searches conducted by four of its employees. The searches included its electronic share and personal drive folders and emails. It stated that the locations identified were the only ones where the officers would record or save information with regard to the matter. The Council provided the Commissioner with evidence of the searches conducted.
17. The Council stated that discussion of the headstone programme started early in 2018, the invitation to quote was issued on 16 May 2018 and works commenced in Peebles Cemetery on 15 January 2019. Therefore, relevant searches were carried out from 15 January 2019 (when works commenced and the focus of the Applicant's request) to the date of the request.
18. During the investigation, the Council provided the Commissioner with documents related to the procurement of services to undertake the headstone testing at its burial sites. These documents included invitations to quote, bidders response, the successful letter to the contractor and related documents. In addition, the Council provided spreadsheets which recorded detailed results of the testing of each headstone contained within Peebles Cemetery.
19. Having reviewed the documents supplied, the Commissioner identified information that fell within the scope of the Applicant's request. As a result, the Council provided the following information to the Applicant during the investigation:
 - (i) details of how the contractor intended to test the headstones;
 - (ii) the full spreadsheet of results relating to the testing of headstones at Peebles cemetery.

20. The Commissioner is satisfied that the former fell within the scope of part 2 and the latter fell within parts 6bii and 7 of the Applicant's request.
21. The Commissioner notes that this information was provided to the Applicant after responding to both the request and request for review. Consequently, the Commissioner finds that, in failing to identify, locate and provide all relevant information at the time it dealt with the Applicant's request, the Council failed to comply with regulation 5(1) of the EIRs.

Part 2 procedures

22. Having considered the information provided to the Applicant in response to the request and on 6 September 2019, the Commissioner is satisfied that the Council has now provided the Applicant with the information it holds and falls within scope of the request.

Parts 6a and 6bii (second part) – qualifications and identity of assessors

23. The Applicant submitted that it is common practice to see the relevant qualifications of external contractors and argued that the information should be held. Furthermore, the Applicant argued that the Council must hold the names of the assessors in order to sign-off their work.
24. The Council explained that, as assessments were undertaken by a third party, it did not hold (and it was not necessary to hold) the specific qualifications or identities of each of the assessors.
25. In its review response, the Council stated that it should have explained that in terms of the procurement process the Council holds general qualifications to ensure that the company is a competent contractor. The Council stated that it does not hold information regarding the identity of the personnel from the appointed company who inspected each headstone and therefore is satisfied that regulation 10(4)(a) applies.
26. The Commissioner notes that, in an attempt to satisfy the terms of this request, the Council provided an extract of the general credentials of Memsafe's staff from its tender bid to the Applicant in response to his request for review.
27. The Commissioner has read the Council's tender specification and Memsafe's response. He notes that both the Council's tender specification states what qualifications the successful bidder should work to and Memsafe's response contains details of what qualifications its staff will have.
28. Having considered the explanations and details of the searches conducted by the Council, the Commissioner is satisfied, on the balance of probabilities, that it does not hold the specific information requested by the Applicant. In reaching this conclusion, the Commissioner is satisfied, in all the circumstances of this case, that there is no reasonable expectation that the Council would hold the identity and qualifications of relating to the employees of a third party contractor (or, indeed, that the information is held by Memsafe on behalf of the Council in terms of regulation 2(2) of the EIRs). The Commissioner is therefore satisfied that the Council was entitled to respond in terms of regulation 10(4)(a) of the EIRs.

The public interest

29. 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. In this case, for the reasons set out above, the Commissioner is satisfied that the Council does not (and did not, on receiving the request) hold any information covered by parts 6a and (the

second part of) 6bii of the Applicant's 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.

Parts 7 and 6bii (first part) – record of all findings

30. In its review response to the Applicant, the Council stated that there was no specified data recorded and the Council was satisfied that it did not hold the requested information in line with regulation 10(4)(a) of the EIRs.
31. The Applicant submitted that, according to the contract, there should be recording sheets for the testing of the stones. The Applicant also indicated that he had been provided with information from the Council that did not appear in the spreadsheet, which suggested to him that more information relating to the record of findings was held. The Applicant referred to the detail contained in testing procedures he had been provided which suggested to him that more data was held.
32. As part of its submissions, the Council provided a full copy of the contractor's testing spreadsheet, which was held by the contractor on behalf of the Council. This version of the spreadsheet (containing dates and photographs) was not provided in response to the Applicant's request. This spreadsheet includes the following information, where available: test date, cemetery section, grave number, date of death, name of deceased, memorial type, memorial height, condition, action, required and photo.
33. The Council explained that the contractor recorded the findings directly at the cemetery on a handheld device along with a photograph which was then sent to its system. The information was then collated by the contractor and entered into a spreadsheet, which was sent to the Council upon completion.
34. In its submissions of 25 July 2019, the Council stated that a visual inspection was made after the works had been carried out. The Council also confirmed that it held no other documentation.
35. As stated above, the Council provided the Applicant with a copy of this spreadsheet during the investigation, subject to the redaction of some pricing information on the basis that regulation 10(5)(e) of the EIRs applied (confidentiality of commercial or industrial information).
36. Having considered this information in detail, the Commissioner is satisfied that this full version report falls clearly within the scope of parts 6bii and 7 of the Applicant's request.
37. Taking account of the searches and explanations provided by the Council, the Commissioner is satisfied that the Council has now provided the Applicant with the information it holds which falls within scope of parts 6bii (first part) and 7 of this request.
38. The Commissioner notes that the full testing spreadsheet was provided to the Applicant after responding to both the request and request for review. Consequently, the Commissioner must find that, in failing to identify, locate and provide all relevant information at the time it dealt with the Applicant's request, the Council failed comply with regulation 5(1) of the EIRs.

Part 6biii –notices

39. In its review response to the Applicant, the Council stated that individual notices were not attached to each stone tested. A Council notice was placed at the cemetery gate. The Council explained that a generic notice is placed at the cemetery gate to advise members of the public that the Council is going to be working therein. The Council disclosed the wording of the notices to the Applicant. The Council explained that the only occasion when it would affix a notice on an individual stone is when it would be unable to make the stone safe at the point of testing and the stone required to be cordoned off to ensure public safety.
40. Having considered the facts in this case, including the searches conducted by the Council, the Commissioner is satisfied that the Council provided the Applicant with the information it holds and falls within scope of this part of the request. The Commissioner is satisfied that the Council complied with regulation 5(1) of the EIRs when it responded to the request.

Parts 11, 12 and 13 – headstones moved or damaged

41. The Applicant requested information about the number of headstones moved or damaged during the inspection.
42. In response, the Council provided the Applicant with a “number” of headstones that had been moved, noting that only identified headstones were moved and two headstones had been damaged. The Council explained that there was never any intention to reinstate previously damaged stones and the purpose of the works was the safety of users and workers in the cemeteries. The Council explained that some stones may have been laid flat in order to make them safe, but no stones were moved from their plot.
43. The Applicant has consistently asserted that the Council should be able to provide definitive answers to these parts of the request.
44. The Council holds a copy of Memsafe’s testing spreadsheet, a copy of which has been disclosed to the Applicant. The spreadsheet documents the state of the headstones and what action should be taken. However, the Commissioner notes that neither this spreadsheet nor any of the other information provided by the Council answers the specific terms of the Applicant’s request.
45. The Commissioner is satisfied that the Council has taken adequate, proportionate steps to establish whether it held any specific information falling within the scope of these parts of the request. Although the Applicant considers the information provided to be inaccurate, the Commissioner cannot comment on the accuracy of the information provided – he is restricted to determining whether the Council held recorded information which would satisfy the terms of this request.
46. Taking the details of the searches conducted and the explanations provided into consideration, the Commissioner is satisfied, on the balance of probabilities, that the Council does not hold any further information falling within the scope of these parts of the Applicant’s request. Consequently, the Commissioner is satisfied that the Council complied with regulation 5(1) in responding to parts 11, 12 and 13 of this request.

Decision

The Commissioner finds that Scottish Borders Council (the Council) partially failed to comply with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by the Applicant.

The Commissioner finds that the Council provided the Applicant with a correct response to parts 6a, 6bii (second part), 6biii, 11, 12 and 13 of the request.

However, the Council failed to comply with regulation 5(1) of the EIRs by not identifying and disclosing all of the information requested in parts 2, 6bii (first part) and 7 when it responded to the request and requirement for review.

The Commissioner does not require any action with respect of these failures.

Appeal

Should either the Applicant or the Council 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**

25 February 2020

Appendix 1: Relevant statutory provisions

The Environmental Information (Scotland) Regulations 2004

2 Interpretation

- ...
- (2) For the purpose of these Regulations, environmental information is held by a Scottish public authority if it is-
- (a) in its possession and it has been produced or received by that authority; or
 - (b) held by another person on that authority's behalf,
- and, in either case, it has not been supplied by a Minister of the Crown or department of the Government of the United Kingdom and held in confidence.
- ...

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;

Appendix 2: The Applicant's request

1. If any of the stones are denoted only by a lair number, a copy of the lair map for Peebles Cemetery.
2. Procedures
 - a. A copy of the "memorial headstone testing procedures", or alternatively named procedures, used by the Council for the testing of headstones.
 - b. A copy of all procedures used by the Council in relation to the Headstone Restoration Programme.
3. A copy of the wording of all public notices surrounding the assessment, where these were posted, and when these were posted.
4. The date on which the assessment started.
5. Whether the assessors were council employees, or if not, for whom did they work.
6. Pressure (Topple) Test.
 - a. A copy of the relevant qualification(s), valid at the time of the 'pressure test' (or topple test), of each assessor
 - b. For each stone tested:
 - i. A description of the method used for the Pressure (Topple) Test, including whether done by hand or use of a spring-loaded [gauge].
 - ii. The record and date of all findings, actions to be taken and future actions required, also which assessor tested the stone.
 - iii. State whether an Individual Notice was attached to the tested stone, and if so what information was contained on this notice.
7. The full report of the assessment of Peebles Cemetery.
8. The method by which the Council informed and consulted with members of the public on the list of stones to be moved.
9. A copy of all notices posted that contained contact details of the Council that gave the lair holder or family the ability to notify the council of their ownership of stones
 - a. Where and when were these notices published/posted.
10. The date of the last stone assessment, and the date the first stone was moved.
11. How many stones were moved (including lair markers) as at Friday the 21st February 2019, and how many more are to be moved.
12. How many stones were moved (including lair markers) that were not meant to be moved as at Friday the 21st February 2019.
13. How many stones have been damaged during moving.

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