

Decision Notice 031/2022

Financial arrangements and trustees related to Lauriston Castle Trust

Applicant: The Applicant

Public authority: City of Edinburgh Council

Case Ref: 202100999, 202101000, 202101001, 202101002, 202101113



Scottish Information
Commissioner

Summary

The Council was asked for information about the financial arrangements between the Council and the Trust and about the identity of appointed trustees at various times.

The Council provided the Applicant with the information it held for some parts of his requests and informed him that no further information was held falling within the scope of any of the requests.

The Commissioner investigated and found that the Council had partially breached FOISA in responding to the requests, as it had wrongly responded to one request under the EIRs rather than FOISA. The Commissioner found that the Council was entitled to notify the Applicant that it did not hold the information.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (4) (General entitlement); 17(1) (Notice that information is not held)

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 8 March (requests one and two), 12 May (requests three and four) and 6 July 2021 (request five), the Applicant made requests for information to City of Edinburgh Council (the Council). The information requested concerned Lauriston Castle Trust (the Trust). The full wording of the requests can be seen in Appendix 2.
2. The Council responded on 6 April, 10 June and 3 August 2021:

Request one – the Council provided information or explanation in relation to each part of the request, stating where it did not hold any recorded information;

Request two – the Council confirmed there was no written agreement and provided explanation of what occurred and why;

Request three – the Council informed the Applicant that the information was not held;

Request four – the Council informed the Applicant that the information was not held;

Request five – the Council informed the Applicant that the Council was the sole trustee of the Trust and that delegated responsibility currently rested with the Finance and Resources Committee.

The Council highlighted in more than one response that it was conducting a review of its administration of trusts, including this one.

The Council responded to all of the requests under the Freedom of Information (Scotland) Act 2002 (FOISA), with the exception of request one, which it responded to under the Environmental Information (Scotland) Regulations 2004 (the EIRs).
3. On 6 April, 22 June, and 6 August 2021, the Applicant wrote to the Council requesting reviews of its decisions on the basis that:

Request one – he did not agree with the Council’s position regarding its status as trustee, or the inclusion of the Trust in the Council’s charitable funds and asked again who or what gave the Council authority to fund the Trust;

Request two – he did not agree that the arrangement described by the Council could be legally correct, or its position that the Council was the trustee and asked it to respond in a way that reflected the legal position;

Requests three and four – he did not believe that no information was held as trustees of the Trust must have existed, citing legislation he believed to be relevant;

Request five – he did not agree that the information was not held and explained his view that it was a legal requirement for it to be held.

4. The Council notified the Applicant of the outcome of its reviews on 10 May, 14 July and 6 September 2021 upholding its original decisions for all of the requests, highlighting again the review it was undertaking of the management of trusts (including Lauriston Castle Trust) and emphasising its position that there was only one trustee of the Trust, the Council itself.
5. On 9 August and 7 September 2021, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant stated he was dissatisfied with the outcome of the Council’s reviews because in each case he did not accept the Council’s position in response to the request.

Investigation

6. The applications were accepted as valid. The Commissioner confirmed that the Applicant made requests for information to a Scottish public authority and asked the authority to review its response to those requests before applying to him for a decision.
7. On 20, 22, 27 September and 5 October 2021, the Council was notified in writing that the Applicant had made valid applications 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 Council was invited to comment on these applications and to answer specific questions. These related to its reasons for concluding that it did not hold any more information requested by the Applicant. The investigator had noted that different legislative regimes had been used when answering request one compared to requests two to five, and asked the Council to explain why this was the case.

Commissioner’s analysis and findings

9. 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.
10. Section 1(1) of FOISA provides that a person who requests information from a Scottish public authority which holds it is entitled to be given that information by the authority, subject to qualifications which, by virtue of section 1(6) of FOISA, allows Scottish public authorities to withhold information or charge a fee for it. The qualifications contained in section 1(6) are not applicable in this case

11. The information to be given is that held by the authority at the time the request is received, as defined in section 1(4). This is not necessarily to be equated with information an applicant believes the authority should hold. If no such information is held by the authority, section 17(1) of FOISA requires it to give the applicant notice in writing to that effect.

Submissions from the Applicant

12. The Applicant outlined why he believed the information should be held by the Council. He explained that trusts and charities are not the same in law and that trusts must be administered by named trustees, the names of whom should be made open to beneficiaries and the general public.
13. The Applicant stated that Lauriston Castle Trust was subject to Scottish Trust Law and that it was placed in Trust in 1930. He explained that, at that time, the Lord Provost, Magistrates and Council of the City of Edinburgh were appointed Trustees. He highlighted that in 1975 that Council was abolished and the previously appointed Trustees ceased to exist. He outlined that legislation authorised the collective Councillors of the new authority to nominate a sufficient number of their councillors to act as trustees. He did not consider that trustees could delegate any of their powers as trustees, unless the trust deed permitted them to do so, and so could not delegate their primary role of overall responsibility for the administration of the trust and for taking decisions. He questioned the Council's view, therefore, that it was in a position to delegate responsibility to the Finance and Resources Committee (and its predecessors) and make decisions about the management of the Trust.
14. The Applicant submitted that, as the Council has not stated that it had broken the law, then the information he sought must exist and be held.

Submissions from the Council – information held

15. The Council reiterated its position that City of Edinburgh Council, the organisation, remained the sole trustee of the Lauriston Castle Trust, a Scottish registered charity (SC02737) and acknowledged that the Applicant did not agree with this position. The Council maintained its position that, as such, no further information was held other than that already provided.
16. The Council, in its submissions, outlined the background to the Trust and the arrangements within the Council for its governance. It stated that the Applicant had been provided with copies of the relevant trust documentation.
17. In relation to the legislation cited by the Applicant, namely The Local Government (Scotland) Act 1973 (1973 Act) and the Local Government, etc (Scotland) Act 1994 (1994 Act), the Council noted provisions referring to a requirement for the authority to nominate a sufficient number of councillors to act as trustees of property held on trust, but that no limit of time was included in either by which the nomination must be made. The Council advised that no evidence had been found to demonstrate that the Council had made any nominations in furtherance of either the 1973 or 1994 Acts.
18. The Council explained that the appointment of councillors to committees and outside bodies usually took place in May or June following an election and would be recorded in public records in the full Council minutes. It stated that Council meetings prior to 2003 were not kept electronically.
19. The Council described the searches that were carried out both by members of the Archives unit and by a member of the Legal team, at the City Chambers and an additional storage facility.

20. The Council explained that the Archives unit had produced a list of Lauriston Castle records and that these files did not contain details of appointment of councillors to the Trust.
21. The Council described additional physical visits undertaken by the Legal team staff member, looking through and considering documents in boxes of files arranged chronologically. It detailed the site visits:
 - (i) April 2021 - The purpose of this inspection was to view documentation relating to any application of the relevant provisions of the 1994 Act. Council minutes at the time of the 1994 Act and its coming into force were inspected (from 1988 to 1999). It was noted that Council minute Item 5.1 of 2 May 1996 referred to the appointment of councillors to outside organisations. The relevant organisations were listed alphabetically. The Trust was not listed.
 - (ii) May 2021 - The purpose of this inspection was to view documentation relating to the trust deeds, and in particular a title box relevant to the founding documentation of the Trust and issues of governance. No evidence was found of the appointment of councillors as trustees of the Trust.
 - (iii) May 2021 - The purpose of this inspection was to view documentation relating to any application of the relevant provisions of the 1973 Act. Council minutes at the time of the 1973 Act and its coming into force were inspected (from 1972 to 1977). No evidence of the appointment of councillors as trustees of the Trust was found.
22. The Council's position, therefore, was that no further information was held, in addition to that already provided to the Applicant.

The Commissioner's findings – information held

23. 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, where appropriate, any reasons offered by the public authority to explain why it does not hold the information. Ultimately the Commissioner's role is to determine what relevant information is actually held by the authority (or was, at the time the request was received).
24. In response to the Applicant's requests, the Council provided the information it held, based on its reading of the legal position regarding the Council and the Trust. The Applicant did not accept the position adopted by the Council, and so questioned the completeness of the information provided to him
25. It is not the role of the Commissioner to comment on the legal status of the Council in relation to the Trust, or whether the position of the Council or the Applicant is correct – rather, his role is to determine whether the authority held recorded information falling within the scope of the requests.
26. Having considered the responses provided to the Applicant by the Council and the submissions from both parties, the Commissioner is satisfied that the Council provided the Applicant with the information it held and that, on the balance of probabilities, no further information was held.

Non-environmental information

27. The Council acknowledged in its submissions that it had incorrectly handled Request one under the EIRs and not FOISA. It recognised that the request did not seek information, in

line with the Commissioner's guidance, which could be considered environmental in nature and that the correct regime for all of the requests was FOISA.

28. Given the nature of the request and the submissions from the Council, the Commissioner can only find that it was incorrect to respond to request one in terms of the EIRs, and that in doing so it breached section 1(1) of FOISA.

Decision

The Commissioner finds that City of Edinburgh Council generally complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information requests made by the Applicant.

The Commissioner accepts that the Council held no further recorded information falling within the scope of requests one to five.

However, he finds that by incorrectly categorising information (request one) as environmental, the Council failed to comply with section 1(1) of FOISA.

Given that the outcome for the Applicant would have been the same whether request one was responded to under FOISA or the EIRs, the Commissioner does not require the Council to take any action in respect of this failure, in response to the Applicant's application.

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.

Daren Fitzhenry
Scottish Information Commissioner

11 March 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.

...

- (4) The information to be given by the authority is that held by it at the time the request is received, except that, subject to subsection (5), any amendment or deletion which would have been made, regardless of the receipt of the request, between that time and the time it gives the information may be made before the information is given.

...

17 Notice that information is not held

- (1) Where-

- (a) a Scottish public authority receives a request which would require it either-

- (i) to comply with section 1(1); or
(ii) to determine any question arising by virtue of paragraph (a) or (b) of section 2(1),

if it held the information to which the request relates; but

- (b) the authority does not hold that information,

it must, within the time allowed by or by virtue of section 10 for complying with the request, give the applicant notice in writing that it does not hold it.

...

Appendix 2: Information requests

Request 1 made on 8 March 2021

What/who gives the City of Edinburgh Council authority to fund the private estate Lauriston Castle Trust?

What specific terms/conditions applied?

From what source(s), e.g. Council Tax, have these funds come from?

How much each year from each source going back 10 years?

Request 2 made on 8 March 2021

Lauriston Castle Trust – Please provide copies of all documents relating to arrangements between Lauriston Castle Trust Trustees and City of Edinburgh Council whereby monies earned from any activity in the Lauriston Castle Estate are remitted to and kept by the Council.

If no arrangements exist, under what authority/legislation empowers the Council to take and retain the said sums?

Request 3 made on 12 May 2021

Local Government (Scotland) Act 1973

Section 223 Property held on trust.

(1) All property held on trust immediately before 16th May 1975 by

(a) an existing local authority, or

(b) a councillor and a specified officer of an existing local authority,

shall on that day be transferred to and vest (subject to the same trust) in the appropriate islands or district council.

(2) The council in whom property is vested by virtue of subsection (1)

above shall nominate a sufficient number of their councillors to act as trustees of that property and in so doing shall have regard to the terms of the trust deed; and where the property is held immediately before 16th May 1975 by the persons mentioned in subsection (1)(b) above, the council shall nominate the proper officer as one of the trustees.

Please provide the names, committees they served on and dates between which the councillors the local authority were legally obliged to nominate as Trustees of the Lauriston Castle Trust.

In addition, please provide all of the documentation in relation to the nominations.

Request 4 made on 12 May 2021

Local Government etc. (Scotland) Act 1994

16 Property held on trust.

(1) All property held on trust immediately before 1st April 1996 by —

(a) an existing local authority; or

(b) a councillor and the proper officer or a specified officer of such an authority, shall on that day be transferred to and vest (subject to the same trust) in the appropriate new authority.

(2) The authority in whom property is vested by virtue of subsection (1) above shall nominate a sufficient number of their councillors to act as trustees of that property and in so doing shall have regard to the terms of the trust deed; and where the property is held immediately before 1st April

1996 by the persons mentioned in subsection (1)(b) above, the authority shall nominate the proper officer as one of the trustees.

Please provide the names, committees they served on and dates between which the councillors the local authority were legally obliged to nominate as Trustees of the Lauriston Castle Trust.

In addition, please provide all of the documentation in relation to the nominations.

Request 5 made on 6 July 2021

Which Councillors are currently Trustees of the Lauriston Castle Trust? What I am seeking is the names and committees of those Councillors who are currently the Trustees of the Trust, not the Charity.

Scottish Information Commissioner

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