

Decision Notice 004/2022

Payments to landowner – A83 works

Applicant: The Applicant

Public authority: Transport Scotland

Case Ref: 202100795



Scottish Information
Commissioner

Summary

Transport Scotland was asked about payments made to the landowner of the Old Military Road in connection with works to the A83 (Rest and Be Thankful). Transport Scotland withheld the information on the basis that it was confidential information relating to a private commercial arrangement with the landowner. The Commissioner found that Transport Scotland had wrongly withheld the information and, in doing so, had breached the EIRs.

Relevant statutory provisions

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (paragraphs (a) and (c) of definition of “environmental information”) (Interpretation); 5(1) and (2)(b) (Duty to make available environmental information on request); 10(1), (2), (4)(a) and (5)(e) (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. The Appendix forms part of this decision.

Background

1. On 9 May 2021, the Applicant made a request for information to Transport Scotland in relation to the A83 Rest and Be Thankful situation (which concerned roadworks). The information requested was:
...what has been paid to the OMR [Old Military Road] landowner over the last five years, broken down by year, and what is the current weekly payment which is being made?
2. Transport Scotland responded under the EIRs on 12 May 2021. It withheld the information requested under regulation 10(5)(e) (Confidentiality of commercial or industrial information) as it considered the sums paid to the OMR landowner to be a private arrangement between the landowner and Transport Scotland. Transport Scotland recognised the public interest in disclosure as part of open and transparent government and accountability for expenditure of public money. However, it considered this was outweighed by the public interest in protecting the commercial interests of individuals who entered into contracts with Transport Scotland, to ensure it could always obtain best value for money.
3. On 12 May 2021, the Applicant wrote to Transport Scotland requesting a review of its decision, on the basis that she disagreed that the exception applied because:
 - There was a high level of public concern (which included the basis for, and the costs of, Transport Scotland’s decisions) about the major issues with the A83 and the impact on communities across Argyll
 - Transport Scotland had not set out the public interest reasoning, so it was not possible to judge how it arrived at its decision
 - The arrangement with the landowner being a private matter was a different matter from it being necessary to protect individuals’ commercial interests so that Transport Scotland could obtain best value for money. As this was a rental arrangement, not a competitive process, it was difficult to see how this applied.

4. Transport Scotland notified the Applicant of the outcome of its review on 9 June 2021, fully upholding its original decision. It maintained its decision to respect the confidentiality of its arrangement with the landlord, as it believed this was commercial information excepted under the EIRs, noting that the sums paid to the OMR landowner were part of a private arrangement. Recognising the public interest in disclosure as part of open and transparent government, Transport Scotland explained it had a duty to obtain best value for money and, in order to do this, it was unable to disclose all payments made to those who entered into a contract with it. This allowed Transport Scotland to protect the interests of the individual receiving the monies and to ensure Transport Scotland achieved a fair price in future transactions.
5. On 30 June 2021, the Applicant wrote to the Commissioner, applying 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 she was dissatisfied with the outcome of Transport Scotland's review because she disagreed with the authority's reasons for withholding the information and believed the public interest favoured disclosure.

Investigation

6. 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.
7. On 6 July 2021, Transport Scotland was notified in writing that the Applicant had made a valid application and was asked to send the Commissioner the information withheld from the Applicant. Transport Scotland provided the information and the case was subsequently 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. Transport Scotland was invited to comment on this application and to answer specific questions. These focused on its justification for withholding the information under the exception in regulation 10(5)(e) of the EIRs.
9. The Applicant was also invited to provide any further comment on the public interest in disclosing the information requested and did so, in response, on 16 November 2021.
10. On 19 November 2021, Transport Scotland informed the Commissioner that, following further consideration, it had issued a further response to the Applicant that day. In that response, Transport Scotland withdrew reliance on regulation 10(5)(e) and fully disclosed some of the information requested (concerning annual payments). It also informed the Applicant, in terms of regulation 10(4)(a) of the EIRs, that it did not hold the remaining information she had asked for (concerning weekly payments).
11. The Applicant remained dissatisfied that Transport Scotland had not offered any explanation on its change of position, and so the Commissioner's investigation continued.
12. On 8 December 2021, Transport Scotland provided submissions to the Commissioner.

Commissioner's analysis and findings

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

Handling in terms of the EIRs

14. Having considered the terms of the request, it is clear that any information falling within scope would be environmental information, as defined in regulation 2(1) of the EIRs. The information requested concerns a financial agreement directly linked to the use of land during works programmes on the A83 Rest and Be Thankful, which affect the environment around the trunk road. As these measures will impact upon on the state of the land and landscape, the Commissioner is satisfied that the information would fall within paragraphs (a) and (c) of that definition. The Applicant has not challenged Transport Scotland's application of the EIRs in this case and so the Commissioner will consider the request in what follows solely in terms of the EIRs.

Regulation 5(1) and (2)(b) of the EIRs – Duty to make available environmental information on request

15. 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.
16. 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)).
17. Under the EIRs, a public authority may refuse to make environmental information available if one or more of the exceptions in regulation 10 applies.

Regulation 10(5)(e) of the EIRs – Confidentiality of commercial or industrial information where such confidentiality is provided for by law to protect a legitimate economic interest

18. At both initial response and review stages, Transport Scotland withheld the information requested under regulation 10(5)(e) of the EIRs. The Applicant disagreed with the application of this exception on the basis that the public interest favoured disclosure of the information.
19. Regulation 10(5)(e) provides that a Scottish public authority may refuse to make environmental information available to the extent that its disclosure would, or would be likely to, prejudice substantially the confidentiality of commercial or industrial information where such confidentiality is provided for by law to protect a legitimate economic interest.
20. As with all of the exceptions contained within regulation 10, a Scottish public authority applying this exception must interpret the exception in a restrictive way (regulation 10(2)(a)) and apply a presumption in favour of disclosure (regulation 10(2)(b)). As noted above, even where the exception applies, the information must be disclosed unless, in all the circumstances, the public interest in making the information available is outweighed by that in maintaining the exception (regulation 10(1)(b)).

21. The Aarhus Convention: an Implementation Guide¹, (which offers guidance on the interpretation of the Aarhus Convention, from which the EIRs are derived) notes (page 88) that the first test for considering this exception is whether national law expressly protects the confidentiality of the withheld information. The law must explicitly protect that type of information as commercial or industrial secrets. Secondly, the confidentiality must protect a "legitimate economic interest".
22. Having taken this guidance into consideration, the Commissioner's view is that, before regulation 10(5)(e) can be engaged, authorities must consider the following matters:
 - (i) Is the information commercial or industrial in nature?
 - (ii) Does a legally binding duty of confidence exist in relation to the information?
 - (iii) Is the information publicly available?
 - (iv) Would disclosure of the information cause, or be likely to cause, substantial harm to a legitimate economic interest?
23. As stated above, at the start of the investigation, Transport Scotland withdrew its reliance on regulation 10(5)(e) of the EIRs to withhold any information in this case.
24. In its submissions to the Commissioner, Transport Scotland conceded that the exception in regulation 10(5)(e) did not apply to the information previously withheld at both initial response and review stages.
25. For the annual payment information requested, Transport Scotland accepted there was no legally binding duty of confidence in relation to that information.
26. For the weekly payment information, Transport Scotland submitted it now wished to rely on regulation 10(4)(a) as no weekly payment was made to the OMR landowner. It explained that payments are only made when the OMR was in use, and a lump sum was paid annually to cover the time period(s) of use. Transport Scotland apologised for the oversight in not providing a formal notification under regulation 10(4)(a) in its initial response or review outcome.
27. Transport Scotland submitted that it would use this case as a learning tool to avoid future omissions of this nature, and the lessons learned would be used to demonstrate the need to appropriately consider the criteria under which the exception in regulation 10(5)(e) could be applied in future.
28. Having considered the submissions from Transport Scotland, the Commissioner has no option but to find that disclosure of the information would not have had the prejudicial impact required for the exception in regulation 10(5)(e) of the EIRs to be engaged. Consequently, in this case, the Commissioner is not satisfied that the information requested was properly withheld under this exception.
29. Having reached this conclusion, the Commissioner is not required to consider the public interest test in regulation 10(1)(b) of the EIRs.
30. The Commissioner concludes, therefore, that Transport Scotland was not entitled to rely upon regulation 10(5)(e) of the EIRs to withhold the information requested and, in so doing, breached regulation 5(1) of the EIRs.

¹ http://www.unece.org/fileadmin/DAM/env/pp/Publications/Aarhus_Implementation_Guide_interactive_eng.pdf

31. The Commissioner cannot stress enough the importance of giving full and proper consideration to the tests which require to be met for an exception under the EIRs (or an exemption under FOISA) to apply, when considering requests for information under either regime.
32. Given that, by the conclusion of the investigation, Transport Scotland had disclosed to the Applicant all of the annual payment information she had asked for, and had informed her, in terms of regulation 10(4)(a) of the EIRs that it did not hold the weekly payment information requested, the Commissioner does not require Transport Scotland to take any further specific action in this case. The Commissioner accepts the reasoning offered by Transport Scotland for not holding the weekly payment information and therefore accepts that it was entitled to apply regulation 10(4)(a) in the circumstances.
33. However, the Commissioner would urge Transport Scotland, and indeed all Scottish public authorities, to ensure that, when responding to information requests, thorough consideration is given to whether the necessary tests required to engage an exception in the EIRs can actually be met in the circumstances. In this case, it appears likely that such consideration would not only have resulted in earlier disclosure of the information, but also a saving in staff time and effort for both Transport Scotland and the Commissioner.

Decision

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

He finds that Transport Scotland was not entitled to withhold the information requested under regulation 10(5)(e) of the EIRs and that, in doing so, it breached regulation 5(1) of the EIRs.

Given that, at the start of the investigation, Transport Scotland issued the Applicant with a further response in which it disclosed some of the information requested, and notified the Applicant, in terms of regulation 10(4)(a) of the EIRs, that it did not hold the remaining information, the Commissioner does not require Transport Scotland to take any further action in respect of this failure, in response to the Applicant's application.

Appeal

Should either the Applicant or Transport Scotland 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

13 January 2022

Appendix 1: Relevant statutory provisions

The Environmental Information (Scotland) Regulations 2004

2 Interpretation

(1) In these Regulations –

...

"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;

...

(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;

...

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;
 - ...
- (5) A Scottish public authority may refuse to make environmental information available to the extent that its disclosure would, or would be likely to, prejudice substantially-
 - ...
 - (e) the confidentiality of commercial or industrial information where such confidentiality is provided for by law to protect a legitimate economic interest;
 - ...

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