



Decision Notice 182/2024

Police Scotland road safety initiative

Authority: Police Service of Scotland

Case Ref: 202301111

Summary

The Applicants asked the Authority for information relating to a particular road safety initiative. The Authority considered the request under FOISA. It disclosed some information but withheld other information. The Commissioner investigated and found that the Authority had considered the request under the wrong legislation. The requested information was environmental information and the Authority should have considered the request under the EIRs. The Commissioner required the Authority to respond to the request under the EIRs.

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 (f) of definition of “environmental information” (Interpretation); 5(1) (Duty to make environmental information available on request); 16 (Review by Scottish public authority); 17(1), (2)(a) and (b) (Enforcement and appeal provisions)

Background

1. On 13 April 2023, the Applicants made a request for information to the Authority. They asked for:

- (i) All details of a particular road safety initiative (detailed in a newspaper article from October 2016, a copy of which was included) relating to road safety for lorry drivers during high winds;
 - (ii) Particulars of the advice given to road hauliers following the above initiative;
 - (iii) Particulars of the advice and information to be given to lorry drivers following the above initiative;
 - (iv) All advice and information relating to the use of weather alerts during high winds; and
 - (v) All correspondence relating to the above initiative emanating from and to the Road Haulage Association and the Freight Transport Standards Association.
2. The Authority responded on 11 May 2023 under FOISA. It gave the Applicants notice, under section 17(1) of FOISA, that it did not hold any information falling within the scope of parts (i), (ii) and (iii) of their request. In response to part (iv) of the request, the Authority provided the Applicant with a summary of the current process, which had been in place since 2017/2018. The Authority applied section 12(1) of FOISA to part (v) of the request, arguing that compliance with the request would exceed £600. The Authority suggested that the Applicant narrowed the scope of part (v) of the request, by limiting it to specific employee mailboxes or a particular time period to bring it within the £600 cost ceiling.
3. On 15 May 2023, the Applicants wrote to the Authority requesting a review of its decision. They argued that the Authority should be able to obtain details of the safety initiative by contacting the officers who were involved.
4. On 16 May 2023, the Authority asked the Applicants to confirm whether they were requesting a review of the original response or submitting a new request for the relevant correspondence to and from a named officer. The Applicants do not appear to have received this email.
5. On 2 August 2023, the Applicants contacted the Authority stating that they had heard nothing in response to their letter of 15 May 2023. The Authority responded to this email on 3 August 2023, and the Applicants confirmed that they wanted the Authority to carry out a review.
6. The Authority notified the Applicants of the outcome of its review on 1 September 2023. It upheld its original response under the original exemptions. It stated that information falling within the scope of parts (i), (ii) and (iii) of the request was not held, the named officer no longer worked for the Authority and their mailbox and files had been deleted under its record retention policy.
7. In relation to part (v) of the request, the Authority stated that the initial request specified “all correspondence” and that searching all files and email mailboxes would incur excessive costs. The Authority commented that, in its requirement for review, the Applicants appeared to be suggesting that the correspondence being sought in request (v) was limited to the named member of staff, but it disagreed with this interpretation. The Authority stated that it considered the original request was seeking “all correspondence” and not just that of a single staff member. In any case, it reiterated its previous position that the named member of staff had left its employment, and their mailbox and files were deleted in line with its record retention policy. It explained that there was no opportunity to contact the staff member or search their files or email inbox.

8. The Authority did not carry out a review of part (iv) of the request, as the Applicants had not requested this in their requirement for review.
9. On 1 September 2023, the Applicants wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. They stated that they believed the information relating to the initiative existed and that the searches required would not be excessive.

Investigation

10. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
11. On 10 October 2023, and in line with section 49(3)(a) of FOISA, the Commissioner gave the Authority notice in writing of the application and invited its comments. In this letter, the Commissioner notified the Authority that he considered the information to be environmental and he asked the Authority to look at the request again.
12. The Authority provided its comments and the case was subsequently allocated to an investigating officer.

Commissioner's analysis and findings

13. The Commissioner has considered all of the submissions made to him by the Applicant and the Authority. He is satisfied nothing of relevance has been overlooked.
14. During the investigation, the Authority was asked to address the question of whether the request should have been handled under the EIRs.

FOISA or the EIRs

15. "Environmental information" is defined in regulation 2(1) of the EIRs. Where information falls within the scope of this definition, a person has a right to access the information under the EIRs, subject to qualifications and exceptions in the EIRs.
16. The relationship between FOISA and the EIRs was considered at length in [Decision 218/2007](#)¹. In light of that decision, the Commissioner's general position includes the following:
 - (i) The definition of what constitutes environmental information should not be viewed narrowly.
 - (ii) There are two separate statutory frameworks for access to environmental information and an authority is required to consider any request for environmental information under both FOISA and the EIRs.
 - (iii) Any request for environmental information therefore must be handled under the EIRs.

¹<https://www.foi.scot/decision-2182007>

- (iv) In responding to a request for environmental information under FOISA, an authority may claim the exemption in section 39(2).
17. The Commissioner notes that the Authority handled the original request and requirement for review under FOISA.
 18. Paragraph 6 of the Commissioner's briefing entitled "[What is environmental information?](#)"² states: "No types of information are excluded from the potential ambit of environmental information. Environmental information may be found in or extend beyond what is not specifically an environmental topic. Court cases have confirmed that environmental information, and the scope of the Directive, should be interpreted broadly."
 19. During the investigation, the Commissioner considered the subject matter of the request. He notes that regulation 2(1)(f) of the EIRs states that environmental information includes; "the state of human health and safety, including...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)...". The Commissioner concluded that the information captured by the request was likely to encompass environmental information.
 20. When questioned by the Commissioner, the Authority said it believed the request may partially come under the EIRs, and it referred to paragraph (a) of the definition of environmental information in regulation 2(1) of the EIRs. It indicated that its general response under the EIRs would be the same as that issued under FOSIA. It submitted that it would seek to rely on regulation 10(4)(b) of the EIRs in relation to part (v) of the request, on the grounds that compliance would be manifestly unreasonable, and it would seek to apply regulation 10(4)(a) to parts (i), (ii) and (iii) of the request, on the grounds that the information was not held. The Authority also submitted that not all of the information was environmental, and so it would continue to rely on section 12(1) of FOISA, for part (v) of the request.
 21. As noted above, the Commissioner considers that at least some, if not all, of the information would fall under the scope of the EIRs.
 22. He has investigated a number of cases where Applicants have requested information about the state or condition of roads or the built environment and, as in this case, has generally found such information to be environmental. While air (or wind) is a less tangible element compared to water or soil, he is clear that it falls under the definition in regulation 2(1)(a) of the EIRs, and that the wind's impact on human safety, in relation to built structures (such as roads) can be considered environmental information as defined in paragraph (f) of regulation 2(1) of the EIRs.
 23. Specifically, the Commissioner is satisfied that parts (i), (ii), (iii) and (v) of the request are likely to encompass environmental information, as defined in regulation 2(1)(a) and (f) of the EIRs. He acknowledges the Authority's comments that the information is either not held or would require "an extensive manual trawl of all police records held", and that part (v) of the request may also encompass non-environmental information. However, as he has noted above, environmental information must be handled under the EIRs. Furthermore, he notes that regulation 10(4)(b) of the EIRs is not a direct equivalent of section 12(1) of FOISA.

² <https://www.foi.scot/sites/default/files/2022-03/EIRBriefingsDefinition.pdf>

24. Given that some, if not all, of the information requested is environmental information, the Authority had a duty to consider it in terms of regulation 5(1) of the EIRs. In failing to do so, it failed to comply with regulations 5(1) and 16 of the EIRs.

Decision

The Commissioner finds that the Authority failed to comply with the requirements of regulations 5(1) and 16 of the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the Applicant's information request and requirement for review.

The Commissioner requires the Authority to provide a response to the Applicant's requirement for review, in terms of regulation 16 of the EIRs, by **14 October 2024**.

Appeal

Should either the Applicants 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.

Jennifer Ross
(Acting) Deputy Head of Enforcement

30 August 2024