



Decision Notice 221/2024

Damage and repairs to the A833 in Inverness

Authority: Highland Council

Case Ref: 202200214

Summary

The Applicant asked the Authority for information relating to damage and repairs to the A833 in Inverness. The Authority considered that responding to the request would be manifestly unreasonable. During the Commissioner's investigation, the Authority changed its position and accepted that the request was not manifestly unreasonable. The Commissioner required the Authority to issue a revised review response.

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" and "the Commissioner" and paragraphs (a), (c) and (f) of definition of "environmental information") (Interpretation); 5(1) and (2)(b) (Duty to make environmental information available on request); 10(1), (2) and (4)(b) (Exceptions from duty to make environmental information available); 17(1), (2)(a), (b) and (f) (Enforcement and appeal provisions)

Background

1. On 2 December 2020, the Applicant made a request for information to the Authority. The Applicant asked for responses to several questions relating to the A833 in Inverness, but only the following two questions are the subject of his application:
 - (i) Details of any reports or complaints received in any form about defects or damage to the road surface on the A833 for the period of 1 September 2019 to the date of his request;

- (ii) Details of all complaints made to the local authority by third parties requesting repair to defects on the A833 for the period of 1 September 2019 to the date of his request.
2. The Authority responded on 25 February 2021 and withheld the requested information on the basis it would be, in terms of regulation 10(4)(b) of the EIRs, manifestly unreasonable for it to provide the information. The Authority explained this was because of the way in which it recorded complaints on its Customer Relationship Management (CRM) system, which did not have the facility to search by description and it would therefore have to individually review a large number of cases to comply with the request.
3. On 9 April 2021, the Applicant wrote to the Authority requesting a review of its decision. The Applicant stated that he was dissatisfied with the decision because he had given a specific time period to search within and a specific road to search against and he therefore disputed it would take a considerable amount of time to comply with his request.
4. The Authority notified the Applicant of the outcome of its review on 8 October 2021, fully upholding its original decision.
5. On 17 February 2022, 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 he was dissatisfied with the outcome of the Authority's review because he disagreed his request was manifestly unreasonable and because he believed the Authority should have an effective system in place to search and sort the information he requested.

Investigation

6. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
7. On 21 February 2022, the Authority was notified in writing that the Applicant had made a valid application 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. The Authority was invited to comment on this application and to answer specific questions. These related to the searches it carried out, its reason(s) for considering the Applicant's request manifestly unreasonable, detail on the significant burden it considered complying with the request would impose and the public interest in favour of maintaining the exception.

Commissioner's analysis and findings

9. The Commissioner has considered all of the submissions made to him by the Applicant and the Authority.

Handling in terms of the EIRs

10. The Authority considered the Applicant's request under the EIRs, having concluded that the information requested was environmental information as defined in regulation 2(1) of the EIRs.
11. Where information falls within the scope of this definition, a person has a right to access it (and the public authority has a corresponding obligation to respond) under the EIRs, subject to the various restrictions and exceptions contained in the EIRs.
12. The Applicant has not challenged the Authority's decision to handle his request under the EIRs and the Commissioner is satisfied, in the circumstances, that the information requested by the Applicant falls within the definition of environmental information set out in regulation 2(1), in particular paragraphs (a), (c) and (f) of that definition.

Section 39(2) of FOISA – Environmental information

13. The exemption in section 39(2) of FOISA provides, in effect, that environmental information (as defined by regulation 2(1) of the EIRs) is exempt from disclosure under FOISA, thereby allowing any such information to be considered solely in terms of the EIRs. In this case, the Commissioner accepts that the Authority was entitled to apply this exemption to the information withheld under FOISA, given his conclusion that it is properly classified as environmental information.
14. As there is a statutory right of access to environmental information available to the Applicant in this case, the Commissioner accepts, in all the circumstances, that the public interest in maintaining this exemption (and responding to the request under the EIRs) outweighs any public interest in disclosing the information under FOISA. Both regimes are intended to promote public access to information and there would appear to be no reason why (in this particular case) disclosure of the information should be more likely under FOISA than under the EIRs.
15. The Commissioner therefore concludes that the Authority was correct to apply section 39(2) of FOISA and to consider the Applicant's information request under the EIRs.

Regulation 5(1) of the EIRs – Duty to make environmental information available

16. 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.
17. 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)).
18. 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(4)(b) of the EIRs – Manifestly unreasonable

19. Regulation 10(4)(b) provides that a Scottish public authority may refuse to make environmental information available to the extent that the request for information is manifestly unreasonable. In considering whether the exception applies, the authority must interpret it in a restrictive way and apply a presumption in favour of disclosure. Even if it finds that the request is manifestly unreasonable, it is still required to make the information available

unless, in all the circumstances, the public interest in doing so is outweighed by that in maintaining the exception.

20. The Commissioner's general approach is that the following factors are relevant when considering whether a request is manifestly unreasonable. These are that the request:
 - (i) would impose a significant burden on the public body;
 - (ii) does not have a serious purpose or value;
 - (iii) is designed to cause disruption or annoyance to the public authority;
 - (iv) has the effect of harassing the public authority; or
 - (v) would otherwise, in the opinion of a reasonable person, be considered manifestly unreasonable or disproportionate.
21. This is not an exhaustive list. Depending on the circumstances, other factors may be relevant, provided the impact on the authority can be supported by evidence. The Commissioner recognises that each case must be considered on its merits, taking all the circumstances into account.

The Applicant's submissions

22. The Applicant disagreed that his request is manifestly unreasonable because he had given the Authority a specific time period within which to search and a specific road to search against.
23. The Applicant therefore disagreed that his request for information would take a considerable amount of time for the Authority to comply with it and stated that he thought it should have an effective CRM system in place to search and sort the information.
24. The Applicant also stated that he thought the Authority should confirm whether it searched its systems for the road number and queried whether it could search based on relevant postcodes in or around the stretch of road in question

The Authority's submissions

25. The Authority stated that it uses a CRM system to collect information from its customers, including reports of roads maintenance issues and complaints, but its purpose is to focus information around the individual customer – not to report information across different customers.
26. The Authority explained that it has no ability to search and report against the topic of a complaint or a road maintenance issue and information regarding inspections and remedial work is recorded on a different system but this does not indicate the reason behind the remedial work being instructed.
27. The Authority stated that it had since moved to a new CRM system which does have the ability to report the kind of information requested by the Applicant but the data for the period he requested is still stored in an offline version of the old CRM system.
28. The Authority explained that it considers the Applicant's information request manifestly unreasonable because it would impose a significant burden on it to comply:
 - There were 841 complaints including the word "road" in their description, which would each have to be investigated to establish which road the complaint was about;

- Road maintenance reports rarely include a description, with the information contained in files (in a variety of formats) relating to each report. There was data on which area the report is allocated to, with 1895 relating to Inverness where the A833 is and 554 relating to “resolved cases”, meaning the area cannot be identified and other cases are allocated to individual area staff;
- Adding all of the above together, it estimated there would likely be at least 4,000 cases which would need to be reviewed to assess whether the A833 was involved.

29. Based on this, the Authority estimated that it would take at least five minutes to review each case and provided the following calculation:

$4,000 * 5 \text{ minutes} = 20,000 \text{ minutes}$

$20,000 \text{ minutes} / 60 = 333.5 \text{ hours}$

$333.5 \text{ hours} * £15 = £5,002.50$

30. During the investigation, the Commissioner asked the Authority if it would be possible to search its old CRM system for “A833” in order to identify information potentially relevant to the request.

31. The Authority, with input from its ICT team and after breaking the search down into smaller chunks, was able to complete a search on the above basis of its old CRM system.

32. The Authority explained that the search returned a number of results. Some fell outwith the scope of the request as they did not relate to the A833, while others related to the A833 but to issues such as fly tipping. However, the Authority confirmed that there were four items that potentially fell within the scope of the request.

33. In view of the above, the Authority confirmed that it no longer wished to rely on the exception in regulation 10(4)(b) of the EIRs for information which would fulfil the Applicant’s request.

The Commissioner’s view about the exception

34. As the Authority has withdrawn its reliance on the exception in regulation 10(4)(b) of the EIRs for information which would fulfil the Applicant’s request, the Commissioner must find that the Applicant’s request was not manifestly unreasonable for the purposes of regulation 10(4)(b).

35. Having reached this finding, the Commissioner is not required to consider the public interest test in regulation 10(1)(b) of the EIRs.

36. The Commissioner therefore requires the Authority to respond to the Applicant’s request in accordance with the requirements of the EIRs, otherwise than in terms of regulation 10(4)(b). In other words, the Commissioner requires the Authority to carry out a fresh review of its response to the Applicant’s request in accordance with regulation 16 of the EIRs, and to communicate the outcome to him.

Decision

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

Specifically, the Commissioner finds that the Authority was not entitled to refuse the Applicant’s request under regulation 10(4)(b) of the EIRs.

The Commissioner therefore requires the Council to respond to the Applicant's requirement for review in accordance with the requirements of the EIRs (otherwise than in terms of regulation 10(4)(b)), by **21 November 2024**.

Appeal

Should either the Applicant 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.

David Hamilton
Scottish Information Commissioner

7 October 2024