



Scottish Information
Commissioner
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Decision Notice 234/2024

Information concerning road safety inspections and repairs

Authority: Highland Council

Case Ref: 202201346

Summary

The Applicant asked the Authority for information relating to road safety inspections and repairs. The Authority considered the request under the EIRs and disclosed some information. The Commissioner investigated and found that the Authority had failed to respond to the request in accordance with the EIRs. While he found that the Authority correctly considered the request under the EIRs, the Commissioner found that the Authority had failed to fully respond to the request. He required the Authority to reconsider the request in full and to issue a revised review outcome.

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) (Environmental information); 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 the 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),(b) and (f) (Enforcement and appeal provisions)

Background

1. On 14 July 2022, the Applicant made a request for information to the Authority for information relating to road safety inspections and repairs. While the Applicant submitted his request in

response to correspondence from the Authority dated 28 June 2022, he asked 12 separate questions in total in response to three statements from the Authority.

2. The full text of the request, subject to personal data redactions, is set out in Appendix 1.
3. The Authority sent an acknowledgement on 15 July 2022, informing the Applicant that it would reply in due course, but it stated that it would only reply to the following question in his request in terms of FOISA:

“Please provide me with an inspection history over the previous 12 months for the location of the time critical repair.”
4. However, the Authority did not respond to any part of the information request.
5. On 18 August 2022, the Applicant wrote to the Authority requiring a review in respect of its failure to respond.
6. The Authority notified the Applicant of the outcome of its review on 22 September 2022. The Authority issued its response in terms of the EIRs but only responded to the question set out in paragraph 3 above (which it disclosed information in response to).
7. On 23 November 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 that he was dissatisfied with the outcome of the Authority’s review because it had failed to respond to his full information request.

Investigation

8. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
9. On 6 December 2022, 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. The Authority provided its comments to the Commissioner.
10. The case was subsequently allocated to an investigating officer.

Commissioner’s analysis and findings

11. The Commissioner has considered the submissions made by the Applicant and the Authority.

Application of the EIRs

12. In its review outcome, 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.
13. 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.

14. The Applicant has not disputed 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).

Section 39(2) of FOISA – Environmental information

15. 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.
16. In this case, the Commissioner accepts that the Authority was entitled to apply the exemption in section 39(2) of FOISA, given his conclusion that the information requested is properly considered to be environmental information. This exemption is subject to the public interest test in section 2(1)(b) of FOISA.
17. As there is a separate statutory right of access to environmental information available to the Applicant in this case, the Commissioner accepts 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.
18. 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

19. Regulation 5(1) of the EIRs (subject to the various qualifications 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. This obligation relates to information that is held by the authority when it receives a request.
20. 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)).
21. The Commissioner has considered the terms of the Applicant's request and the Authority's review outcome. Having done so, it is clear that the Applicant's request contained 12 separate questions (set out in Appendix 1), and that the Authority's review outcome only responded to the following question:

"Please provide me with an inspection history over the previous 12 months for the location of the time critical repair."
22. The Commissioner therefore finds that the Authority, by only responding to one of the questions in the Applicant's request, failed to comply with regulation 5(1) of the EIRs in handling the request, and in doing so provided an incomplete response to the Applicant.
23. In the circumstances, the Commissioner therefore requires the Authority to reconsider the Applicant's request in full (i.e. to address each of the questions in the request separately) to identify and locate any relevant information it actually held at the time of the request, and to provide the Applicant with a fresh review response in relation to his request.

Regulation 9 – Duty to provide advice and assistance

24. Regulation 9 of the EIRs requires Scottish public authorities to provide advice and assistance to applicants, so far as it would be reasonable to expect them do so.
25. Regulation 9(3) of the EIRs provides that a Scottish public authority shall be taken to have complied with this duty if it conforms with the guidance contained in the Scottish Ministers' [Code of Practice on the Discharge of Functions by Scottish Public Authorities under FOISA and the EIRs](#)¹ (the Section 60 Code).
26. Paragraph 5.3.3 of Part 2 of the Section 60 code states that if an authority is unsure about what information the applicant wants, it should obtain clarification by performing its duty to provide reasonable advice and assistance to the applicant.
27. The Commissioner accepts that the circumstances in which the Applicant's request was made (in the context of a complaint which referred to previous correspondence) made the request more difficult to respond to. However, notwithstanding this, the Commissioner finds the Authority's interpretation of, and response to, the Applicant's request difficult to understand.
28. Given the circumstances in which the Applicant's request was made, the Commissioner considers that it would have been appropriate for the Authority to have engaged with the Applicant to clarify his request instead of failing to provide any advice and assistance to him and only responding to one of the questions in his request.
29. The Commissioner therefore concludes that the Authority failed to comply with its duty under regulation 9 of the EIRs to provide the Applicant with the requisite advice and assistance.
30. The Commissioner cannot stress enough the importance of ensuring that the terms of any information request received by a Scottish public authority are clear before proceeding to respond. He would urge all Scottish public authorities to take steps to clarify with applicants any request which they are unsure of prior to proceeding with them (as provided for by regulation 9 of the EIRs).
31. The Commissioner requires the Authority to provide advice and assistance to the Applicant, in terms of regulation 9 of the EIRs, with a view to reaching a clear, and mutually shared, understanding of the scope of the request before issuing its revised review outcome in terms of regulation 16 of the EIRs.
32. The revised review to be carried out by the Authority, and the notice given to the Applicant of the outcome of that review, should address each of the questions in the Applicant's request separately and ensure that it explains which parts of the request any information being disclosed relates to, and also which parts of the request any information being excepted relates to (with full details of which exception is being applied, and why).

¹ <https://www.gov.scot/binaries/content/documents/govscot/publications/advice-and-guidance/2016/12/foi-eir-section-60-code-of-practice/documents/foi-section-60-code-practice-pdf/foi-section-60-code-practice-pdf/govscot%3Adocument/FOI%2B-%2Bsection%2B60%2Bcode%2Bof%2Bpractice.pdf>

Decision

The Commissioner finds that the Authority partially complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) and the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by the Applicant.

The Commissioner finds that the Authority was entitled to consider the request as a request for environmental information, in terms of the EIRs, and to that end it was entitled to apply section 39(2) of FOISA.

However, the Commissioner finds that the Authority failed to:

- comply with regulation 5(1) of the EIRs by failing to fully respond to the Applicant's request
- provide reasonable advice and assistance to the Applicant to enable it to identify all information that he was seeking and to allow it to fully respond to his request, and so failed to comply with regulation 9(1) of the EIRs.

The Commissioner requires the Authority to provide the Applicant with reasonable advice and assistance, in terms of regulation 9(1), and on the basis carry out a fresh review and issue a revised review outcome, as set out in this decision notice and in line with regulation 16 of the EIRs, by **9 December 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.

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.

Cal Richardson
Deputy Head of Enforcement

25 October 2024

Appendix 1: Information request

Request made on 14 July 2022

“I will now turn to my email of 11th May. I expected [named person] to reply to this, but for whatever reason you decided to do so for which I am grateful. However, your reply on [named person’s] behalf has raised some other issues for which I would like explanations/further information. I set the parts of your reply below together with my questions.

- If we are carrying out a time critical defect repair then we will also fill in as many other potholes as possible in the area afterwards. Please provide me with the following Information
 1. On what date was the repair to the pothole in question repaired?
 2. If there was a time critical repair in the area carried out during the week commencing 10th January 2022 where was it and on what date was it carried out?
 3. How far was the time critical repair from the pothole in question?
 4. Was a work instruction issued for the time critical repair, and if so on what date?
 5. Please provide me with an inspection history over the previous 12 months for the location of the time critical repair.
 6. If the pothole in question had not been identified as a safety defect, how did the repair team know about the pothole in question?
 7. If the pothole in question had not been identified as a safety defect, why did the repair team need to repair the pothole in question?
- During the survey on 30 December 2021 the Roads Inspector did consider this a road safety defect, however, did not exit the vehicle to inspect the site.
 1. This seems to contradict other claims made by both you and [named person]. If it is correct why was it not recorded as a defect in the inspection history?
 2. If it is correct, why did the inspector not exit the vehicle to inspect the site?
- I can confirm that our database does not allow searches that identify ‘requests for service’ on potholes at specific locations. However, any complaints received regarding defects would be passed to our Area Roads Operations Manager for a response. [Named person] has advised me that there have been no previous complaints received about defects in this location.
 1. How are complaints about defects recorded?
 2. How are complaints regarding defects passed to the Area Roads Operation Manager?
 3. If your database does not allow searches that identify requests for service on potholes at specific locations, from what record is [named person] able to advise you that there have been no previous complaints received about defects in that location?”