

Decision Notice



Decision 063/2010 QCon (Scotland) Ltd. and Fife Council

Rights of way map

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www.itspublicknowledge.info

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Summary

QCon Scotland Ltd. (QCon) requested from Fife Council (the Council) a map showing all rights of way (ROW) in Fife. The Council initially advised QCon that it was unable to provide the requested information as it did not hold the copyright. Following a review, at which point the Council stated that the information was exempt from disclosure under the Freedom of Information (Scotland) Act 2002 (FOISA), QCon remained dissatisfied and applied to the Commissioner for a decision.

During the investigation, the Commissioner took the view that the information comprised environmental information and asked for the Council's comments as to whether the request should have been dealt with under the Environmental Information (Scotland) Regulations 2004 (the EIRs). The Council agreed that any information held would be environmental and that it wished to rely on section 39(2) of FOISA. At this stage, however, the Council provided QCon with a map which it considered fulfilled the terms of the request. QCon disagreed with the Council's position, indicating that the information provided was not in an acceptable format and wishing the Commissioner to determine whether it should be provided in an alternative format.

Following an investigation, the Commissioner found that the Council had failed to deal with the information request made by QCon in accordance with the EIRs, by failing to provide the requested information, or to respond to QCon's request for information and requirement for review within the respective timescales laid down by regulations 5(2), 13(a) and 16(4) and by failing to specify the reasons for the refusal of the request including the public interest test as required by regulation 13(b) and 13(c) of the EIRs. However, the Commissioner did not consider that the Council was obliged to provide the information to QCon in a format other than that supplied during the investigation.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions) and 39(2) (Health, safety and the environment)

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (Interpretation) (definitions (a) and (f) of "environmental information"); 5(1) and (2) (Duty to make available environmental information on request); 6(1)(a) (Form and format of information); 13(a), (b) and (c) (Refusal to make information available) and 16(4) (Review by Scottish public authority)

The full text of each of the statutory provisions cited above is reproduced in the Appendix to this decision. The Appendix forms part of this decision.



The Scottish Ministers' Code of Practice on the Environmental Information (Scotland) Regulations 2004 for Scottish Public Authorities (the "Section 62 Code")

Background

1. On 5 June 2009, QCon wrote to the Council requesting the following information:
"A map showing all the ROW in Fife, irrespective of their status i.e. claimed, asserted, vindicated etc."
2. The Council responded on 8 June 2009, indicating that it did not normally give out ROW map information for the whole of Fife as the information it held was not entirely accurate. It explained that, where it received an enquiry regarding a particular ROW route, a copy of the particular route could normally be provided with the proviso that the information may not be entirely accurate.
3. QCon emailed the Council on 9 June 2009 indicating that "in this instance, the accuracy of certain routes is not paramount as we merely require an overview for the whole of Fife". QCon considered that if the Council were able to provide maps for specific areas, it should, logically, be able to provide a map for the whole of Fife.
4. The Council subsequently responded on 18 June 2009, advising that it intended providing QCon with ROW maps for Fife in the form of photocopies of four A0 size maps.
5. QCon wrote to the Council on 3 July 2009, seeking an update on the processing of these maps, and was informed on 7 July 2009 that there were copyright issues that were still to be resolved.
6. On 16 July 2009, the Council emailed QCon stating that it would not be providing the ROW map on the basis that the Council did not hold the copyright to the information.
7. On 21 July 2009, QCon emailed the Council, requesting a review of its decision. In particular, QCon pointed out that the fact the Council did not hold the copyright to the information did not constitute a valid exemption from disclosure under FOISA.
8. The Council notified QCon of the outcome of its review on 22 September 2009, stating that it considered the requested information to be exempt from disclosure in terms of section 33(1)(b) of FOISA on the basis that its disclosure would be likely to prejudice substantially the commercial interests of the charitable organisation which produced the maps.



9. On 2 October 2009, QCon wrote to the Commissioner, stating that it was dissatisfied with the outcome of the Council's review and its handling of its request and applying to the Commissioner 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 certain specified modifications.
10. The application was validated by establishing that QCon had made a request for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its response to that request.

Investigation

11. On 3 November 2009, the Council was notified in writing that an application had been received from QCon and was asked to provide the Commissioner with any information withheld from it. The Council responded with the information requested and the case was then allocated to an investigating officer.
12. The investigating officer subsequently contacted the Council, giving it an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking it to respond to specific questions.
13. The investigating officer pointed out that, having considered the nature of the information requested in this case, it appeared likely that any information falling within the scope of the request would be environmental information and therefore subject to the EIRs. The Council was asked to comment on this point and to provide submissions as to whether it considered that the requested information fell within the scope of any of the exceptions contained in the EIRs. The Council was also asked whether it wished to rely on section 39(2) of FOISA, which allows Scottish public authorities to exempt information from disclosure under FOISA if it is environmental information which the authority is obliged to make available to the public in accordance with the EIRs.
14. In its response, the Council confirmed that it now considered the request should have been dealt with under the EIRs and considered the information to be exempt under section 39(2) of FOISA. The Council indicated, however, that it was now prepared to provide the requested information to QCon and subsequently did so.
15. QCon subsequently contacted the investigating officer, confirming that it had received information from the Council. However, this was in the form of a single A0 size map at a scale of 1:65000, which QCon considered rendered the information almost useless. QCon referred to the Council's previous email of 18 June 2009 which had indicated that the information would be provided in the form of four A0 size maps.



16. In ensuing correspondence with the investigating officer, the Council stated that it considered the information it had provided to QCon fulfilled the terms of the request and complied with the requirements of regulation 6(1) of the EIRs.
17. In subsequent correspondence and discussion with the investigating officer, QCon stated that it did not consider the format of the information provided by the Council fulfilled the terms of its request. QCon confirmed that it wished the Commissioner to investigate and issue a decision on this matter. QCon also wished the Commissioner to investigate a number of aspects of the Council's handling of its request which are considered, along with the submissions made by both QCon and the Council, in the Commissioner's analysis and findings section below.

Commissioner's analysis and findings

18. In coming to a decision on this matter, the Commissioner has considered all of the submissions made to him by both QCon and the Council and is satisfied that no matter of relevance has been overlooked.

FOISA or the EIRs?

19. In *Decision 218/2007 Professor A D Hawkins and Transport Scotland*, the Commissioner considered the relationship between FOISA and the EIRs at some length and set out his understanding of the situation. Broadly, the Commissioner's general position on the interaction between the two regimes is as follows:
 - a. The definition of what constitutes environmental information should not be viewed narrowly
 - b. 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
 - c. Any request for environmental information therefore must be dealt with under the EIRs
 - d. In responding to a request for environmental information under FOISA, an authority may claim the exemption in section 39(2)
 - e. If the authority does not choose to claim the section 39(2) exemption it must deal with the request fully under FOISA, by providing the information, withholding it under another exemption in Part 2, or claiming that it is not obliged to comply with the request by virtue of another provision in Part 1 (or a combination of these)
 - f. The Commissioner is entitled (and indeed obliged) where he considers a request for environmental information has not been dealt with under the EIRs to consider how it should have been dealt with under that regime.



20. 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 it under the EIRs, subject to the exceptions contained within regulation 10, the provisions of regulation 11 and certain other restrictions set out in the EIRs.
21. In this case, the Commissioner has concluded that the requested information (a ROW map) is environmental information for the purposes of the EIRs. The request relates to the state of the elements of the environment, such as land, landscape and natural sites (paragraph (a) of the definition) and to the state of built structures as they may be affected by the state of the elements of the environment referred to in paragraph (a) (paragraph (f) of the definition) (see the definition of environmental information as contained in parts (a) and (f) of regulation 2(1) of the EIRs, set out in the Appendix).
22. As the Commissioner considers that the information requested by QCon is environmental information, he also therefore considers this information to be exempt in terms of section 39(2) of FOISA.
23. The exemption in section 39(2) is subject to the public interest test in section 2(1)(b) of FOISA. The Commissioner's view is that, in this case, as there is a separate statutory right of access to environmental information, the public interest in maintaining this exemption and allowing access in line with the requirements of the EIRs outweighs the public interest in the disclosure of information under FOISA. In what follows, therefore, the Commissioner will make his decision solely in terms of the EIRs.

Regulation 5 of the EIRs

24. Regulation 5(1) of the EIRs requires authorities which hold environmental information to make it available to an applicant when requested to do so by any applicant. Regulation 5(2) specifies that the information should be supplied no later than 20 working days after the date of receipt of the request (subject to regulations 6 to 12 of the EIRs).
25. In this case, the Council did not supply QCon with any information in response to the request within the timescales laid down in the EIRs. Since the Council did not claim that the information was excepted from disclosure (or that the right of access was otherwise disapplied) under the EIRs at the time of the request or requirement for review (or throughout the period of the Commissioner's investigation), he has concluded that the Council failed to comply with the requirements of regulation 5(1) and (2) of the EIRs in responding to QCon's request.

Regulation 6(1)(a) of the EIRs

26. Regulation 6(1)(a) of the EIRs provides that where an applicant requests that environmental information be made available in a particular form or format, a Scottish public authority shall comply with that request unless it is reasonable for it to make the information available in another form or format.



27. In its original application to the Council on 5 June 2009, QCon stated that it was seeking “a map showing all the ROWs in Fife, irrespective of their status i.e. claimed, asserted, vindicated etc.”
28. On 9 June 2009, QCon emailed the Council concerning its request and noted that “in this instance, the accuracy of certain routes is not paramount as we merely require an overview for the whole of Fife”.
29. As noted at paragraph 4 above, the Council contacted QCon on 18 June 2009 indicating that the requested information would be provided in the form of four A0 size maps.
30. In its submissions to the Commissioner, the Council maintained that it had fulfilled the terms of the request by providing a map of the most up to date information that it held on ROWs in Fife (which had been updated in 2009) and was not therefore obliged to provide the information in an alternative form or format under regulation 6(1).
31. The Council explained that the four printed maps referred to in its email to QCon on 18 June 2009 dated from 2001 and contained out of date information. The Council also explained that the Officer who had corresponded with QCon at that time had been unaware that the information in question was in a historical document and was out of date.
32. The Council also referred to the earlier email from QCon which had indicated “we merely require an overview for the whole of Fife”. The Council considered that the information provided to QCon during the investigation fulfilled this criterion.
33. In its submissions to the Commissioner, QCon stated that the scale of the map provided was too large to extract the information it required.
34. In considering this matter, the Commissioner notes that the first time QCon gave any indication that it required the information requested to be provided in a particular format was during the investigation. This followed the provision by the Council of a single A0 size map at a scale of 1:65000. This disclosure came after the Council had previously indicated that the information would be provided in the form of four A0 maps.
35. Having considered the terms of QCon’s initial request and the further comments made in the email of 9 June 2009, the Commissioner is unable to accept that QCon’s request should be interpreted as requiring access to the information specified in any particular format. The request is simply for a map showing all ROWs in Fife; it does not however specify that a certain size of map is required or that it should be at any specified scale.
36. In the circumstances, the Commissioner does not consider that the Council was obliged in terms of regulation 6(1)(b) of the EIRs to provide the information requested by QCon in the form of a map of any particular size or scale, and he is satisfied that the information now provided to QCon satisfies the terms of the request as specified to the Council.



Technical provisions of the EIRs

Timescales

37. In its application to the Commissioner, QCon expressed concern about the length of time taken by the Council in responding both to the initial request for information and the requirement for review.
38. Regulation 13(a) of the EIRs gives a Scottish public authority which is refusing to comply with a request to make environmental information available a maximum of 20 working days after the date of receipt of the request to give that refusal in writing.
39. The Council did not provide a refusal to QCon's request of 5 June 2009 until 16 July 2009.
40. The Commissioner therefore finds that the Council failed to respond to QCon's request for information within the 20 working days allowed under regulation 13(a) of the EIRs.
41. Regulation 16(4) of the EIRs gives public authorities a maximum of 20 working days following the date of receipt of the requirement to comply with a requirement for review.
42. The Council did not provide a response to QCon's requirement for review of 21 July 2009 until 22 September 2009.
43. The Commissioner therefore finds that the Council failed to respond to QCon's requirement for review within the 20 working days allowed under regulation 16(4) of the EIRs.

Content of notices

44. QCon also expressed dissatisfaction with the content of the Council's responses to its request for information and requirement for review. It argued that the initial response failed to provide any proper explanation as to why any relevant exception was considered to apply and made no mention of the public interest test. It also argued that there was inadequate reasoning provided for withholding the requested information in the response to the requirement for review and no analysis of the public interest.
45. Regulation 13 of the EIRs provides that, where a request to make environmental information available is refused by a Scottish public authority, the refusal must be provided in writing and must specify the authority's reasons for refusal. This should include details of any exception the authority considers applicable under regulation 10(4), 10(5) or provision of regulation 11, with the basis on which these are considered to apply, and also how the public authority has reached its decision with respect to the public interest under regulation 10(1)(b).
46. In addition, paragraph 65 of the Scottish Ministers' Ministers Code of Practice on the Environmental Information (Scotland) Regulations 2004 (commonly known as the "Section 62 Code") for Scottish Public Authorities states:



“Where a request for information is refused or partially refused in accordance with an exception, the [EIRs] require that the Scottish public authority notifies the applicant in writing which exception has been claimed, and the reason that exception applies. Scottish public authorities should not merely paraphrase the wording of the exception unless the statement would involve the disclosure of information which would itself be withheld in accordance with the [EIRs]. The Scottish public authority should state clearly in the decision letter why they have decided to apply that exception in the case in question. The [EIRs] also require Scottish public authorities, when withholding information, to state the reasons for claiming that the public interest in maintaining the exception outweighs the public interest in disclosure. Scottish public authorities should specify the public interest factors - for and against disclosure - that they have taken into account before reaching the decision, unless the statement would involve the disclosure of information which would itself be withheld in accordance with the [EIRs]. They should also include details of procedure for review of the decision and for appeal for a decision by the Scottish Information Commissioner.”

47. The Council’s response to QCon’s request (on 16 July 2009) and response to its requirement for review did not comply with the requirements above. In particular, the Council did not cite which exception in the EIRs (or, indeed, under FOISA) it was relying on to withhold the requested information, nor state the basis on which any exception or provision relied upon applied and did not provide any consideration of the public interest.
48. For this reason, the Commissioner has concluded that the Council failed to comply with the requirements of regulation 13(b) and 13(c) of the EIRs in responding to QCon’s request.

Conclusion on technical breaches

49. The Commissioner does not require the Council to take any action with regard to the technical breaches noted above in response to this particular application.
50. It should be noted, however, that the Commissioner carried out an assessment of the Council's Development and Regeneration Service's practice in dealing with information requests in November 2009. The findings from this will be discussed with the Council and a report published in due course.



DECISION

The Commissioner finds that Fife Council (the Council) complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the request from QCon (Scotland) Ltd. (QCon).

The Commissioner finds that the Council partially failed to comply with the Environmental Information (Scotland) Regulations 2004 (the EIRs) by failing to comply with the technical requirements of regulations 5(1) and (2), 13(a), 13(b), 13(c) and 16(4) of the EIRs. The Commissioner does not require the Council to take any action in response to these technical failures in response to this particular application.

The Commissioner does not however find that the Council failed to comply with the requirements of regulation 6(1)(a) of the EIRs in responding to QCon's request.

Appeal

Should either QCon or the Council wish to appeal against this decision, there is an 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 notice.

Margaret Keyse
Head of Enforcement
6 May 2010



Appendix

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.

...

- (6) This section is subject to sections 2, 9, 12 and 14.

2 Effect of exemptions

- (1) To information which is exempt information by virtue of any provision of Part 2, section 1 applies only to the extent that –

...

- (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

...

39 Health, safety and the environment

...

- (2) Information is exempt information if a Scottish public authority-
- (a) is obliged by regulations under section 62 to make it available to the public in accordance with the regulations; or
 - (b) would be so obliged but for any exemption contained in the regulations.

...



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;

...

(f) the state of human health and safety, including the contamination of the food chain, where relevant, 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) or, through those elements, by any of the matters referred to in paragraphs (b) and (c);

...

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)-

(a) shall be complied with as soon as possible and in any event no later than 20 working days after the date of receipt of the request; and

(b) is subject to regulations 6 to 12.

...



6 Form and format of information

- (1) Where an applicant requests that environmental information be made available in a particular form or format, a Scottish public authority shall comply with that request unless-
- (a) it is reasonable for it to make the information available in another form or format;

...

13 Refusal to make information available

Subject to regulations 10(8) and 11(6), if a request to make environmental information available is refused by a Scottish public authority in accordance with regulation 10, the refusal shall-

- (a) be given in writing as soon as possible and in any event no later than 20 working days after the date of receipt of the request for the information;
- (b) specify the reasons for the refusal including, as appropriate, any exception under regulation 10(4) or (5) or provision of regulation 11 and how the Scottish public authority has reached its decision with respect to the public interest under regulation 10(1)(b);
- (c) state the basis on which any exception relied on under regulation 10(4) or (5) or provision of regulation 11 applies if it would not otherwise be apparent;

...

16 Review by Scottish public authority

...

- (4) The Scottish public authority shall as soon as possible and no later than 20 working days after the date of receipt of the representations notify the applicant of its decision.

...