

Decision Notice 082/2021

Traffic management measures

Applicants: The Applicants

Public authority: Transport Scotland

Case Ref: 202000898



Scottish Information
Commissioner

Summary

Transport Scotland was asked about the installation and operation of specific traffic lights. Transport Scotland responded by advising that certain information was not held or exempt from disclosure under FOISA.

Following an investigation, the Commissioner found that the Applicants had made a request for environmental information and Transport Scotland had failed to respond properly under the EIRs.

He also found that Transport Scotland had not been entitled to withhold information, which was disclosed during the investigation. The Commissioner was, however, satisfied that Transport Scotland was entitled to tell the Applicants that it did not hold certain information.

Relevant statutory provisions

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

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) and (4)(a) (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 7 November 2019, the Applicants made a request for information to Transport Scotland about the installation and operation of specific traffic lights and associated traffic management measures. The Applicants' request was in 13 parts, each embedded in a lengthy paragraph and requiring some interpretation.

2. The following parts of the request are under consideration here:

Part 5: In relation to the removal of road markings, the Applicants asked

Why has this traffic calming measure been removed altogether at that speed troubled section of street...?

Part 7: In relation to the speed tolerance that had been set, the Applicants stated:

...we wish to know the specific public safety policy basis for maintaining that tolerance...

Part 8: In relation to what the Applicants referred to as a profound increase in compensating speeding in the area, the Applicants asked

...what measures, if any, does Transport Scotland plan to take to combat this most unwelcome development...?

Part 9: The Applicants commented on Transport Scotland's intention to approach the UK Department for Transport with a view to securing their approval of reverse discrimination speed control traffic lights being trialled here, for inclusion within the UK-wide Traffic Signs

Regulations and General Directions legislation. The Applicants stated they wished to know what progress, if any has been made in this regard and the anticipated timescales for such approval, or indeed the likelihood of such approval and requested

... disclosure of any written communication which refers, suggest or requests a reduction in red trigger activation frequency here as a prerequisite to obtaining any such approval. Have you received any such communication?

Part 13: In relation to this part of the request, the Applicants stated that on 2 May 2019 ScotlandTranserv distributed a multiple question survey to villagers. The Applicants requested:

... an identity redacted analysis of the number and range of responses to each set question and transcript of any comments.

3. Transport Scotland responded on 17 December 2019. In relation to part 5 of the request, Transport Scotland advised that the road markings were removed when the signals were installed on 11 December 2017. It explained that the removal of the “slow” markings was necessary as this type of measure in thermoplastic paint on the approach to the signals would be a hazard in the event of a vehicle breaking for the signals.
4. In relation to parts 7 and 8 of the request, Transport Scotland stated that the information was not held. Transport Scotland stated that the information held for part 9 of the request was exempt from disclosure under section 36(1) of FOISA, and applied section 30(b)(ii) of FOISA to withhold the information falling within the scope of part 13.
5. On 27 January 2020, the Applicants wrote to Transport Scotland requesting a review of its decision. Within the request for review, the Applicants raised a number of issues regarding the subject matter of the request and commented on the responses received. The content of the requirement for review can be interpreted as the Applicants being dissatisfied with the responses received to those parts of the request outlined above.
6. Transport Scotland notified the Applicants of the outcome of its review on 12 February 2020. It provided further explanation to the effect that part 5 of the request had been answered, and upheld the initial responses to parts 7, 8, 9 and 13 of the request.
7. On 10 August 2020, the Applicants 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.
8. The Applicants stated they were dissatisfied with the outcome of Transport Scotland’s review because it failed to answer the questions they had asked Transport Scotland and because they disagreed with the responses in terms of sections 17(1), 30(b)(ii) and 36(1) of FOISA. The Applicants acknowledged, however, that personal data should be redacted in relation to part 13 of the request.

Investigation

9. The application was accepted as valid. The Commissioner confirmed that the Applicants 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.

10. Transport Scotland is an agency of the Scottish Ministers (the Ministers). On 31 August 2020, in line with agreed procedures, the Ministers were notified in writing that the Applicants had made a valid application to the Commissioner and were asked to send the Commissioner the information withheld from the Applicants. The Ministers provided the information and the case was allocated to an investigating officer.
11. Subsequent references to contact with or submissions from Transport Scotland are references to contact with or submissions made by the Ministers on behalf of Transport Scotland.
12. On 26 November 2020, the investigating officer gave Transport Scotland an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asked it to respond to specific questions.
13. In particular, Transport Scotland was asked if it had considered whether the Applicants' information request should have been handled as a request for environmental information, to be responded to under the EIRs. It was also asked to confirm the searches and enquiries it had undertaken to establish what information it held falling within the scope of the Applicants' request.
14. In relation to the information to which Transport Scotland had applied section 36(1) of FOISA, it was not apparent to the investigating officer why this information was considered to fall within the scope of part 9 of the Applicants' request. Transport Scotland was asked to explain why this information was considered to fall within the scope of part 9.
15. Transport Scotland responded and agreed that the information requested was environmental information and, therefore, that the request should have been dealt with under the EIRs. It also acknowledged that the information it initially considered to be exempt in terms of section 36(1) of FOISA did not in fact fall within the scope of part 9 of the request.
16. As a result, Transport Scotland retrospectively applied regulation 10(4)(a) of the EIRs to parts 5, 7, 8 and 9 of the request, and provided submissions to that effect.
17. In relation to the information falling within the scope of part 13 of the request, which it had initially withheld in terms of section 30(b)(ii) of FOISA, Transport Scotland advised that it had reconsidered its position. It withdrew its reliance on this exemption, and determined that most of the information (i.e. excepting some personal data) could be disclosed as it would not fall to be excepted from disclosure under an exception in the EIRs.
18. Transport Scotland wrote to the Applicants on 17 December 2020 and confirmed that it should have considered the request in terms of the EIRs, and so wished to rely upon section 39(2) of the EIRs. It provided the information it had previously withheld under section 30(b)(ii) of FOISA, subject to the redaction of personal data only.
19. The Applicants acknowledge receipt of the information disclosed. They had no objection to the redaction of personal data, but remained dissatisfied with Transport Scotland's handling of their request and wished the Commissioner to come to a decision.

Commissioner's analysis and findings

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

Application of the EIRs

21. In *Decision 218/2007 Transport Scotland*¹, the Commissioner confirmed (at paragraph 51) that, where environmental information is concerned, there are two separate statutory frameworks for access to that information and, in terms of the legislation, an authority is required to consider the request under both FOISA and EIRs.
22. In its submissions to the Commissioner, Transport Scotland acknowledged that the Applicants' request should have been responded to under the EIRs and, in its response to the Applicants on 17 December 2020, as referred above, it stated that it wished to rely on the exemption in section 39(2) of FOISA. For this exemption to apply, any information requested would require to be environmental information as defined in regulation 2(1) of the EIRs.
23. Having considered the terms of the request and Transport Scotland's submissions on this point, it is clear that any information falling within the scope of the request would be environmental information, as defined in regulation 2(1) of the EIRs. The information in question concerns the installation and operation of traffic lights and related traffic management measures and, as such, the Commissioner is satisfied that it would fall within either paragraph (a) or paragraph (c) of the definition of environmental information in regulation 2(1) of the EIRs (reproduced in Appendix 1 to this decision).
24. In this case, therefore, the Commissioner accepts that Transport Scotland was entitled to apply the exemption in section 39(2) of FOISA, given his conclusion that it is properly considered to be environmental information. This exemption is subject to the public interest test in section 2(1)(b) of FOISA.
25. As there is a separate statutory right of access to environmental information available to the Applicants in this case, the Commissioner accepts that the public interest in maintaining this exemption and dealing with the request in line with the requirements of the EIRs outweighs any public interest in disclosure of the information under FOISA. In the circumstances, he has proceeded to consider this case in what follows solely in terms of the EIRs.
26. As Transport Scotland failed to recognise and respond to the request as a request for environmental information, the Commissioner must find that it failed – in this respect – to respond in accordance with regulation 5(1) of the EIRs.

Was all relevant information identified by Transport Scotland?

27. 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. While this duty is subject to certain qualifications, none of them appear to be relevant in this case. It is important to bear in mind that this obligation relates to information actually held by an authority when it receives the request, as opposed to information an applicant believes the authority should hold, but which is not in fact held at that time.
28. Under the EIRs, a public authority may refuse to make environmental information available if one or more of the exceptions in regulation 10 apply and, in all the circumstances of the case, the public interest in maintaining the exception or exceptions outweighs the public interest in making the information available. If no such information is held by the authority, regulation 10(4)(a) of the EIRs permits the authority to give the applicant notice to that effect.

¹ <http://www.itspubliknowledge.info/ApplicationsandDecisions/Decisions/2007/200600654.aspx>

29. The Commissioner has taken account of the submissions provided by the Applicants in which they provide explanation as to why they consider Transport Scotland should hold further information falling within the scope of their request. While the Applicants may have genuine reasons for believing that Transport Scotland should hold further information, the Commissioner can only consider whether or not Transport Scotland identified and located the information it actually held.
30. The standard of proof to determine whether a Scottish public authority holds information is the civil standard of the balance of probabilities. In determining where the balance lies, the Commissioner considers the scope, quality, thoroughness and results of the searches carried out by the public authority. He also considers, where appropriate, any reason offered by the public authority to explain why it does not hold the information. While it may be relevant as part of this exercise to explore expectations as to what information the authority should hold, ultimately the Commissioner's role (as indicated above) is to determine what relevant information is actually held by the public authority (or was, at the time it received the request).
31. As stated in many previous decisions, the Commissioner's remit extends only to consideration of a Scottish public authority's compliance with Part 1 of FOISA, or with the EIRs, in responding to a request. The Commissioner cannot comment on whether a public authority should have taken particular action or, if it has, what records it should maintain in relation to that action.
32. The Commissioner has also to consider the actual scope of the information requested. In this case, he notes that the requests for information were contained within correspondence where the Applicants commented on, and raised questions regarding, the subject matter. The requests were, at times, contained in lengthy paragraphs and in the form of questions. The Commissioner considers that, to a degree, Transport Scotland had to carry out a certain amount of analysis and interpretation to identify what constituted a valid request for information.
33. The Commissioner would highlight the importance of separating requests for information from lengthy discourse on the underlying issues. The same applies when submitting a requirement for review, which must express dissatisfaction with the response received to a specific request. In this case, the fact that the requests had to be extracted from lengthy correspondence was likely to undermine any clarity the request and subsequent requirement for review might possess.
34. A request submitted in such a way can not only run the risk of the request not being identified by the authority, but can lead to confusion as to what is actually being requested and additional work for both the authority and subsequently the Commissioner in dealing with any application that he may receive.
35. In relation to the parts 5, 7, 8 and 9 of the request, Transport Scotland submitted that it held no information. As mentioned above, it confirmed that the information falling within the scope of part 13 had been provided to the Applicants.
36. Transport Scotland explained the searches and enquiries it conducted to identify and locate any relevant information. It advised that the installation of the traffic system in question was managed by a small team of policy officials within Transport Scotland who all had a good knowledge of the information held in relation to this subject matter. Transport Scotland detailed the searches undertaken, which included consultation with relevant staff. Transport Scotland provided supporting evidence confirming the outcomes of its searches.

37. Transport Scotland confirmed that the conclusion of the searches and enquiries was that no information was held.
38. Taking account of all of the circumstances regarding the wording of the requests and subsequent requests for review, and having considered all relevant submissions and the terms of the request, the Commissioner accepts that Transport Scotland interpreted the Applicants' request reasonably and took adequate, proportionate steps with a view to identifying and locating the information falling within the scope of each part of the request under consideration. If Transport Scotland did hold any further relevant information, the Commissioner is satisfied that it would have been found by the searches carried out.
39. As mentioned above, the Commissioner can only consider whether information is actually held by an authority, not what information it should hold or what an applicant believes it should hold.
40. The exception in regulation 10(4)(a) is subject to the public interest test in regulation 10(1)(b) of the EIRs and can only be upheld if, in all the circumstances, the public interest in maintaining the exception outweighs the public interest in making the information available. The Commissioner is satisfied that Transport Scotland does not (and did not, on receiving the request) hold the information in question. Consequently, he does not consider there to be any conceivable public interest in requiring that information be made available. The Commissioner therefore concludes that the public interest in making the requested information available is outweighed by that in maintaining the exception in regulation 10(4)(a) of the EIRs.
41. In all the circumstances, therefore, the Commissioner is satisfied that Transport Scotland does not (and did not, at the time it received the request from the Applicants) hold any information falling within the scope of parts 5, 7, 8 and 9 of the Applicants' request. It was entitled to rely on regulation 10(4)(a) of the EIRs, on the basis that it did not hold the information requested.

Information withheld under exemptions

42. In relation to part 13 of the request, Transport Scotland provided submissions to the effect that, other than the information disclosed to the Applicants during the investigation, it held no further information.
43. While Transport Scotland initially withheld the information, considering it to be exempt in terms of section 30(b)(ii) of FOISA on the basis that disclosure would inhibit substantially the free and frank exchange of views, its submissions to the Commissioner withdrew its reliance on this exemption, on the basis that the request fell to be considered under the EIRs, and that no exception contained in the EIRs was applicable.
44. In the absence of submissions from Transport Scotland as to why the information was initially considered exempt or excepted from disclosure, the Commissioner must conclude that the information in question was not properly withheld by Transport Scotland and that, by doing so, it breached regulation 5(1) of the EIRs.
45. Given that the information was disclosed to the Applicants during the investigation, the Commissioner does not require Transport Scotland to take any action.

Observations about the handling of the request and review

46. The following observations are not part of the Commissioner's findings on compliance with the EIRs, but cover practice issues the Commissioner has identified during this investigation and about which he has concerns. He hopes these comments are helpful to all Scottish public authorities and requesters.
47. As mentioned above, during the investigation, Transport Scotland confirmed that it did not hold information falling within the scope of part 9 of the request. While the Commissioner has accepted that Transport Scotland does not hold any information falling within the scope of part 9, he considers it appropriate to make further comment on the initial application of section 36(1) of FOISA.
48. In this particular case, considering the terms and context of the request (and notwithstanding the comments above about keeping requests separate from other communications), the Commissioner is satisfied that this part of the request was clear in its scope. It appears equally clear that the information identified initially did not, on any reasonable interpretation, fall within the scope of part 9. It does not appear that this part of the request was adequately considered until after the investigation had commenced, causing unnecessary work for both the Commissioner and Transport Scotland staff during the investigation.
49. Overall, the Commissioner cannot stress enough that it is vital for proper consideration and interpretation to be given to a request before purporting to withhold information that does not actually fall within scope. It is vital that adequate steps are taken to identify, locate and provide any relevant information held or, as in this case, to establish that no information is held.
50. Equally, before deciding that information is exempt or excepted from disclosure, full consideration has to be given as to the tests to be met for an exemption or exception to apply, when dealing with requests under both FOISA and the EIRs. Any shortcomings in the public authority's initial response should be rectified on review. In this case, however, Transport Scotland again relied on the exemptions claimed in the original response, which raises the question as to the quality of the review.
51. While no useful purpose would be served by requiring Transport Scotland to take any specific action in this case, the Commissioner would urge it to take steps to ensure that it meets these obligations fully in future.

Decision

The Commissioner finds that Transport Scotland failed to comply with the Environmental Information (Scotland) Regulations 2004 (in particular, regulation 5(1)) in responding to the information request made by the Applicants. The Commissioner finds that Transport Scotland failed to recognise that the request fell to be considered under the EIRs and, in responding to the Applicants, was not entitled to withhold the information disclosed during the investigation.

The Commissioner is, however, satisfied that Transport Scotland was entitled to inform the Applicants that certain information was not held.

Appeal

Should either the Applicants 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

26 May 2021

Appendix 1: 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;

...

- (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.

...

- (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;

...

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