

Decision Notice

Decision 140/2017: Mr Dave Sutton and South Lanarkshire Council

Adoption of specific roads

Reference No: 201701048

Decision Date: 29 August 2017



Scottish Information
Commissioner

Summary

The Council was asked whether it had adopted specific roads in a housing development. The Council initially considered the request was for environmental information. At review, the Council decided the request was for information which it did not hold, but which would not be environmental information even if it did. The Council explained that it would only hold recorded information if the roads were adopted, which they were not.

The Commissioner investigated and accepted that the Council did not hold any recorded information. However, she found that the information, if held, would be environmental information and that the Council should have responded under the EIRs.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (4) (General entitlement); 17(1) (Notice that information is not held)

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (definitions (a), (c) and (f) of "environmental information"); 4 (Active dissemination of environmental information); 5(1) and (2)(b) (Duty to make available environmental information on request)

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.

All references in this decision to "the Commissioner" are to Margaret Keyse, who has been appointed by the Scottish Parliamentary Corporate Body to discharge the functions of the Commissioner under section 42(8) of FOISA.

Background

1. On 26 April 2017, Mr Sutton made a request for information to South Lanarkshire Council (the Council). Mr Sutton explained that he had been told by a third party that the Council had adopted the roads in a new estate development, but had been told (orally) by the Council that the estate had not been adopted. Mr Sutton wanted to check whether the roads in the estate had been adopted.
2. The Council responded on 10 May 2017. The Council interpreted Mr Sutton's request as seeking information on the adoption of a residential development by the Council, and specifically whether the Council had adopted two named streets. The Council dealt with the request under the EIRs. It informed Mr Sutton that its list (register) of public roads is publicly available and easily accessible for inspection at its offices. Alternatively, property enquiries could be carried out at a cost of £36.06 per road.
3. On 12 May 2017, Mr Sutton wrote to the Council requesting a review of its decision. He argued that because the information was not available online, it could not be said to be publicly available and easily accessible to him. Mr Sutton believed that the Council should make such information available online. He believed there was a clear public interest in members of the public being able to view the Council's list of public roads online rather than having to attend to inspect information.

4. The Council notified Mr Sutton of the outcome of its review on 12 June 2017. The Council decided that Mr Sutton's request should not have been dealt with under the EIRs, as the information requested did not fall within the definition of environmental information. The information was whether the Council had adopted (i.e. taken over for maintenance) certain roads and, in the Council's view, this did not relate to the effect of any elements of the environment on the roads in question, but to the legal status for maintenance. The Council also informed Mr Sutton that it did not hold the information he had asked for. It explained that it would only hold recorded information if the roads were adopted, which was not the case.
5. On 13 June 2017, Mr Sutton applied 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 specified modifications. Mr Sutton was dissatisfied with the outcome of the Council's review as he believed the information requested was covered by the EIRs. He was also dissatisfied that the list of public roads was not available online and that a person would have to attend a local office to access it instead. He did not accept that the Council did not hold the information covered by his request.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that Mr Sutton made a request for information to a Scottish public authority and asked the authority to review its response to that request requests before applying to her for a decision.
7. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Council was invited to comment on this application and answer specific questions including justifying its reliance on any provisions of FOISA or the EIRs that it considered applicable to the information requested.

Commissioner's analysis and findings

8. In coming to a decision on this matter, the Commissioner considered all relevant submissions, or parts of submissions, made to her by both Mr Sutton and the Council. She is satisfied that no matter of relevance has been overlooked.

FOISA or EIRs?

9. The Council initially responded to Mr Sutton's request under the EIRs, but after review it decided that the information was not environmental and the request should be handled under FOISA.
10. Mr Sutton believed the information he had requested was environmental. In his application he explained that, due to a deed of servitude, surface drainage was allowed at a certain location in the estate and this had caused flooding in the area. The information was environmental as it related to flooding, which was clearly an environmental issue. Mr Sutton believed that the non-adoption of the roads, lighting and drainage system was a cause of the flooding problem in adjoining areas.
11. Environmental information is defined in regulation 2(1) of the EIRs (the relevant parts of the definition are reproduced in Appendix 1 to this decision). Where information falls within the scope of this definition, a person has a right to access the information under the EIRs, subject to various restrictions and exceptions contained in the EIRs.

12. The Council submitted that it was correct to respond to the request in terms of FOISA. The Council believed that it was important to understand the information requested by Mr Sutton, and referred to his email of 26 April 2017:

“... I spoke to [named] last week who verbally confirmed that the estate had not yet been adopted... I am obliged to submit this Fol/EIR request in order to formally clarify whether [named] verbal statement was in fact correct.”
13. The Council understood that Mr Sutton wanted to know whether it held information regarding the adoption of the roads in question, and this was the basis upon which the Council’s response and review followed.
14. The Council referred to *Decision 031/2005 Millar & Bryce Limited and South Lanarkshire Council*¹ in which the Commissioner had concluded that the contents of the register of public roads did not constitute environmental information because it provides no direct information on the state of the roads. The Council believed this conclusion applied to the information requested by Mr Sutton: his request was for information on whether the Council had adopted certain roads (i.e. taken them over for maintenance). The information did not relate to the effect of any elements of the environment on the roads in question, but related only to the legal status of the roads for maintenance purposes.
15. It is well established that the term “environmental information” in the Directive is to be given a broad interpretation, but it is also recognised that there will be limitations on what information can be said to be environmental information.
16. In *Decision 276/2016 Mr Dave Sutton and the City of Edinburgh Council* the Commissioner considered the authority’s response to a request for a list of occupied and virtually completed but non-adopted housing schemes and the reasons for non-adoption. The Commissioner accepted that the information fell within the definition of environmental information in regulation 2(1) of the EIRs (and particularly paragraphs (a), (c) and (f) of the definition of “environmental information”). In that case, Mr Sutton had asked for the reasons for non-adoption, under headings such as “road surface” or “drainage or sewers”. The Commissioner accepted that information falling under such headings would relate to the state of the land, or to the state of built structures inasmuch as they are or may be affected by the state of the elements of the environment; it was therefore environmental information.
17. Although adoption of roads is a measure relating to the legal status of the roads in relation to their maintenance, it also has implications in terms of the effect that elements of the environment will have, or have had, on the roads. A Council is unlikely to adopt a road unless it meets a certain standard, and some of the reasons why a road would not be adopted relate to factors which would have an environmental impact, such as inadequate drainage. Once a road has been adopted, the Council has powers to alter the road and obligations to prevent snow and ice from endangering pedestrians and vehicles.
18. The Roads (Scotland) Act 1984 (the 1984 Act) provides at section 1(1):

“Subject to subsection (10) below, a local roads authority shall manage and maintain all such roads in their area as are for the time being entered in a list (in this Act referred to as their “list of public roads”) prepared and kept by them under this section; and for the purposes of such management and maintenance (and without prejudice to this subsection’s generality) they shall, subject to the provisions of this Act, have power to reconstruct, alter, widen,

¹ <http://www.itspublicknowledge.info/UploadedFiles/Decision031-2005.pdf>

improve or renew any such road or to determine the means by which the public right of passage over it, or over any part of it, may be exercised.“

19. The Commissioner would regard adoption of a road, therefore, as a “measure” which falls within part (c) of the definition of environmental information. Section 1 of the 1984 Act provides that the local Roads Authority “shall manage and maintain” the roads on the list of public roads (adopted roads). Adoption of a road is therefore a measure which is likely to affect the state of the elements of the landscape, and to have implications in terms of factors affecting the elements of the environment (e.g. salt from gritting).
20. The Commissioner acknowledges that this finding is at odds with the conclusion reached in *Decision 031/2005* and several other decisions of 2005, in which the Commissioner did not accept that the list of public roads is environmental information. It must be recognised, however, that since these early decisions were issued there has been interpretation of both FOISA and the EIRs - and the equivalent legislation for the UK - by respective Commissioners and, importantly, by the courts. There is a body of judicial precedent and case law that did not exist in 2005; this must inform the Commissioner’s decisions, which, as always, are decided on a case-by-case basis.
21. The Commissioner finds that the information requested by Mr Sutton falls within the definition of environmental information set out in regulation 2(1) of the EIRs, and particularly paragraphs (a), (c) and (f) of the definition of “environmental information”. She finds that, at review, the Council was wrong to respond to the request in terms of FOISA, rather than the EIRs. A Scottish public authority must respond to a request for environmental information under the EIRs: as it failed to do so, the Commissioner finds that the Council failed to comply with regulation 5(1) of the EIRs.

Whether the Council held information

22. As noted, the Council gave notice to Mr Sutton that it did not hold any recorded information covered by his request. Mr Sutton did not accept this.
23. The Council explained that when Mr Sutton visited its office, he was able to view the Register of Roads and the temporary cards which are created when the Council’s Roads and Transportation Services are notified of new street names. The Council supplied to the Commissioner a copy of the information shown to Mr Sutton when he visited the Council’s office. The information consisted of a temporary card on which details of the road could be recorded under a number of headings, including “status” and “adopted”.
24. The Council explained that its Roads and Transportation Services are notified when new roads are named and, at that time, create a card entry. If the roads in question were to be adopted by the Council, the temporary card would be replaced with a version containing boxes in which information would be recorded as to when the roads were adopted and to what extent. However, as Mr Sutton was shown a temporary card, there was no information recorded under the “adopted” heading, indicating by omission that the roads in question have not been adopted. The cards record that the roads are “private” but contain no information about their adoption by the Council.
25. The Council stated:

“Community and Enterprise Resources have explained the significance of the absence of this information. The lack of information regarding adoption of the roads in question was because the Council would only hold information on the status of roads if the roads were adopted, which, in this case, they were not.”

26. The Council submitted that its position (that no information was held) was based on the Commissioner's definition of information in *Decision 275/2016 Mr Marc Ellison and the Chief Constable of the Police Service of Scotland*². In paragraph 16 of that decision, the Commissioner stated that she "does not accept that the absence of information... comprises "information" for the purposes of FOISA".
27. Mr Sutton has disputed that the Council does not hold recorded information showing whether the roads were adopted. He submitted that there was in fact a colour-coded hard filing system in the Council office (a few shelves of alphabetically organised ring-binders) which did show both roads adopted and those roads that were not yet adopted.
28. The question of whether recorded information is held is a factual question.
29. The Council made it clear to Mr Sutton in its review that the roads in question are not adopted. As the Council can convey this information, it would seem likely that it holds recorded information to this effect. However, it is important to note what information has been requested and what is actually recorded on the cards made out for the roads named in Mr Sutton's request. On each card there is a box in which to record that the road has been adopted, if this has happened. The Council has stated that the absence of an entry in this box shows that it has not to date adopted the road. If the road had been adopted, the box would have been completed (or the temporary card replaced with a version giving information about the adoption). So the card effectively provides the information which Mr Sutton asked for, as it shows that the road was not adopted. However, the fact remains that the box is empty, and does not contain any recorded information to support the inference that the road has not been adopted.
30. To some extent, this is analogous to the situation considered in *Decision 043/2013 Global Alliance Against Industrial Aquaculture and the Scottish Ministers*³ (paragraph 21):
"The Commissioner also accepts the Ministers do not hold information which records the deletion of sea lice data. The Ministers may have information from which it may be inferred that data has been deleted, but this is not the same as holding the information GAAIA has requested..."
31. The Commissioner is satisfied that the only source of information to be considered in this case is the temporary card made out for each road.
32. Having considered all relevant submissions and the terms of the request, the Commissioner accepts that the Council did not hold the information (in recorded format) which Mr Sutton requested. She notes that the Council assisted him by confirming that the absence of recorded information meant that the roads had not been adopted.
33. Although the Commissioner is satisfied that the Council was correct to tell Mr Sutton that it held no recorded information falling within his request, she finds that it should have responded to his request and issued its refusal under the EIRs (i.e. the Council should have relied on the exception in regulation 10(4)(a) rather than giving notice, in terms of section 17 of FOISA, that it did not hold the information).
34. Given that the Council has confirmed to Mr Sutton that the roads have not been adopted, and given that the Commissioner's investigation has confirmed that there is no recorded

² <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2016/201601520.aspx>

³ <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2013/201201459.aspx>

information covered by his request, the Commissioner does not require the Council to issue a new response to Mr Sutton in terms of the EIRs.

Online publication of the information

35. Mr Sutton was dissatisfied that the Council did not publish its register of public roads online. He thought the Council should proactively publish such information, and commented that other councils do so. He thought it imperative that prospective purchasers (or their agents) should be easily able to check whether a road has been adopted or not, and the key to this was online access to the register.
36. The Council was invited to comment on Mr Sutton's dissatisfaction that information was not available online. The Council accepted that "in an ideal world, information should be proactively published in a way that is easily accessible by members of the public" but stated that it "is subject to various demands on ever more restricted financial resources". It added: "even if the temporary cards and final cards showing adoption information were available online, they would not contain any information specific to Mr Sutton's request".
37. Regulation 4 of the EIRs (see Appendix 1) promotes the active dissemination of environmental information by electronic means, requiring Scottish public authorities to take reasonable steps to organise their environmental information to this end. Regulation 4(2) lists the categories of environmental information which, as a minimum, should be made available online.
38. The Commissioner accepts that the register of roads does not fall within the categories of information listed in regulation 4(2), and accepts that she cannot require the Council to publish it on its website or make it available in another electronic format. However, she notes that many Scottish local authorities already publish their list of public roads online. This is something the Council may wish to aspire to in future.

Decision

The Commissioner finds that South Lanarkshire Council (the Council) did not comply fully with Part 1 of the Freedom of Information (Scotland) Act 2002 and the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by Mr Sutton.

The Council was correct to give notice that it held no recorded information, and provided assistance by explaining the effect of the absence of recorded information. However, the Council failed to respond to a request for environmental information in terms of the EIRs and therefore failed to comply with regulation 5(1) of the EIRs.

For reasons explained in the decision, the Commissioner does not require the Council to take any action in respect of this failure, in response to Mr Sutton's application.

Appeal

Should either Mr Sutton or the Council 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
Acting Scottish Information Commissioner

29 August 2017

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.

...

(4) The information to be given by the authority is that held by it at the time the request is received, except that, subject to subsection (5), any amendment or deletion which would have been made, regardless of the receipt of the request, between that time and the time it gives the information may be made before the information is given.

...

17 Notice that information is not held

(1) Where-

(a) a Scottish public authority receives a request which would require it either-

(i) to comply with section 1(1); or

(ii) to determine any question arising by virtue of paragraph (a) or (b) of section 2(1),

if it held the information to which the request relates; but

(b) the authority does not hold that information,

it must, within the time allowed by or by virtue of section 10 for complying with the request, give the applicant notice in writing that it does not hold it.

...

...

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;

...

(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);

...

4 Active dissemination of environmental information

(1) A Scottish public authority shall take reasonable steps to organise and keep up to date the environmental information, relevant to its functions, which it holds and at least the types of information listed in paragraph (2), with a view to the active and systematic dissemination of that information to the public and shall make that information progressively available to the public by electronic means unless it was collected before 14th February 2003 and is not available in electronic form.

(2) The types of information referred to in paragraph (1) are–

(a) texts of international treaties, conventions or agreements, and of Community, national, regional or local legislation, on the environment or relating to it;

(b) policies, plans and programmes relating to the environment;

(c) progress reports on the implementation of the items referred to in sub paragraphs (a) and (b) when prepared or held by a Scottish public authority in electronic form;

(d) reports on the state of the environment;

(e) data or summaries of data derived from the monitoring of activities that affect or are likely to affect the environment;

- (f) authorisations with a significant impact on the environment and environmental agreements or a reference to the place where such information can be requested or found;
- (g) environmental impact studies and risk assessments concerning those elements of the environment referred to in paragraph (a) of the definition of "environmental information" in regulation 2(1); and
- (h) facts and analyses of facts which the authority considers relevant and important in framing major environmental policy proposals.

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.

...

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