

Decision 204/2007 Mr E.E. Cowell and Transport Scotland

Request for meeting minutes or notes when the route for the Aberdeen West Peripheral Route was decided upon

Applicant: Mr E.E. Cowell
Authority: Transport Scotland
Case No: 200601145
Decision Date: 30 October 2007

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Decision 204/2007 Mr E.E. Cowell and Transport Scotland

Request for meeting minutes or notes when the route for the Aberdeen West Peripheral Route was decided upon – information withheld – Commissioner found that the information requested was not held – technical breaches of FOISA

Relevant Statutory Provisions and Other Sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections: 1(1) (General entitlement); 10(1) (Time for compliance); 15 (Duty to provide advice and assistance); 17(1) (Notice that information is not held) and 21(1) (Review by Scottish public authority)

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

Facts

Mr E.E. Cowell (Mr Cowell) requested from the Transport Minister copies of the meeting minutes or notes when the route of the Aberdeen West Peripheral Route (AWPR) was decided. Transport Scotland (an Executive Agency of the Scottish Ministers [the Ministers]) responded by directing Mr Cowell to copies of technical reports which were available on the internet and stating that the information he requested was exempt under section 30(b) of FOISA. Mr Cowell was not satisfied with this response and asked Transport Scotland to review its decision. Transport Scotland carried out a review and, as a result, notified Mr Cowell that it maintained the original decision to withhold information under section 30(b) of FOISA without amendment. Mr Cowell remained dissatisfied and applied to the Commissioner for a decision.

In the course of the investigation, the Ministers (responding on behalf of Transport Scotland) submitted that no information was actually held that fell within the scope of Mr Cowell's request. They claimed that the information that Transport Scotland had withheld fell outwith the scope of the request, but it had considered this in order to be helpful to Mr Cowell.

Following an investigation, the Commissioner found that Transport Scotland had partially failed to deal with Mr Cowell's request for information in accordance with



Part 1 of FOISA. He found that Transport Scotland failed to notify Mr Cowell in terms of section 17(1) of FOISA that the information he requested was not held. By suggesting to Mr Cowell that it held and was withholding information that was relevant to his request, the Commissioner also found that Transport Scotland had failed to comply fully with its duty to advise and assist requestors under section 15 of FOISA. He also found that Transport Scotland had failed to comply with the timescales set out in sections 10(1) and 21(1) of FOISA.

Background

1. On 1 March 2006, Mr Cowell wrote to the Transport Minister requesting the following information:

“...copies of the meeting minutes or notes when the route [AWPR] was finally decided upon.”
2. On 24 April 2006, Transport Scotland (an Executive Agency of the Scottish Ministers) wrote to Mr Cowell in response to his request for information. Transport Scotland provided Mr Cowell with an explanation of the process leading up to the decision and directed him towards copies of technical reports which were available on the internet. However Transport Scotland also stated that the information Mr Cowell sought was exempt under section 30(b) of FOISA.
3. On 8 May 2006, Mr Cowell wrote to the Transport Minister requesting a review of Transport Scotland’s decision. In particular, Mr Cowell was dissatisfied with the application of section 30(b) of FOISA and the time taken to respond to his request. Within this correspondence Mr Cowell also made a new request for:

“...meeting minutes and technical reports and cost comparisons that allowed you [the Ministers] to choose the more expensive Western route...”

This new request for information, raised at the request for review stage, falls outwith the scope of this investigation.
4. On 14 June 2006, Transport Scotland notified Mr Cowell of the outcome of its review. It maintained that the information sought by Mr Cowell was exempt from disclosure under section 30(b) of FOISA. However, it also identified a summary of an additional technical report and this was provided to Mr Cowell.



5. On 25 June 2006, Mr Cowell wrote to my Office, stating that he was dissatisfied with the outcome of Transport Scotland's review and applying to me for a decision in terms of section 47(1) of FOISA. In particular, Mr Cowell expressed dissatisfaction with Transport Scotland's decision to withhold information that he had requested. He also expressed dissatisfaction that the time taken to respond to his request and request for review had exceeded the time allowed by FOISA.
6. The application was validated by establishing that Mr Cowell had made a request for information to a Scottish public authority and had applied to me for a decision only after asking the authority to review its response to that request.

The Investigation

7. As noted above, Transport Scotland is an Executive Agency of the Scottish Ministers (the Ministers) and a letter was sent to the Ministers' Freedom of Information Unit on 12 July 2006 in line with agreed procedures giving notice that an application had been received and that an investigation into the matter had commenced.
8. The Ministers were invited to comment on the matters raised by Mr Cowell and the application as a whole in terms of section 49(3) of FOISA and were asked to provide my Office with specified items of information required for the purposes of the investigation.
9. The Ministers responded to my Office on 30 August 2006 providing their comments on the application and a copy of the documents which had been withheld from Mr Cowell.
10. In their letter, the Ministers stated that Transport Scotland had interpreted the Mr Cowell's request for meeting minutes and notes widely but that, in actual fact, they did not hold the specific information requested by Mr Cowell. The Ministers noted that Mr Cowell's request had specifically sought minutes or notes of the meeting where the route for the AWPR was finally decided upon. The Ministers submitted that there were no such minutes or notes, and so the information requested was not held.



11. The Ministers explained that, under the duty to advise and assist requestors set out in section 15 of FOSIA, Transport Scotland did release some technical reports and it was considering the release of other documents associated with the AWPR, but on consideration had decided that these documents should be withheld under 30(b) of FOISA. It was to these documents, which the Ministers submitted fell outside the scope of Mr Cowell's request, that the exemptions in section 30(b) had been applied. The Ministers submitted to my Office that further exemptions should also be considered to apply to these documents.
12. The investigating officer wrote to the Ministers on 6 October 2006 asking for further information and clarification with regard to their submission that they (and Transport Scotland) did not hold any meeting minutes or notes related to the final decision on the route of the AWPR.
13. The Ministers responded on 13 October 2006. In this response, the Ministers acknowledged that while there were discussions around the time of the decision, there were no formal minutes or notes taken from a meeting relating to the final decision about the route of the AWPR.

The Commissioner's Analysis and Findings

14. In coming to a decision on this matter, I have considered all of the information and the submissions that have been presented to me by both Mr Cowell and the Ministers and I am satisfied that no matter of relevance has been overlooked.

Mr Cowell's request

15. Mr Cowell, in his initial request of 1 March 2006, specifically requested:

"...copies of the meeting minutes or notes when the route [AWPR] was finally decided upon."
16. The Ministers submitted that Transport Scotland (and the Ministers more generally) do not actually hold any meeting minutes or notes which record how the route was finally decided upon. However, in line with its duty to advise and assist under section 15 of FOISA, Transport Scotland had provided Mr Cowell with directions as to how to obtain copies of the technical reports used in reaching the decision. These reports, the Ministers explained, were already in the public domain at the time of Mr Cowell's request.



17. In addition, the Ministers explained that, although it did not hold any information which fell within the strict interpretation of Mr Cowell's request, Transport Scotland had considered releasing communications between Ministers and officials between 14 November and 1 December 2005 (when the preferred route was announced). The Ministers acknowledged that Transport Scotland failed, in its responses to Mr Cowell, to make a distinction between the information actually held and that requested by Mr Cowell.
18. Having considered both Mr Cowell's initial request and request for review, it is clear that his request for review contains a new request under FOISA, which widens his request to meeting minutes, technical reports and cost comparisons that allowed the Ministers to choose a particular route.
19. However, my investigation is limited to information falling within the scope of Mr Cowell's original request of 1 March 2006.
20. Within their submissions to my Office, the Ministers have explained that Transport Scotland did not hold any information which would fall within the scope of Mr Cowell's original request. The investigating officer contacted the Ministers and requested details of the decision-making process which would explain why there were no minutes or notes of meeting where the route option was finally decided upon.
21. The Ministers provided copies of the documents that were withheld when Transport Scotland considered Mr Cowell's request and request for review, and I am satisfied that each of these falls outwith the specific terms of his request. These documents include emails and other communications relating to the route choice, but they are not meeting minutes or notes. Having questioned the Ministers further on this point, I am also satisfied that no information is held that falls within the scope of this request.
22. I recognise Transport Scotland's attempt to provide Mr Cowell with advice and assistance in identifying information *relating to* his request. However, in this specific instance, the failure to make a distinction between information falling within the scope of Mr Cowell's request and withholding information which actually falls outwith the scope of his request, has caused unnecessary confusion.
23. I do not consider it helpful to an applicant to give the impression that information that they have requested is held and is exempt from disclosure under FOISA, when actually the information being withheld is not directly relevant to their request.



24. The confusion created in this case could easily have been avoided had Transport Scotland made it clear to Mr Cowell that no information was held that fell within the scope of his request, and that its decision to withhold information was actually taken in relation to related information that he had not specifically requested. This approach would have allowed Mr Cowell to make a new request for the information that was held and may have been relevant to his interests and to ask me to consider the response to this request if he remained dissatisfied with the outcome of an internal review. In the circumstances, Mr Cowell has not had the opportunity to do so.
25. I note that the question of whether information was held was only raised by the Ministers following Mr Cowell's application to me for a decision. This issue should have been raised by Transport Scotland with Mr Cowell when first responding to his information request.
26. I have therefore concluded that Transport Scotland failed to comply with the requirements of Part 1 of FOISA by failing to issue a notice to Mr Cowell in terms of section 17 of FOISA stating that the information he had requested was not held.
27. I have also concluded that, by suggesting to Mr Cowell that information was held that was relevant to his request and which was being withheld, Transport Scotland failed to comply fully with its duty to provide advice and assistance to applicants under the terms of section 15 of FOISA.
28. I would note, however, that the information that was withheld from Mr Cowell by Transport Scotland is currently under consideration by me in response to other applications for decision. I anticipate that my decisions on this information will be issued shortly, and Mr Cowell will also be able to seek access to any information that is disclosed as a result of these decisions.

Technical requirements of FOISA

29. Section 10(1) of FOISA gives Scottish public authorities a maximum of 20 working days from receipt of the request to comply with a request for information. Transport Scotland failed to respond to Mr Cowell's request for information within that period.
30. Mr Cowell also raised concerns that Transport Scotland had failed to respond to his request for review within the 20 working day period allowed by section 21(1) of FOISA. Mr Cowell submitted his request on 8 May 2006, Transport Scotland responded on 14 June 2006. Allowing time for postage, and taking account of the public holiday in that period, I am satisfied that Transport Scotland also failed to respond to Mr Cowell's request for review within the timeframe stipulated by FOISA.



31. By way of explanation for these failures, the Ministers submit that Mr Cowell's request was passed to the Trunk Roads: Infrastructure and Professional Services Branch in Transport Scotland through the Ministerial Correspondence System (MCS). The Ministers explain that at that time the Branch was dealing with more than 400 items of Ministerial correspondence, much of which was about the AWPR, and there were considerable delays in issuing responses. The Ministers also highlighted that they were, at the time, undergoing significant organisational changes.

Decision

I find that Transport Scotland partially complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr Cowell.

While I am satisfied that Transport Scotland does not hold any information falling within the scope of Mr Cowell's request, I have found that Transport Scotland failed to provide notice to Mr Cowell in terms section 17(1) of FOISA that the information he requested was not held.

I have also found that Transport Scotland failed to comply fully with the duty to provide advice and assistance to requestors under section 15 of FOISA.

I also find that Transport Scotland breached the requirements of Part 1 of FOISA by failing to respond to Mr Cowell's initial request and subsequent request for review within the relevant 20 working day period set out in sections 10(1) and 21(1) of FOISA.

I do not require any remedial action to be taken by Transport Scotland in respect of these breaches.



Appeal

Should either Mr Cowell or Transport Scotland 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.

Kevin Dunion
Scottish Information Commissioner
30 October 2007



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.

10 Time for compliance

- (1) Subject to subsections (2) and (3), a Scottish public authority receiving a request which requires it to comply with section 1(1) must comply promptly; and in any event by not later than the twentieth working day after-
 - (a) in a case other than that mentioned in paragraph (b), the receipt by the authority of the request; or
 - (b) in a case where section 1(3) applies, the receipt by it of the further information.

[...]

15 Duty to provide advice and assistance

- (1) A Scottish public authority must, so far as it is reasonable to expect it to do so, provide advice and assistance to a person who proposes to make, or has made, a request for information to it.
- (2) A Scottish public authority which, in relation to the provision of advice or assistance in any case, conforms with the code of practice issued under section 60 is, as respects that case, to be taken to comply with the duty imposed by subsection (1).



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.
- [...]

21 Review by Scottish public authority

- (1) Subject to subsection (2), a Scottish public authority receiving a requirement for review must (unless that requirement is withdrawn or is as mentioned in subsection (8)) comply promptly; and in any event by not later than the twentieth working day after receipt by it of the requirement.
- [...]