

Decision Notice

Decision 073/2018: Ms Dorothy King and Mr Christopher J. Wybrew and Transport Scotland

Traffic control trigger speeds

Reference No: 201800059

Decision Date: 30 May 2018



Scottish Information
Commissioner

Summary

Transport Scotland was asked about the trigger speed to be adopted for reverse discrimination traffic signals at Springholm, Dumfries and Galloway. In its response, Transport Scotland indicated that it was withholding information.

After investigation, the Commissioner found that Transport Scotland did not, at the date of the request, hold the information, but had failed to give notice of this. The Commissioner also found that Transport Scotland should have responded to the request in terms of FOISA, rather than the EIRs, as the requested information was not environmental information.

Relevant statutory provisions

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

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (definitions (a), (b), (c) and (f) of "environmental information"); 5(1) and (2) (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.

Background

1. On 5 September 2017, Ms King and Mr Wybrew made an information request to Transport Scotland. They asked for a range of information about the A75 traffic control measures at Springholm, Dumfries and Galloway, including confirmation of the amber/red light trigger speed to be adopted upon commissioning of the reverse discrimination traffic signals.
2. Transport Scotland responded on 3 October 2017, in terms of the EIRs. It provided some information, stated that it did not hold some of the requested information, and withheld information about the amber/red light trigger speed under the exception in regulation 10(5)(b) of the EIRs. Transport Scotland explained that to disclose this information would prejudice the course of justice as the information related to the detection of offences and potential legal proceedings. Transport Scotland believed the public interest favoured withholding this information.
3. On 18 October 2017, Ms King and Mr Wybrew wrote to Transport Scotland requesting a review of its decision. They disagreed that disclosure of the amber/red light trigger speed information would prejudice the course of justice, as claimed by Transport Scotland.
4. Transport Scotland notified Ms King and Mr Wybrew of the outcome of its review on 15 November 2017. Transport Scotland upheld its initial decision to withhold the trigger speed information under the exception in regulation 10(5)(b) of the EIRs.
5. On 8 January 2018, Ms King and Mr Wybrew 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. Ms King and Mr Wybrew stated they were dissatisfied with the

outcome of Transport Scotland's review because they disagreed that disclosure of the amber/red light trigger speed information would prejudice the course of justice.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that Ms King and Mr Wybrew 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.
7. Transport Scotland is an agency of the Scottish Ministers (the Ministers) and, in line with agreed procedures, the Ministers were notified on 12 February 2018 that an application had been received from Ms King and Mr Wybrew and that an investigation into the matter by the Commissioner had commenced. Subsequent references in this decision to submissions sought and received from Transport Scotland are to be read as including submissions sought and received from the Ministers on behalf of Transport Scotland.
8. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. Transport Scotland was invited to comment on this application and answer specific questions including justifying its reliance on any provisions of FOISA and the EIRs it considered applicable to the information requested.
9. During the Commissioner's investigation, Transport Scotland changed its position from the decision taken at review (i.e. that it was withholding information in terms of regulation 10(5)(b) of the EIRs). It stated that that it did not hold the information at the time Ms King and Mr Wybrew made their request.

Commissioner's analysis and findings

10. In coming to a decision on this matter, the Commissioner considered all the relevant submissions, or parts of submissions, made to him by both Ms King and Mr Wybrew and Transport Scotland. He is satisfied that no matter of relevance has been overlooked.
11. In this decision, the Commissioner is only considering Transport Scotland's response to the request for the amber/red light trigger speed to be adopted upon commissioning of the reverse discrimination traffic signals. This was the only matter of dissatisfaction raised by Ms King and Mr Wybrew. The Commissioner is not required to decide whether Transport Scotland's response to other parts of the request complied with FOISA and/or the EIRs.

FOISA or the EIRs?

12. Transport Scotland responded to the request under the EIRs. During the investigation, the Commissioner asked Transport Scotland why it considered the requested information to be environmental information. Environmental information is defined in regulation 2(1) of the EIRs (the definition is 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.
13. Transport Scotland submitted that the entirety of the request constituted a request for environmental information, and it would not be appropriate to deal with one part of the request under a separate regime (i.e. FOISA). Transport Scotland considered that if it had held information about the trigger speeds, this would have fallen under the definition of environmental information in regulation 2(1) of the EIRs (paragraphs (b),(c) and (f)):

- Paragraph (b) – the speed of vehicles through Springholm could impact on noise and emissions.
 - Paragraph (c) – new legislation (speed change) could affect the elements [of the environment].
 - Paragraph (f) – implementation of new technology/speed restrictions could impact on human health and safety.
14. The Commissioner accepts that traffic studies may comprise or contain environmental information covered by the EIRs. In *Decision 117/2013 Scott Walker and Fife Council*¹ the Commissioner accepted that proposals to introduce speed cushions would be measures affecting the state of the land, and information about those proposals would fall within the definition of environmental information. However, in *Decision 107/2017 Ms Dorothy King and Mr Christopher J. Wybrew and Transport Scotland*,² the Commissioner decided that speed data from a traffic management study did not fall within the definition of environmental information in regulation 2(1) of the EIRs.
 15. In the present case, the information requested is the amber/red light trigger speed to be adopted for specific reverse discrimination traffic signals. On the basis of the arguments from Transport Scotland and the evidence available to him, the Commissioner does not regard such information as falling within the definition of environmental information. The EIRs must be interpreted as far as possible in accordance with the purpose of the Directive and the Aarhus Convention, and although the term “environmental information” must be construed broadly, there are limits to a broad approach.
 16. Transport Scotland suggested that part (b) of the definition of environmental information (regulation 2(1)) applied to the trigger speed information as the speed of vehicles through could impact on noise and emissions. Both noise and emissions are listed as specific factors in part (b). The speed of vehicles may affect the noise level and emissions (from the vehicles). However, the purpose of introducing such speed triggers in the traffic signals would not seem to be to reduce noise or emission level, or were it to be the case, the Commissioner has seen nothing to so evidence that position. The signals (and the associated speed triggers) would seem to the Commissioner more intended to encourage compliance with speed restrictions in the location.
 17. The Commissioner does not regard the speed trigger information as information on factors, such as noise or emissions, affecting or likely to affect the elements of the environment referred to in paragraph (a) of the definition of environmental information. He therefore does not accept that the information is environmental, as defined by paragraph (b) of the definition in regulation 2(1).
 18. Transport Scotland submitted that part (c) of the definition applied as “new legislation (speed change) could affect the elements [of the environment]”. The definition of “environmental information” in part (c) of the definition in regulation 2(1) covers information on measures affecting or likely to affect the elements of the environment or factors affecting the environment. (Again, the full definition is in Appendix 1.) It is therefore first necessary to identify the relevant measure, or activity. Transport Scotland addressed this by referring to

¹ <http://www.itspubliknowledge.info/ApplicationsandDecisions/Decisions/2013/201300312.aspx>

² <http://www.itspubliknowledge.info/ApplicationsandDecisions/Decisions/2017/201602145.aspx>

“new legislation”, but did not specify the legislation in question, or specifying the relevant elements of the environment or factors affecting the environment.

19. Transport Scotland also suggested that implementation of new technology and speed restrictions could impact on human health and safety, and in this regard referred to part (f) of the definition of environmental information (regulation 2(1) of the EIRs). It is true that speed restrictions may impact on health and safety. One of the purposes of the speed measures would be to ensure drivers abide by the speed limits, which would promote human health and safety. However, the Commissioner finds that Transport Scotland has not explained in sufficient detail why this part of the definition of environmental information applies to the information requested by Ms King and Mr Wybrew.
20. The Commissioner does not accept that the information (the speed at which reverse discrimination traffic signals are triggered) is information on a measure or on an activity affecting, or be likely to affect, the elements of the environment.
21. Consequently, the Commissioner considers that the information that is at issue in this decision does not fall within the definition of environmental information set out in regulation 2(1) of the EIRs, and Transport Scotland was incorrect to respond to the request in terms of the EIRs rather than FOISA.
22. The Commissioner acknowledges that other parts of the request from Ms King and Mr Wybrew may have been correctly considered under the EIRs. However, it does not follow that because some of the request fell to be dealt with under the EIRs, a part of the request which was not for environmental information should be dealt with in terms of the EIRs rather than FOISA. Nothing in FOISA or the EIRs, or the *Scottish Ministers' Code of Practice on the Discharge of Functions by Scottish Public Authorities under FOISA and the EIRs*³, or any case which has been drawn to the Commissioner's attention, would suggest this is how such a request should be dealt with.

Was all relevant information identified, located and provided by Transport Scotland?

23. Transport Scotland submitted that it did not hold the information requested by Ms King and Mr Wybrew, and – as it regarded the information to be environmental information – provided submissions in terms of regulation 10(4)(a) of the EIRs. (Regulation 10(4)(a) provides that a Scottish public authority may refuse to make environmental information available to the extent that it does not hold that information when an applicant's request is received.)
24. As noted, the Commissioner has found that this part of the request from Ms King and Mr Wybrew should have been considered under FOISA, not the EIRs. In terms of section 1(4) of FOISA, the information to be provided in response to a request under section 1(1) is that falling within the scope of the request and held by the authority at the time the request is received. This is subject to qualifications, but these are not applicable here. If no such information is held by the authority, section 17(1) of FOISA requires the authority to give the applicant notice in writing to that effect.
25. Transport Scotland acknowledged that it had wrongly applied an exception (regulation 10(5)(b) of the EIRs) when responding to the request and had wrongly upheld this decision at review. The information that would have allowed Transport Scotland to answer the request for the amber/red light trigger speed was not held by the Ministers at the time of Ms King and

³ <http://www.gov.scot/Resource/0051/00510851.pdf>

Mr Wybrew's request. Transport Scotland said it had applied regulation 10(5)(b) as the exception that would have applied if it had held the requested information.

26. Transport Scotland said that it did not hold the information at the time of the request. The information had to be obtained from Police Scotland as it fell within Police Scotland's responsibility (in that it related to information settings which can lead to potential infringement and prosecutions). Transport Scotland clarified that, in the period following receipt of the request, the trigger speeds were agreed verbally between the Scottish Government and Police Scotland officials and were set following those discussions. Transport Scotland admitted that Ms King and Mr Wybrew should have been given notice that the information was not held and advised to make a request to Police Scotland for the information.
27. Ms King and Mr Wybrew commented that they found it incredible that Transport Scotland should only now, at the appeal stage, assert that it never held the traffic signal speed settings: "...a fresh claim we very much doubt the veracity of, given that it would have been so simple for them at the initial request and review stages to have applied [r]egulation 10(4)(a)."
28. Mr Wybrew and Ms King commented that they failed to see what the traffic signals have to do with Police Scotland. They submitted that there had been two public meetings when the traffic signals were discussed in detail with residents. Trigger speeds were discussed and a Transport Scotland official participated in traffic signal presentations. By contrast, at no time was Police Scotland ever in attendance, nor had they ever been in attendance at the site of the lights.
29. Mr Wybrew and Ms King commented that the function of the traffic signals is to calm traffic by mean of a non-law enforcement measure: no part of the signal installation plays any evidential role in relation to the detection of crime. They stated that the speed limit is set at 30 mph and it follows that any speed above that is a violation.
30. In terms of section 1(4) of FOISA, the information to be provided in response to a request under section 1(1) is that falling within the scope of the request and held by the authority at the time the request is received. This is subject to qualifications, but these are not applicable here. If no such information is held by the authority, section 17(1) of FOISA requires the authority to give the applicant notice in writing to that effect.
31. The Commissioner has found that the requested information was not environmental information. If the information was not held, Transport Scotland should have responded in terms of section 17(1) of FOISA.
32. The standard of proof to determine whether a Scottish public authority holds information is the civil standard of the balance of probabilities. In determining this, the Commissioner will consider the scope, quality, thoroughness and results of the searches carried out by the public authority. He will also consider, where appropriate, any reason offered by the public authority to explain why the information is not held.
33. Having made enquiries and considered all the relevant submissions, the Commissioner accepts that Transport Scotland did not hold the information at the time of the request. The requested information is specific, limited and precise and would be readily identifiable if held by Transport Scotland. Transport Scotland has also explained why it did not hold the information and pointed to another public authority (Police Scotland) that did hold the information. The Commissioner acknowledges that this is a reasonable explanation though he is aware that Ms King and Mr Wybrew have expressed doubts. Although Transport

Scotland did not provide any evidence of discussion with Police Scotland on the issue of the trigger speeds, the Commissioner accepts the explanation that these discussions were verbal, not written. He sees no reason to doubt Transport Scotland's explanation of what information it held (or did not hold) at the time.

34. The Commissioner finds that Transport Scotland failed to comply with Part 1 of FOISA in responding to the part of the applicants' request under consideration. Transport Scotland failed to give notice to Ms King and Mr Wybrew (in line with section 17(1) of FOISA) that it did not hold the information they had asked for. Instead, it wrongly applied exceptions in the EIRs to information which it did not hold and which, if it had been held, was not environmental information.

Decision

The Commissioner finds that Transport Scotland failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Ms King and Mr Wybrew. Transport Scotland failed to respond to the request under FOISA, and failed to give notice that it did not hold the information, as required by section 17(1).

Given that Transport Scotland did not hold the information at the time of the request, and Ms King and Mr Wybrew have been told how to request the information from another Scottish public authority, the Commissioner does not require Transport Scotland to take any further action in response to Ms King and Mr Wybrew's application.

Appeal

Should either Ms King and Mr Wybrew 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

30 May 2018

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;

- (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in paragraph (a);
- (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);

...

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.

...

Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews, Fife
KY16 9DS

t 01334 464610

f 01334 464611

enquiries@itspublicknowledge.info

www.itspublicknowledge.info