



# Decision Notice 016/2024

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## Information about a road closure

**Authority: Transport Scotland**

**Case Ref: 202200713**

### Summary

The Applicant asked the Authority for information about a road closure. The Authority originally overlooked the second part of the Applicant's request, then retrospectively told him it did not hold the information for that part. The Commissioner investigated and found that the Authority did not comply with the EIRs in overlooking the request. He was, however, satisfied that the Authority did not hold the information for this part of the request at the time it received the request.

### Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) section 47(1) and (2) (Application for decision by Commissioner)

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (definition of "the Act", "applicant" and "the Commissioner") (Interpretation); 5(1) (Duty to make environmental information available on request); 10(1), (2) and (4)(a) (Exceptions from duty to make environmental information available); 17(1), (2)(a) and (b) (Enforcement and appeal provisions)

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. The Applicant had previously raised concerns with the Authority about communications relating to a closure of the southbound carriageway of the A77 road, near Symington.
2. On 14 April 2022 the Applicant made a request for information to the Authority. His request was a two-part request in which he asked for:

- (i) All communication, internal and external, from 15 February to 14 April 2022, regarding the work at the A77 Dutch House Roundabout.
  - (ii) Details of the steps taken by the Authority to resolve the issue(s) raised by the Applicant during any future closure of the A77.
3. The Authority responded on 25 April 2022. The Authority told the Applicant that the information requested was environmental information for the purposes of the EIRs. It told the Applicant that it had applied the exception in regulation 10(4)(e) of the EIRs to some of the information requested, because it was internal communications and the public interest favoured upholding that exception. While it recognised that there was some public interest in release of the information as part of open, transparent and accountable government, it considered that was outweighed by the strong public interest in maintaining the right to confidentiality of communications between officials whilst an agreed position was still being developed. The Authority also applied the exception in regulation 11(2) of the EIRs to information that it said was the personal data of a third party.
4. On 28 April 2022, the Applicant wrote to the Authority requesting a review of its decision. The Applicant stated that he was dissatisfied with the decision because there was strong public interest in disclosure of the information. He said he was concerned that the matter concerning the road closure had not been properly investigated, and therefore that proper consideration had not been given to ensuring the same issue did not arise again. He argued that the local community deserved to know why and how the issue arose, and that there had been steps taken to rectify matters.
5. The Authority notified the Applicant of the outcome of its review on 20 May 2022. The Authority substituted a new decision. The Authority said it had reconsidered the public interest and, on balance, it agreed that the public interest lay in favour of disclosing the information. The Authority provided some information to the Applicant, except that which was personal information of a third party, which it continued to withhold under regulation 11(2).
6. On 16 June 2022, the Applicant 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. The Applicant stated he was dissatisfied with the outcome of the Authority's review because it had not provided him with the information he requested in part (ii) of his request.

## **Investigation**

7. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
8. On 29 August 2022, the Authority was notified in writing that the Applicant had made a valid application.
9. On 27 July 2023 and in line with section 49(3)(a) of FOISA, the Commissioner invited the Authority to provide its comments.
10. The case was subsequently allocated to an investigating officer.

## **Commissioner's analysis and findings**

11. The Commissioner has considered all of the submissions made to him by the Applicant and the Authority.

### **Handling in terms of the EIRs**

12. The Authority processed and responded to the Applicant's request and requirement for review in accordance with the EIRs.
13. Where information falls within the scope of the definition of "environmental information" in regulation 2(1) of the EIRs, a person has a right to access it (and the public authority a corresponding obligation to respond) under the EIRs, subject to various restrictions and exceptions contained in the EIRs.
14. The Applicant did not challenge the Authority's decision to deal with the information as environmental information. The Commissioner is satisfied that the information does comprise environmental information (see in particular paragraphs (a), (b) and (c) of the definition in regulation 2(1) of the EIRs) and will consider the handling of the request in what follows solely in terms of the EIRs.

### **Regulation 5(1) – Information falling within scope of the request**

15. 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 an applicant. 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. The duty to comply with regulation 5(1) of the EIRs is subject to regulations 6 to 12.
16. The Applicant was dissatisfied because he did not receive a response to the second part of his request.
17. In its comments to the Commissioner, the Authority submitted that it was retrospectively applying an exception available under regulation 10 of the EIRs to the second part of the request. Specifically, it sought to apply regulation 10(4)(a) because it did not hold the information at the time of the request. It said that it had overlooked this at the request and review stage, and it apologised.
18. Under regulation 5, an authority has a duty to make environmental information available on request. The Commissioner finds that in failing to respond to part two of the request (either by providing information or applying the relevant exception available under regulation 10), the Authority failed to comply fully with Regulation 5(1) of the EIRs.

### **Regulation 10(4)(a) – Information not held**

19. 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, the exception in 10(4)(a) of the EIRs permits the authority to refuse to make environmental information available.
20. 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).

21. The Authority submitted that at the time of the request it did not hold the information sought in part (ii) of the Applicant's request. In support of its arguments, the Authority submitted details of the searches carried out and a timeline for meetings related to the subject of the request. The Authority made it clear that while it did not hold the information at the time of the request, it did hold it now.
22. The Applicant was asked for his views on the Authority's revised response. He did not make any submission regarding the Authority's application of regulation 10(4)(a), specifically.

### **The Commissioner's view on the exception**

23. The Commissioner considers the searches carried out by the Authority, by the conclusion of the investigation, were thorough and encompassed all areas where information of the type covered by the Applicant's request would have been likely to be held. He is also satisfied that those members of staff involved in carrying out the searches were the most appropriate to do so, based on their knowledge of the systems in use and their role within the Authority.
24. Having considered all of the submissions from the Authority, the Commissioner is satisfied that adequate searches were carried out of relevant electronic systems, and that the timeline of meetings was such that, on the balance of probabilities, the Authority did not hold the information at the time of the Applicant's request.
25. The Commissioner therefore find that the Authority was entitled to reply on the exception in regulation 10(4)(a) of the EIRs, on the basis that it did not hold the information requested.
26. This exception is subject to the public interest test in regulation 10(1)(b) of the EIRs, but the Commissioner can identify no conceivable public interest in requiring disclosure of information which the Authority did not hold at the time of the Applicant's request.: on balance, therefore, the Commissioner is satisfied that the public interest in maintaining the exception should prevail.

### **Decision**

The Commissioner finds that the Authority failed to comply with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to part (ii) of the information request made by the Applicant. He finds that the Authority failed to comply with regulation 5(1) of the EIRs in initially failing to respond to part (ii) of the request.

However, the Commissioner is satisfied that the Authority was entitled to rely on regulation 10(4)(a) when it did provide a response to part (ii) of the request.

Given that a response has now been provided to part (ii) of the Applicant's request, the Commissioner does not require the Authority to take any action in respect of the initial failure to respond.

## **Appeal**

Should either the Applicant or the Authority 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.

**Euan McCulloch**  
**Head of Enforcement**

**31 January 2024**

## **Appendix 1: Relevant statutory provisions**

### **Freedom of Information (Scotland) Act 2002**

#### **47 Application for decision by Commissioner**

- (1) A person who is dissatisfied with -
- (a) a notice under section 21(5) or (9); or
  - (b) the failure of a Scottish public authority to which a requirement for review was made to give such a notice.

may make application to the Commissioner for a decision whether, in any respect specified in that application, the request for information to which the requirement relates has been dealt with in accordance with Part 1 of this Act.

- (2) An application under subsection (1) must -
- (a) be in writing or in another form which, by reason of its having some permanency, is capable of being used for subsequent reference (as, for example, a recording made on audio or video tape);
  - (b) state the name of the applicant and an address for correspondence; and
  - (c) specify –
    - (i) the request for information to which the requirement for review relates;
    - (ii) the matter which was specified under sub-paragraph (ii) of section 20(3)(c);  
and
    - (iii) the matter which gives rise to the dissatisfaction mentioned in subsection (1).

# The Environmental Information (Scotland) Regulations 2004

## 2 Interpretation

- (1) In these Regulations –
  - “the Act” means the Freedom of Information (Scotland) Act 2002;
  - “applicant” means any person who requests that environmental information be made available;
  - “the Commissioner” means the Scottish Information Commissioner constituted by section 42 of the Act;
  - ...

## 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;
  - ...

## 17 Enforcement and appeal provisions

- (1) The provisions of Part 4 of the Act (Enforcement) including schedule 3 (powers of entry and inspection), shall apply for the purposes of these Regulations as they apply for the purposes of the Act but with the modifications specified in paragraph (2).
- (2) In the application of any provision of the Act by paragraph (1) any reference to -
  - (a) the Act is deemed to be a reference to these Regulations;

(b) the requirements of Part 1 of the Act is deemed to be a reference to the requirements of these Regulations;

...

(f) a notice under section 21(5) or (9) (review by a Scottish public authority) of the Act is deemed to be a reference to a notice under regulation 16(4); and

...