



Decision Notice 027/2024

Temporary traffic lights

Applicant: The Applicant

Authority: Aberdeenshire Council

Case Ref: 202200301

Summary

The Applicant asked the Authority for information relating to the number of temporary traffic lights where no road repairs were carried out within 28 days, and also for information on the number of queries to the Authority's customer contact centre about such traffic lights and how long it took to resolve any query raised. The Authority considered the information in both parts of the request to be environmental information and issued the Applicant with a fees notice for £188.87. The Commissioner investigated and found that some of the information was not environmental and that the Authority had therefore incorrectly issued a fees notice for this information. He required the Authority to provide the Applicant with a new review for that part of the Applicant's request.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2) and (6) (General entitlement); 21(4) and (5) (review by a Scottish public authority); 39(2) (Health, safety and the environment); 47(1) and (2) (Application for decision by Commissioner)

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (a), (b), (c) and (f) (definition of "the Act", "applicant" and "the Commissioner") (Interpretation); 5(1) and 2(1)(b) (Duty to make environmental information available on request); 8(1) and (3) (Charging); 9(1) (Duty to provide advice and assistance); 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. On 26 November 2021, the Applicant made a request for information to the Authority. He asked, for the period 1 April 2020 to 26 November 2021, for:
 - (i) Statistics/further information on the number of sets of temporary traffic lights that the Authority has sited and left in situ for a consecutive period of 28 days or more whilst no roads repair works have taken place during this timeframe (note that for this request a roads repair activity would constitute the Authority or its designated contractor attending to repair/progress the underlying issue that gave rise to the lights being sited rather than, for example, periodic attendance at site to top up the generators or to resite road signs which have become overgrown). A response in this format would be appreciated:
 - Date temporary lights sited
 - Duration (in days) these lights were continuously sited for (or continue to be sited at 26 November 2021)
 - Location of temporary traffic lights
 - Reason for siting these lights
 - Reason for failure to repair/remedy the underlying issue more quickly
 - Any known/reported accidents or incidents occurring on the immediate vicinity of these temporary traffic lights during the time these lights were sited.
 - (ii) Statistics/further information on the total number of roads maintenance queries/customer contacts logged via the council contact centre (whether by chat, dedicated phone line, email or letter etc.), which did not result in the originating customer receiving a full and complete response from the Authority in relation to the initial contact within 5 working days of receipt of the contact (Note for the purposes of this request, an automated or manually generated acknowledgement on the part of the contact centre undertaking to obtain a response would not be regarded as a full and complete response. Simply lifting text from the Authority's systems to state what investigations have been conducted where this does not constitute a full and complete response to the original report/contact would not be regarded as a full and complete response within 5 working days) A response in this format would be appreciated:
 - Total number of roads maintenance related queries/contacts received that did not receive a full and complete response within 5 working days
 - Of this, the number that were closed off by the Authority as part of housekeeping protocols (rather than as a result of the underlying issue being resolved)
 - Of the total number of queries/contacts that did not receive a full and complete response within 5 working days, please provide the number of contacts that remained open /unresolved for:
 - Up to 30 days
 - Up to 60 days

Up to 90 days

Up to 180 days

180 days or more

2. The Authority responded on 14 December 2021. It explained that it considered the request was for environmental information and, as such it would respond under the EIRs. It provided the Applicant with a Fees Notice (under the EIRs) for £188.87, stating that the time required to retrieve the information falling within the scope of the request would be 11 hours.
3. On 16 December 2021, the Applicant wrote to the Authority requesting a review of its decision. The Applicant stated that he was dissatisfied with the Authority's decision because he did not consider that the information he had requested should be considered to be environmental and therefore fall under the EIRs. He also considered that the Fees Notice was unreasonable, firstly as it had been calculated using the charging regime within the EIRs, as opposed to FOISA, and secondly that he considered 11 hours to retrieve the information was unreasonable.
4. The Applicant did not receive a review outcome within the statutory timeframe, and appealed to the Commissioner. Following the Commissioner's intervention, the Authority notified the Applicant of the outcome of its review, which upheld its initial response without amendment.
5. On 11 March 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 that he was dissatisfied with the outcome of the Authority's review because he did not agree that his request had been for environmental information and he considered that his request should instead have been dealt with under FOISA. He also considered that the cost in the Fees Notice was excessive.

Investigation

6. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
7. On 22 April 2022, the Authority was notified in writing that the Applicant had made a valid application and the case was allocated to an investigating officer.
8. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Authority was invited to comment on this application and to answer specific questions. These related to why the Authority considered that the information falling within the scope of the Applicant's request was environmental information, and also how the Fees Notice had been calculated.

Commissioner's analysis and findings

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

FOISA or the EIRs

10. The Authority handled both parts of the Applicant's request under the EIRs. 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.

The Authority's comments on whether the information requested was environmental

11. The Authority, in its submissions to the Commissioner, argued that the definition of environmental information was very broad and that it considered that any requests about road maintenance/repairs should be considered under the EIRs rather than under FOISA.
12. The Authority interpreted the Applicant's request as being about road maintenance/repair and stated that both repair and maintenance affect, or are likely to affect, elements of the environment, which included the land, which therefore meant that the requested information fell within paragraphs 2(1)(a) and (c) of the definition of environmental information in the EIRs.
13. The Authority concluded that both parts of the Applicant's request fell within this definition.

The Applicant's comments on whether the information requested is environmental

14. The Applicant considered that the Authority's interpretation of environmental information was too broad, and that on the interpretation it had used virtually no activity or service provided by the Authority would not "affect land". The Applicant pointed out that the information he sought concerned temporary traffic lights where no work affecting or likely to affect the land had taken place. He highlighted that had it done so, there would have been no need for him to make his information request.
15. The Applicant explained that the Authority had responded to both parts of his request under the EIRs. He considered that the second part of his request amounted to a query about customer service resolution rates [in relation to temporary traffic lights where no work had taken place], and that he struggled to see how this part of his request, in particular, could be considered to have requested environmental information.
16. In the time between making his Application to the Commissioner and the completion of the investigation, the Applicant informed the Commissioner that he had made a further request to the Authority, that quite clearly did ask for environmental information, and that the Authority had in fact responded to this request under FOISA and provided all the information requested, free of charge. The Applicant questioned how the two situations could be correct, and pointed out that it appeared at odds with the purposes of openness and transparency of public bodies that FOISA and the EIRs were intended to give effect to address.

The Commissioner's view on whether the information requested is environmental

17. The Commissioner has considered each part of the Applicant's request in turn. In deciding whether the request is for environmental information, the Commissioner has considered the wording of the request and the various arguments of the Applicant and the Authority, as well as the associated legislation and case law.
18. 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 and this is recognised by the

relevant case law. The Directive's concern is to enable citizens to have access to (environmental) information in order to assert their right to live in an adequate environment, including to participate in decision-making and have access to justice to that end.

19. In justifying the decision to process a request under the EIRs, the Commissioner would expect the Authority, and certainly on being asked in respect of an application to him (as is the case here), to be able to explain with sufficient detail and reasoning which part of the definition of environmental information – in regulation 2(1) of the EIRs - the requested information falls within, and why. There will be instances where doing so will not require a great degree of detail – for example, for information that is readily accepted as being environmental.
20. However, there will be cases – as here – where some explanation of why information is or is not environmental is required, especially where an applicant has challenged the Authority's position on the information being environmental. There are previous decisions of the Commissioner where traffic/road related information has been held to be environmental information and others where it has not. In [Decision 117/2013](#)¹ the Commissioner accepted that information relating to proposals to introduce speed cushions would be measures affecting the state of the land, and would fall within the definition of environmental information. The UK Information Commissioner (who is responsible for regulating the Freedom of Information Act 2000 (FOIA)) had also issued decisions - for example, [Decision FS50510852](#)² - in which information from traffic studies was held to be environmental information. However, in [Decision 107/2017](#)³ the Commissioner found that speed data did not fall within the definition of environmental information set out in regulation 2(1) of the EIRs.

Part 1 of the request

21. Part 1 of the Applicant's request seeks statistics and further information on the number of sets of temporary traffic lights (of the Authority) where no road repairs work had taken place in the timeframe referred to in the request. The Applicant sought information on dates, duration, location, reason for siting and "for failure to repair/remedy the underlying issue more quickly" and reported accidents or incidents occurring on the immediate vicinity.
22. The central part of the information was a number i.e. the number of sets of temporary traffic lights left in situ for a consecutive period of 28 days or more whilst no roads repair works have taken place during this timeframe. However, this part also sought information about each set of temporary traffic lights.
23. In Decision [082/2021](#)⁴, the Commissioner concluded that the installation and operation of traffic lights and related traffic management measures, in that case, fell within either paragraph (a) or paragraph (c) of the definition of environmental information in regulation 2(1) of the EIRs. In that instance there was no road repair or maintenance work involved, similar to the circumstances of the Applicant's request here.
24. As such, the Commissioner finds that part 1 of the Applicant's request in this case, even though it is concerned with the number of temporary traffic lights, falls within either paragraph (a) or paragraph (c) of the definition of environmental information in regulation 2(1) of the

¹ [Decision 117/2013 | Scottish Information Commissioner \(itspublicknowledge.info\)](#)

² https://ico.org.uk/media/action-weve-taken/decision-notices/2014/954476/fs_50510852.pdf

³ <https://www.itspublicknowledge.info/decision-1072017>

⁴ [Decision 082/2021 | Scottish Information Commissioner \(itspublicknowledge.info\)](#)

EIRs. The information sought, especially when read with the format requirements of location and reasons, could reasonably be regarded as environmental.

25. For part 1 of the Applicant's request, the Commissioner therefore accepts that the Authority 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.
26. As there is a separate statutory right of access to environmental information available to the Applicant in this case, the Commissioner accepts that the public interest in maintaining the exemption and dealing with the request in line with the requirement of the EIRs outweighs any public interest in disclosure of the information under FOISA.

Part 2 of the request

27. Part 2 of the Applicant's request relates to statistics on the Authority's response times to queries/contacts logged with the Authority's contact centre that related to road maintenance. The Authority considered that this part of the request was also for environmental information, as the statistics requested were in relation to road maintenance. In contrast, the Applicant believed that this part of his request was fundamentally about the response rates of the Authority to customer queries, albeit that the queries related to road maintenance.
28. This part of the request relates on the time taken by the Authority to conclude customer queries logged through its central customer contact centre. The same customer contact centre can be used by members of the public to log queries or concerns about any aspect of the Authority's activities. However, the Applicant seeks information on one type of query/contact (i.e. road maintenance).
29. In the present case, the Authority has not supplied the level of detail to explain or justify its interpretation of the part of the request as being for environmental information. The Commissioner does acknowledge, though, that there are aspects of the request, specifically the reference to road maintenance, that could lead an authority to consider if the information requested was environmental. The Commissioner does not fault the Authority in this regard i.e. in considering whether the EIRs applied.
30. To decide whether disputed information is environmental information, it is first necessary to identify the relevant measure (or activity). Information can be said to be "on" a measure if it is about, relates to or concerns that measure. In this instance, the Authority has not identified the measure – or activity - that the disputed information is "on" in the sense above.
31. The Commissioner has not received sufficient justification to accept that the information requested is environmental information. In order to respond to this part of the request, there is no need for the Authority to know anything about the road maintenance activity that was the subject of the queries logged with the contact centre: the request is concerned with the time taken to conclude these queries (albeit in relation to roads maintenance activities).
32. In the Commissioner's view, the asserted connection between the information and the environment is too remote to bring it within the terms of the definition in regulation 2 of the EIRs. The focus of the request is on the Authority's performance in dealing with complaints, by way of seeking data on time taken to respond. Access to information about the number of complaints falling within intervals of time to respond would not enable the public (and the Applicant here) to be better informed about or participate in decision-making regarding the environment.

33. As the focus of this part of the request is on the Authority's response times, as opposed to the actual road maintenance activity, the Commissioner is satisfied that the requested information cannot be regarded as environmental information, as defined in regulation 2(1) of the EIRs.
34. The Commissioner therefore finds that the Authority was wrong in this instance to respond to the request in term of the EIRs, and was not entitled to apply the exemption in section 39(2) of FOISA. The Authority should provide the Applicant with a new response under FOISA.
35. The Applicant in his application to the Commissioner also considered that the fee asked for by the Authority to provide the information was not reasonable.

The different charging regimes under the EIRs and FOISA

36. Under regulation 8(1) of the EIRs, a Scottish public authority may charge a fee for making environmental information available. Regulation 8(3) makes it clear that a fee charged under the EIRs shall not exceed a reasonable amount and shall not exceed the costs to the authority of producing the environmental information.
37. If the information is not environmental information, the information request must be dealt with under FOISA and any charges must be inline with the (FOISA) Fees Regulations.
38. The two charging regimes are very different. For example, while the EIRs allow an authority to charge a reasonable fee in any case where information is being made available, under FOISA, an authority is not allowed to charge where the projected costs of complying with the request is £100 or less. Where the projected costs are more than £100, the authority may only charge up to 10% of the difference between the projected costs and the £100 (Regulation 4 of the Fees Regulations). It is therefore important, when an authority wishes to charge a fee, that the correct charging regime is used.
39. The Commissioner has determined that the information falling within part 2 of the Applicant's request is not environmental information, and as such, this information should have been dealt with under FOISA, and not under the EIRs.
40. As a result, the Commissioner must find that, in charging a fee for non-environmental information under regulation 8(1) of the EIRs, the Authority breached both regulation 8(1) of the EIRs and section 1(1) of FOISA.

Was the fees notice reasonable?

41. As noted above, regulation 8(1) of the EIRs allows a Scottish public authority to charge a fee for making environmental information available. Regulation 8(3) makes it clear that the fee charged shall not exceed a reasonable amount and shall not exceed the costs to the authority of producing the information requested.
42. As part of the Authority's fees notice of £188.87 included charges for information that was not environmental, the Commissioner cannot accept that the fees notice was reasonable. He requires the Authority to carry out a new review, in terms of regulation 16 of the EIRs, in relation to the environmental information falling within the scope of the Applicant's request.

Advice and assistance

43. Regulation 9 of the EIRs requires a Scottish public authority to provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to applicants and prospective applicants.

44. Given that the Authority had determined that a substantial fee would be chargeable to access the information falling within the scope of the request, and that the Applicant, in his requirement for review, was not happy with this, the Commissioner considers it would have been reasonable at the time of the review to offer the Applicant advice and/or assistance in formulating his request in a way that he could access the information he required, in a way that perhaps better suited the way in which the Authority held its information, thereby resulting in a potentially lower cost. It would be reasonable to assume, for example, that the Applicant may not have been aware that there were six roads teams, or of the work that would be required to retrieve the requested information.

Decision

The Commissioner finds that the Authority failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) and with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by the Applicant.

In particular, the Authority failed to comply with section 1(1) of FOISA by incorrectly categorising information as environmental and in not responding to the non-environmental part of the request under FOISA.

The Authority also failed to comply with the following provisions of the EIRs:

- Regulation 8(3) by issuing a fees notice for information which, by virtue of it including non-environmental information, was not reasonable
- Regulation 9(1) by not providing advice and assistance to the Applicant on how to amend his request to potentially lower the fee due.

The Commissioner therefore requires the Authority to provide the Applicant with a new review under regulation 16 of the EIRs regarding the information which falls within the scope of part 1 his request, and a new review outcome under section 21(4) of FOISA regarding the non-environmental information falling within the scope of part 2 of his request, by **15 April 2024**.

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.

Enforcement

If the Authority fails to comply with this decision, the Commissioner has the right to certify to the Court of Session that the Authority has failed to comply. The Court has the right to inquire into the matter and may deal with the Authority as if it had committed a contempt of court.

Euan McCulloch
Head of Enforcement

29 February 2024

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.
- (2) The person who makes such a request is in this Part and in Parts 2 and 7 referred to as the “applicant.”
- ...
- (6) This section is subject to sections 2, 9, 12 and 14.
- ...

21 Review by Scottish public authority

- ...
- (4) The authority may, as respects the request for information to which the requirement relates-
 - (a) confirm a decision complained of, with or without such modifications as it considers appropriate;
 - (b) substitute for any such decision a different decision; or
 - (c) reach a decision, where the complaint is that no decision had been reached.
- (5) Within the time allowed by subsection (1) for complying with the requirement for review, the authority must give the applicant notice in writing of what it has done under subsection (4) and a statement of its reasons for so doing.
- ...

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.
- ...

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;

...

"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)-

...

- (b) is subject to regulations 6 to 12.

...

8 Charging

- (1) Subject to paragraphs (2) to (8), where a Scottish public authority is under a duty to make environmental information available under regulation 5(1), it may charge a fee for so doing.

...

- (3) Fees charged under paragraph (1) shall not exceed a reasonable amount and in any event shall not exceed the costs to the authority of producing the information requested.

...

9 Duty to provide advice and assistance

- (1) A Scottish public authority shall provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to applicants and prospective applicants.

...

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
 - ...