



Scottish Information
Commissioner
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Decision Notice 057/2024

Business case for cycle lane

Authority: East Renfrewshire Council

Case Ref: 202200845

Summary

The Applicant asked the Authority for a business case for a specific cycle lane. The Authority initially stated that it did not hold information which met that description, but later provided information that it considered comparable. The Commissioner investigated and was satisfied that the Authority did not hold the information requested. However, the Commissioner found that the Authority failed to recognise the information as being “environmental” information and that its handling of the request failed in other respects to comply with the EIRs.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 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”) (paragraphs (a), (c) and (e) definition of “environmental information” (Interpretation); 5(1) and (2)(b) (Duty to make environmental information available on request); 10(1) and (4)(a) (Exceptions from duty to make environmental information available); 13(b) (Refusal to make information available); 16(4) (Review by Scottish public authority); 17(1), (2)(a), (b) and (f) (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 4 March 2022, the Applicant made a request for information to the Authority. Among other things, he asked for “the detailed business case (safety, cost, environmental impact, health and wellbeing) for the mandatory cycle lane [Ayr Road, Newton Mearns] and its 30mph speed limit”.
2. The Authority responded on 18 March 2022, stating that no detailed business case for introducing the mandatory cycle lanes or 30pmh speed limit was developed and that a business case was not required.
3. On 27 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 he believed the Authority was required to create a business case.
4. On the same day, the Authority wrote to the Applicant to clarify whether he was complaining that a business case existed but had not been disclosed to him or that a business case did not exist but should. The Applicant confirmed that he considered a business case existed (as it was a requirement) and that it should have been disclosed to him.
5. The Authority notified the Applicant of the outcome of its review on 27 May 2022. The Authority provided several documents to the Applicant that it considered relevant to his request, but stated it would “leave the assessment” of whether any of the documents constituted a business case to him.
6. On 1 August 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 the Authority had not provided him with a detailed business case and it had failed to comply with the timescales to respond to his requirement for review.

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 30 September 2022, and in line with section 49(3)(a) of FOISA, the Commissioner gave the Authority notice in writing of the application and invited its comments. The Authority provided its comments.
9. The case was subsequently allocated to an investigating officer.

Commissioner’s analysis and findings

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

Application of the EIRs

11. 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.

12. The Authority handled the Applicant's information request under FOISA, but it revised its position during the investigation and acknowledged that it should have responded under the EIRs.
13. The Commissioner is satisfied that the information requested falls within the definition of environmental information in regulation 2 of the EIRs (particularly paragraphs (a), (c) and (e)).
14. The Commissioner therefore concludes that the Authority failed to identify the information as environmental information in terms of regulation 2(1) of the EIRs, at the time of asking, and thereby failed to comply with regulation 5(1) of the EIRs.
15. In what follows, the Commissioner will consider this case solely in terms of the EIRs.

Regulation 5(1) – Duty to make available environmental information on request

16. Regulation 5(1) of the EIRs (subject to the various qualifications contained in regulations 6 to 12) requires a Scottish public authority which holds environmental information to make it available when requested to do so by any applicant. This obligation relates to information that is held by the authority when it receives a request.
17. 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.

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

18. Regulation 10(4)(a) of the EIRs provides that a Scottish public authority may refuse to make environmental information available to the extent that it does not hold that information when it received the request.
19. 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 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 is to determine what relevant information is actually held by the public authority (or was, at the time it received the request).

The Authority's submissions about the exception

20. The Authority explained that it had consulted with the relevant officers within the Roads Service involved in the cycle lane project, both of whom confirmed that no business case existed and that they did not believe one was required for a project of this sort.
21. The Authority suggested that, if such a business case did exist, then it would be counter to its interests to withhold its disclosure.
22. However, the Authority explained that it had still carried out searches of the relevant electronic record stores.
23. The Authority noted that, given the project-specific context, any relevant information would be held within a specific folder. The Authority provided a screenshot of the searches it had

undertaken for the “business case” requested by the Applicant, which returned no relevant results.

24. As part of its duty to provide advice and assistance, the Authority explained that it went beyond the strict terms of the request and provided the Applicant with what it considered to be relevant associated information (the content of which may accord with what one might consider business case information).
25. However, the Authority maintained that it would not have been “entirely accurate” to have issued a notice under regulation 10(4)(a) of the EIRs as it had provided information to the Applicant that was comparable to the information he had requested.

The Applicant's submissions about the exception

26. The Applicant raised a number of issues in his application to the Commissioner.
27. In summary, the Applicant believed that the Authority was required to prepare a business case for the mandatory cycle lane, that it therefore must hold such a business case and that it had failed to disclose it to him.

The Commissioner's view about the exception

28. Having considered the terms of the request, the searches carried out and the explanations provided by the Authority as to why it did not hold the business case requested by the Applicant, the Commissioner is satisfied that the Authority took adequate and proportionate steps to establish whether it held the information requested.
29. While the Applicant believed and expected the specified information to be held by the Authority, the Commissioner is satisfied that this was not the case. Whether a public authority should hold information which it does not hold is not a matter for the Commissioner to decide.
30. While the Commissioner understands the motivation of the Authority in providing to the Applicant information it considered comparable to the information he had requested, the Authority should have been clear that this was done as part of its duty, under regulation 9 of the EIRs, to provide advice and assistance.
31. Regulation 5(1) of the EIRs does not allow for a public authority to substitute information it considers comparable to the information requested. If the authority does not hold the information requested, it must issue a notice under regulation 10(4)(a) to that effect.
32. Regulation 13(b) of the EIRs provides that if a request to make environmental information available is refused by a public authority in accordance with regulation 10, the authority must provide a notice in writing explaining which exceptions are being relied upon (subject to certain qualifications which are not relevant in this case).
33. The Authority failed to provide such a notice in this case. The Commissioner must therefore find that the Authority failed to comply with regulation 13(b) of the EIRs.
34. In all the circumstances, the Commissioner is satisfied, on the balance of probabilities, that the Authority does not (and did not, on receipt of the request) hold recorded information that would fulfil the Applicant’s request.
35. The Commissioner therefore finds that the Authority was entitled to rely on the exception in regulation 10(4)(a) of the EIRs on the basis that it did not hold the information requested.

The public interest

36. The exception in regulation 10(4)(a) of the EIRs is subject to the public interest test in regulation 10(1)(b) and so can only apply if, in all the circumstances of the case, the public interest in maintaining the exception outweighs that in making the information available.
37. The question of whether or not a public authority holds information is a factual one, determined on the balance of probabilities. If a public authority does not hold the information, then there is no meaningful public interest test that can be undertaken.
38. In this case, for the reasons set out above, the Commissioner is satisfied that the Authority does not hold any information covered by the request, and did not do so, on receipt of the request.
39. Consequently, the Commissioner accepts that there is no conceivable public interest in requiring the disclosure of such information and finds that the public interest in making information available is outweighed by that in maintaining the exception.

Handling of request

40. Regulation 16 of the EIRs states that, on receipt of a requirement to conduct a review, the authority shall review the matter and decide whether it has complied with the EIRs, within 20 working days (regulations 16(3) and (4)).
41. It is a matter of fact that the Authority's review response was a day late.
42. The Commissioner must therefore find that, in failing to respond to the requirement for review within the time allowed, the Authority failed to meet the requirements of section 16(4) of the EIRs.

Decision

The Commissioner finds that the Authority failed to comply with the Environmental Information (Scotland) Regulations 2004 (the EIRs), in particular regulation 5(1), in responding to the information request made by the Applicant by failing to identify the information requested as environmental information in terms of regulation 2(1).

The Commissioner also finds that the Authority failed to:

- respond to the Applicant's requirement for review within the prescribed timescale, and, in that respect, failed to comply with regulation 16(4) of the EIRs.
- failed to specify that the information covered by the request was excepted from disclosure under regulation 10(4)(a), and therefore failed to comply with regulation 13(b) of the EIRs.

Given that the Commissioner is satisfied that the information requested is not held, the Commissioner does not require the Authority to take any action in response to these failures in response to the Applicant's application.

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.

Cal Richardson
Deputy Head of Enforcement

23 April 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;

...

"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;

...

(e) costs benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in paragraph (c); and

...

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;

...

13 Refusal to make information available

Subject to regulations 10(8) and 11(6), if a request to make environmental information available is refused by a Scottish public authority in accordance with regulation 10, the refusal shall-

...

- (b) specify the reasons for the refusal including, as appropriate, any exception under regulation 10(4) or (5) or provision of regulation 11 and how the Scottish public authority has reached its decision with respect to the public interest under regulation 10(1)(b);

...

16 Review by Scottish public authority

...

- (4) The Scottish public authority shall as soon as possible and no later than 20 working days after the date of receipt of the representations notify the applicant of its decision.

...

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

...