



Scottish Information
Commissioner
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Decision Notice 054/2025

Adoption of roads

Authority: East Lothian Council
Case Ref: 202301493

Summary

The Applicant asked the Authority for information relating to the adoption of roads within a specified area. The Authority provided the Applicant with the information it identified as falling within the scope of the request. During the Commissioner's investigation, the Authority located further relevant information. The Commissioner found that the Authority had breached the EIRs by failing to identify all information held at the time of the request. However, he was satisfied, by the close of the investigation, that the Authority had identified all information falling within the scope of the request.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 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) (definition of "the Act", "the applicant", "the Commissioner" and the definition of "environmental information") (Interpretation); 5(1) (Duty to make environmental information available on request); 17(1), (2)(a), (b) and (f) (Enforcement and appeal provisions)

Background

1. On 11 July 2023, the Applicant made a request for information to the Authority. He asked for information about the adoption of roads within a specified area. The request was in three parts:
 - a) A copy of the assessment and decision regarding the roads in Archerfield being declared as adoptable in 2006.
 - b) The criteria in place in 2006 with regards to roads adoption.
 - c) Copies of any correspondence or files notes between the developer and the Authority between 2005 and 2023 relating to the roads in Archerfield Estate.
2. On 25 July 2023, the Authority sought clarification of part (c) of the request. The Applicant confirmed that for part (c) of the request he was seeking:

“Copies of any correspondence or files notes (held by [the Authority] in digital, electronic, paper, micro fiche or other form) between the developer (Caledonian Heritable Limited, its Directors, Advisers and employees) and [the Authority] between 2005 and 2023 relating to the adoption of roads ([How to get a road adopted | Brodies LLP](#)) in Archerfield Estate...”
3. The Authority responded on 7 August 2023. It advised the Applicant that it was dealing with the request under the EIRs and that a fee would be payable before it provided the information requested.
4. On the same day, the Applicant wrote to the Authority requesting a review of its decision. He stated that he was dissatisfied with the decision because he disagreed that his request fell to be dealt with under the EIRs.
5. The Authority notified the Applicant of the outcome of its review on 5 September 2023, which upheld its original decision to deal with the request under the EIRs. It advised the Applicant of his right of appeal to the Commissioner.
6. The Applicant subsequently paid the fee notice on 31 October 2023.
7. The Authority responded on 24 November 2023, disclosing four documents falling within the scope of the request. It informed the Applicant that it had already carried out a review of how his request had been handled and advised him again of his right of appeal to the Commissioner.
8. On 26 November 2023, 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 he believed it held more information relevant to his request than it had identified and provided.

Investigation

9. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.

10. On 25 January 2024, 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.
11. The case was subsequently allocated to an investigating officer.
12. Further comments were sought from the Authority on how it established that it held no further information falling within the scope of the request. The Authority provided further comments.
13. During the investigation, the Authority identified two further documents falling within the scope of the request. It disclosed these documents (subject to some redactions of personal data and out of scope information) to the Applicant and it also fully refunded him the fee notice he had paid.

Commissioner's analysis and findings

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

EIRs or FOISA?

15. The Authority considered the Applicant's request under the EIRs, having concluded that the information requested was environmental information as defined in regulation 2(1) of the EIRs.
16. The information requested appears to fall clearly within the scope of the definition of environmental information contained in regulation 2(1) of the EIRs.
17. The Commissioner has investigated a number of cases where individuals have requested information regarding roads, and he has generally found such information to be environmental information for the purposes of the EIRs. He has reached the same conclusion in this case.
18. Although adoption of roads is a measure relating to the legal status of the roads in relation to their maintenance, it also has implications in terms of the effect that elements of the environment will have, or have had, on the roads. The Commissioner would regard adoption of a road, therefore, as a "measure" which falls within part (c) of the definition of environmental information in regulation 2(1) of the EIRs.
19. The Commissioner is satisfied, in the circumstances, that the information requested by the Applicant falls within the definition of environmental information set out in regulation 2(1).

Section 39(2) – Environmental information

20. The exemption in section 39(2) of FOISA provides, in effect, that environmental information (as defined by regulation 2(1) of the EIRs) is exempt from disclosure under FOISA, thereby allowing any such information to be considered solely in terms of the EIRs.
21. In this case, therefore, the Commissioner accepts that the Authority was entitled to apply the exemption in section 39(2) of FOISA, given his conclusion that the information requested is properly considered to be environmental information.
22. As there is a statutory right of access to environmental information available to the Applicant in this case, the Commissioner accepts, in all the circumstances, that the public interest in maintaining this exemption (and responding to the request under the EIRs) outweighs any public interest in disclosing the information under FOISA.

23. Both regimes are intended to promote public access to information and there would appear to be no reason why (in this particular case) disclosure of the information should be more likely under FOISA than under the EIRs.
24. The Commissioner therefore concludes that the Authority was correct to apply section 39(2) of FOISA and to consider the Applicant's information request under the EIRs.

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

25. Regulation 5(1) of the EIRs requires a Scottish public authority which holds the 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, as opposed to information an applicant believes the authority should hold, but which is not in fact held.
26. 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.
27. The Commissioner 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 is to determine what relevant information is actually held by the public authority (or was held, at the time it received the request).

The Applicant's submissions

28. In relation to part (a) of his request, the Applicant considered that the Authority should hold a detailed file noting why, with reference to the legislation in place at the time, the roads in question were declared adoptable. He submitted that there should be photographic evidence, detailed file notes and specification provided by the developer (that was validated by the Authority) on file. He also considered it likely there would be litigation to follow the information gathering exercise that would found on the position of the Authority and the developer that the roads in question had been built to an adoptable standard.
29. In relation to parts (b) and (c) of his request, the Applicant contended that the developer of the estate must have corresponded extensively with the Authority between 2005 and 2023. He expected email servers, case management systems and paper files to be reviewed and “significant correspondence” to be provided.

The Authority's submissions

30. To identify the information requested, the Authority asked staff within the Roads and Planning Services to undertake searches of their records (both electronic and paper).
31. The Authority explained that the Roads Service Manager checked the paper files in his control, many of which had been passed to him by the Head of Transportation (who occupied the role during the period relevant to the request and who had some involvement in the development). The Roads Service confirmed that they did not hold “redundant” paper records in their office, as around two years ago they undertook a wholesale review of all their historic paper records as part of an office move. The Roads Service was therefore confident that all paper records held were current and within their retention period, according to the Authority's retention schedule.

32. To carry out relevant searches of electronic records, the Roads Service searched the records held on shared network drives using the key words “Archerfield” (the site in question) and “Caledonian” (the site developer).
33. The Roads Service also requested access to archived email accounts for departed staff who were believed to potentially have had some involvement in the matters addressed by the request. They were granted access to two accounts – a third had been deleted previously. The Roads Service searched these accounts using search parameters between 2005 and 2023, using the search terms “Archerfield”, “Caledonian Heritable” and “John Glen” (a director of Caledonian Heritable). It also used the terms “adoption” and “adoptable”.
34. The Authority explained that the Planning Service also conducted searches of their electronic system and of individual staff email accounts, including the Service Manager, the Team Manager and two Planners. These searches resulted in one positive return – a letter issued by the Head of Transportation in 2006. The Planning Service advised it was not surprising that they held only limited information because roads adoption is dealt with by the Roads Service.
35. The Authority also asked the Building Standards Service to carry out searches. They confirmed they held no information falling within the scope of the request.
36. When preparing submissions to the Commissioner, the Roads Service identified one additional email exchange in the mailbox of a former member of staff and the Planning Service also identified additional information held within a planning application. As stated above, the Authority disclosed this information to the Applicant (subject to some redactions of personal data and out of scope information) to the Applicant and it also fully refunded him the fee he had paid.
37. The Authority noted that the Applicant believed it should hold more information – and more detailed information – than it had located and provided in response to his request. It noted that the roads in question were not adopted, and so the Roads Service believed that the level of inspection and detailed filing expected by the Applicant would not have been undertaken.
38. The Authority also noted it was possible that, given any such assessments would have been carried out in 2006, any relevant paper records might have since been destroyed. It explained that the first corporate records retention schedule was established in 2015, meaning there was no formal retention policy in use by the Roads Service prior to then. However, an experienced member of the Roads Service recalled a typical retention period of such records of around three years. If such records were ever held by the Authority, it would not have retained them by the date of the request – especially since the Authority, as “Roads Authority”, was not taking responsibility for road assets within Archerfield Estate.
39. The Authority explained that it did not consider it likely that any searches would have resulted in the retrieval of information of the nature the Applicant considered it should hold. It reiterated that the roads in question were not adopted by the Authority. Any records created in relation to the road infrastructure in Archerfield Estate would have been minimal, and it was unlikely, given the passage of time, they would have been retained.
40. In summary, while the Authority noted that the Applicant asserted a broad range of information that he believed would have been generated and retained until the date of his request, it maintained that this was not an accurate assumption given the developer at the time did not put forward the roads for adoption.

The Commissioner's view

41. The Commissioner has taken account of the submissions provided by the Applicant, in which he explained why he believed that the Authority held further information falling within the scope of his request.
42. Having considered all relevant submissions and the nature of the information requested, the Commissioner accepts that (by the close of the investigation) the Authority took adequate, proportionate steps in the circumstances to establish what information it held falling within the scope of the request.
43. The Commissioner considers that the Authority's searches were (by the close of the investigation) reasonable, in the sense of who it asked to carry out the searches and the locations searched; he finds that they would be capable of locating the information requested. He is therefore satisfied, on balance, that (by the close of the investigation) the Authority identified and located all the relevant information it held.
44. While the Applicant believed and expected further information to be held by the Authority, the Commissioner is satisfied that (by the close of the investigation) 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.
45. As stated above, the Authority located further information relevant to the Applicant's request after it had issued the review outcome. In failing to take adequate steps to identify, locate and provide all the relevant information at the time it dealt with the Applicant's request and requirement for review, the Commissioner must find that the Authority failed to comply with regulation 5(1) of the EIRs.
46. The Commissioner would urge all public authorities to ensure they take adequate, proportionate steps in the circumstances to establish what information they hold when responding to information requests and to ensure at the earliest opportunity – and by the date of the review outcome, at the latest – that requesters receive full responses to their requests.

Decision

The Commissioner finds that the Authority failed to comply with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by the Applicant.

The Commissioner finds that, by failing to identify and locate all the relevant information it held in response to the Applicant's request, the Authority failed to comply with regulation 5(1) of the EIRs.

Given that the Authority identified and located all the relevant information it held by the close of the investigation (which it has disclosed, subject to some redactions for personal data and out of scope information, to the Applicant), the Commissioner does not require the Authority to take any action regarding this failure, 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.

Euan McCulloch
Head of Enforcement

27 February 2025