

Decision Notice 030/2020

New Ferry Terminal and Pier at Ardrossan Harbour

Applicant: The Applicant

Public authority: Transport Scotland

Case Ref: 201901972



Scottish Information
Commissioner

Summary

Transport Scotland was asked about the new ferry terminal and pier at Ardrossan Harbour. Transport Scotland withheld some of the information requested on the basis that it was exempt from disclosure in terms of various exemptions in FOISA.

The Commissioner found that Transport Scotland had considered the request under the wrong legislation. The requested information was environmental information and so Transport Scotland should have considered it under the EIRs.

The Commissioner required Transport Scotland to respond to the request under the EIRs.

Relevant statutory provisions

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (definitions (a) and (c) of "environmental information"); 5(1) and (2) (b) (Duty to make available environmental information on request); 16 (Review by Scottish public authority)

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 10 June 2019, the Applicant made a request for information to Transport Scotland. The request asked for:
 - a) All reports and consultant opinions received by the Ardrossan Task Force regarding the new ferry terminal and pier, particularly those dealing with reliability and resilience of the ferry service.
 - b) A list of all agencies and authorities consulted in terms of design and weather-related access to Ardrossan harbour.
 - c) Public minutes of Task Force meetings.
2. Transport Scotland responded on 18 July 2019. It provided the Applicant with some information, stating that other information was being withheld in terms of sections 30(b)(ii) and 33(1)(b) of the Freedom of Information (Scotland) Act 2002 (FOISA).
3. On 2 September 2019, the Applicant wrote to Transport Scotland, requesting a review of its decision on the basis that it disagreed with the exemptions applied, with reasoning.
4. Transport Scotland notified the Applicant of the outcome of its review on 14 October 2019. Transport Scotland provided further information to the Applicant, but maintained that some information was exempt from disclosure under sections 30(b)(ii) and 33(1)(b) of FOISA.
5. On 15 November 2019, the Applicant wrote to the Commissioner. The Applicant 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. The Applicant stated it was

dissatisfied with the outcome of Transport Scotland's review because it disputed the exemptions applied.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that the Applicant 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). On 19 November 2019, in line with agreed procedures, the Ministers were notified in writing that the Applicant had made a valid application to the Commissioner and were asked to send the Commissioner the information withheld from the Applicant. Transport Scotland provided the information and the case was allocated to an investigating officer.
8. Subsequent references to contact with or submissions from Transport Scotland are references to contact with or submissions made by the Ministers on behalf of Transport Scotland.
9. On 28 January 2020, the investigating officer gave Transport Scotland an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asked it to respond to specific questions.
10. In particular, Transport Scotland was asked if it had considered whether the Applicant's information request should have been handled as a request for environmental information, to be responded to under the EIRs.
11. Transport Scotland responded on 31 January 2020, acknowledging that it had responded to the Applicant's request in terms of FOISA only. Transport Scotland agreed that the information requested was environmental information and, therefore, that the request should have been dealt with under the EIRs.
12. Transport Scotland also advised it would take steps to provide the Applicant with a new review outcome, meeting the requirements of both FOISA and the EIRs. This had not been done by the date of this decision.

Commissioner's analysis and findings

13. In coming to a decision on this matter, the Commissioner considered all of the withheld information and the relevant submissions, or parts of submissions, made to him by both the Applicant and Transport Scotland. He is satisfied that no matter of relevance has been overlooked.

FOISA or EIRs?

14. The relationship between FOISA and the EIRs was considered at length in *Decision 218/2007 Professor A D Hawkins and Transport Scotland*¹. In the light of that decision, the Commissioner's general position is as follows:
 - (i) The definition of what constitutes environmental information should not be viewed narrowly.

¹ <http://www.itspublicknowledge.info/applicationsanddecisions/Decisions/2007/200600654.asp>

- (ii) There are two separate statutory frameworks for access to environmental information and an authority is required to consider any request for environmental information under **both** FOISA and the EIRs.
 - (iii) Any request for environmental information therefore **must** be dealt with under the EIRs.
 - (iv) In responding to a request for environmental information under FOISA, an authority may claim the exemption in section 39(2).
 - (v) If the authority does not choose to claim the section 39(2) exemption, it must respond to the request fully under FOISA, by providing the information, withholding it under another exemption in Part 2, or claiming that it is not obliged to comply with the request by virtue of another provision in Part 1 (or a combination of these).
 - (vi) Where the Commissioner considers a request for environmental information has not been dealt with under the EIRs, he is entitled (and indeed obliged) to consider how it should have been dealt with under that regime.
15. Given the nature of the subject matter of the request, the Commissioner asked Transport Scotland to consider whether the request properly fell to be handled as a request for environmental information, and therefore responded to under the EIRs. Transport Scotland agreed that it should have responded under the EIRs and not solely under FOISA.
 16. It is clear from Transport Scotland's correspondence with the Commissioner that any information falling within the scope of the request would be environmental information, as defined in regulation 2(1) of the EIRs. This is also the Commissioner's view having considered the information withheld from the Applicant. The information in question concerns a major potential construction project (and, in part, the impact of the elements of the environment on navigation) and the Commissioner is satisfied that it would fall within either paragraph (a) of the definition of environmental information contained in regulation 2(1) of the EIRs (as information on the state of the elements of the environment) or paragraph (c) of that definition (as information on measures affecting or likely to affect those elements).
 17. Given that the information requested is environmental information, Transport Scotland has a duty to consider it as a request in terms of regulation 5(1) of the EIRs.
 18. As Transport Scotland failed to recognise and respond to the request as a request for environmental information, the Commission must find that in that regard it failed to respond in accordance with regulation 5(1) of the EIRs.
 19. 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 regulations within 20 working days (regulations 16(3) and (4)). It also states that where an authority has not complied with its duty under the EIRs, it shall immediately take steps to remedy the breach of duty (regulation 16(5)).
 20. Although Transport Scotland responded to the Applicant's requirement for review on 14 October 2019, as explained above, this was done wholly under FOISA. At this stage, too, it failed to recognise the request as being for environmental information and so failed to meet the requirements of regulation 16 of the EIRs.
 21. The Commissioner therefore requires Transport Scotland to provide a response to the Applicant's requirement for review of 2 September 2019, in terms of regulation 16 of the EIRs. The Commissioner would note that he would expect such a review outcome to include

full reasons for its decision on review, disclosing the information held unless any exception contained in regulation 10 of the EIRs can be fully justified.

22. In responding under the EIRs, Transport Scotland is reminded that regulation 10(2) of the EIRs requires that, in considering any exceptions under regulation 10(4) and 10(5) of the EIRs, a Scottish public authority must interpret those paragraphs a restrictive way and apply a presumption in favour of disclosure.
23. The Commissioner's decision below states a compliance date of 23 March 2020, in line with the timescales he is required to follow in determining an application. This is the latest day on which Transport Scotland can issue a response, but it does not prevent Transport Scotland from issuing one sooner. The Commissioner would encourage Transport Scotland to provide the Applicant with a compliant response as soon as possible.

Decision

The Commissioner finds that Transport Scotland failed to comply with the requirements of regulations 5(1) and 16 of the Environmental Information (Scotland) Regulations 2004 in responding to the Applicant's information request and requirement for review.

The Commissioner requires Transport Scotland to provide a response to the Applicant's requirement for review, in terms of regulation 16 of the EIRs, by **23 March 2020**.

Appeal

Should either the Applicant 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.

Enforcement

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

Margaret Keyse
Head of Enforcement

6 February 2020

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

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(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;

...

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.

...

16 Review by Scottish public authority

(1) Subject to paragraph (2), an applicant may make representations to a Scottish public authority if it appears to the applicant that the authority has not complied with any requirement of these Regulations in relation to the applicant's request.

(2) Representations under paragraph (1) shall be made in writing to the Scottish public authority no later than 40 working days after either the date that the applicant receives any decision or notification which the applicant believes does not comply with these Regulations or the date by which such a decision or notification should have been made, or any other action should have been taken, by the authority but was not made or taken.

(3) The Scottish public authority shall on receipt of such representations-

- (a) consider them and any supporting evidence produced by the applicant; and
 - (b) review the matter and decide whether it has complied with these Regulations.
- (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.
- (5) Where the Scottish public authority decides that it has not complied with its duty under these Regulations, it shall immediately take steps to remedy the breach of duty.

Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews, Fife
KY16 9DS

t 01334 464610

f 01334 464611

enquiries@itspublicknowledge.info

www.itspublicknowledge.info