

Decision Notice

Decision 102/2014 Rail Freight Group and Transport Scotland

Impact of A9 dualling on rail freight

Reference No: 201400332

Decision Date: 6 May 2014



Scottish Information
Commissioner

Summary

On 22 August 2013, Rail Freight Group (RFG) asked Transport Scotland for information relating to the proposed dualling of the A9. Transport Scotland provided links to documents on its website which it considered fulfilled parts of RFG's request. Transport Scotland also informed RFG that it did not hold all of the information it had asked for.

The Commissioner found that, by failing initially to identify and provide all relevant information that it held, Transport Scotland failed to comply with regulation 5(1) of the EIRs. The Commissioner also found that, by failing to give notice that some of the information requested was excepted from disclosure in terms of regulation 10(4)(a), Transport Scotland failed to comply with regulation 5(1).

Relevant statutory provisions

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 5(1) and (2)(b) (Duty to make environmental information available on request); 10(1), (2) and (4)(a) (Exceptions from duty to make environmental information available)

The full text of each of the statutory provisions cited above is reproduced in the Appendix to this decision. The Appendix forms part of this decision.

Background

1. On 22 August 2013, RFG wrote to Transport Scotland in relation to the proposed dualling of the A9 and the implications for rail freight on the Highland main line. RFG asked the following:
 1. Has a comprehensive cross-modal corridor study been undertaken into the Perth-Inverness route to determine the most cost-effective package of road and rail interventions to meet policy objectives for climate change, connectivity, the economy, environment and safety?
 2. What package of road and rail interventions did any such study determine would best meet policy objectives, and can you supply the outputs of the study showing how this package compared with other (i) road, (ii) rail, and (iii) road-plus-rail interventions in terms of its costs and benefits?
 3. Can you provide details of the analyses Transport Scotland has undertaken of the freight modal shift impacts of:
 - (i) full A9 dualling
 - (ii) provision of more and longer crossing loops on the Perth-Inverness railway
 - (iii) easing of freight train speed restrictions over structures between Perth and Inverness
 - (iv) provision of improved loading gauge clearance between Perth and Inverness
 - (v) full double-tracking between Perth and Inverness
 - (vi) electrification from Perth to Inverness (and the associated railway from Dunblane to Perth)

(vii) a combination of (iii), (iv), (v) and (vi) above [*note that (ii) (longer loops) would not be required in the event of (v) (double tracking)*].

2. Transport Scotland responded on 17 October 2013. In relation to questions 1 and 2, Transport Scotland provided weblinks to information published on its website¹². Transport Scotland considered the information to be exempt from disclosure in terms of section 25(1) of the Freedom of Information (Scotland) Act 2002 (FOISA), stating that the information was already “reasonably accessible” to RFG. In relation to question 3, Transport Scotland informed RFG that it did not hold all of the information requested by RFG. Transport Scotland provided an explanation of its future intentions in relation to question 3(i). In relation to the remainder of question 3, Transport Scotland stated that information was available on its website and provided weblinks to specific published documents³. Transport Scotland also considered this information to be exempt from disclosure in terms of section 25(1) of FOISA on the basis that it was already reasonably accessible to RFG.
3. On 14 November 2013, RFG wrote to Transport Scotland requesting a review of its decision. RFG did not agree that Transport Scotland had answered its questions. RFG did not consider that the information contained in the documents to which it had been referred answered its questions.
4. Transport Scotland notified RFG of the outcome of its review on 10 January 2014. Transport Scotland now considered it should have dealt with the request under the EIRs, and considered the information to be exempt from disclosure under FOISA in terms of section 39(2) of FOISA. Transport Scotland stated that, for questions 1 and 2, the Strategic Transport Projects Review (STPR) to which RFG had been directed provided the answers to RFG’s questions and this was all the information that Transport Scotland actually held. In relation to question 3, Transport Scotland stated that it did not hold all of the information that RFG was seeking and applied the exception in regulation 10(4)(a) of the EIRs to the information that it did not hold. Transport Scotland stated that it had directed RFG to relevant sections of the STPR which it considered would go some way towards answering the questions.
5. On 17 February 2014, RFG wrote to the Commissioner, stating that it was dissatisfied with the outcome of Transport Scotland’s review and applying 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.)
6. The application was validated by establishing that RFG made a request for information to a Scottish public authority and applied to the Commissioner for a decision only after asking the authority to review its response to that request. The case was then allocated to an investigating officer.

Investigation

¹ <http://www.transportscotland.gov.uk/strategy-and-research/strategic-transport-projects-review>
[http://www.transportscotland.gov.uk/files/documents/projects/StrategicProjectsReviewEtc/STPR - summary leaflet - FINAL - 10 December 2008.pdf](http://www.transportscotland.gov.uk/files/documents/projects/StrategicProjectsReviewEtc/STPR_-_summary_leaflet_-_FINAL_-_10_December_2008.pdf)

² <http://www.transportscotland.gov.uk/strategy-and-research/publications-and-consultations/j10194a-00.htm>

³ <http://www.transportscotland.gov.uk/files/documents/reports/j10194a/j10194a-a2D15.pdf>
<http://www.transportscotland.gov.uk/strategy-and-research/publications-and-consultations/j11260a-07.htm>

7. Transport Scotland is an agency of the Scottish Ministers (the Ministers) and, in line with agreed procedures, the Ministers were notified in writing on 4 March 2014 that an application had been received from RFG. (Subsequent references to communications with Transport Scotland should be read as relating to communications with the Ministers acting on Transport Scotland's behalf.)
8. The investigating officer subsequently contacted Transport Scotland, giving it an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking it to respond to specific questions. Transport Scotland was asked to explain the searches it had undertaken in order to locate and retrieve any relevant information. Transport Scotland was also asked to specify in more detail which parts of the documents to which RFG had been referred would address RFG's request. Additionally, in relation to question 3, Transport Scotland was asked to clarify what information it did, or did not, hold.
9. Transport Scotland responded on 25 March 2014. Transport Scotland provided submissions explaining why it considered that all relevant information had been identified, and why the specific information contained on its website fulfilled the terms of RFG's request.

Commissioner's analysis and findings

10. In coming to a decision on this matter, the Commissioner considered all of the relevant submissions, or parts of submissions, made to her by both RFG and Transport Scotland. She is satisfied that no matter of relevance has been overlooked.

FOISA or EIRs

11. In its review response of 10 January 2014, Transport Scotland informed RFG that it considered the requested information was environmental information and that the request should be handled under the EIRs. The Commissioner agrees with Transport Scotland that the information under consideration is environmental. She will therefore consider RFG's application in terms of the EIRs.

Has all relevant information has been located and retrieved by Transport Scotland?

12. 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 any 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, but which, in fact, it does not hold.
13. In its submissions to the Commissioner, Transport Scotland explained that the scope of the request was such that it covered a number of work areas within the organisation. In order to ensure that all relevant information was identified, Transport Scotland carried out searches within those work areas.
14. Transport Scotland explained that it had searched the Scottish Government Electronic Records and Document Management System and staff email inboxes, and had carried out additional internal searches to ensure that all relevant information was identified.
15. In relation to the searches of electronic records, Transport Scotland explained the areas that had been searched and the search terms utilised. Transport Scotland explained that where potential documents were highlighted by these searches, the contents were reviewed to identify any information falling within the scope of the request.

16. Transport Scotland also confirmed that, following notification of RFG's appeal to the Commissioner, it had carried out further checks with an official who had worked previously on historic elements of the policy. As a result, it had identified one additional document with information which it considered was partly within the scope of the request. This document was subsequently provided to RFG.
17. In its application to the Commissioner, RFG argued that the information contained on Transport Scotland's website did not provide evidence that Transport Scotland had undertaken cross-modal analyses of road and rail investment packages in order to determine the best investment outcome. In RFG's view, Transport Scotland had stated that it had reached an evidence-based decision on dualling the A9, but the information to which RFG had been referred did not provide confirmation that the evidence had been comprehensively assessed.
18. The subject matter of the information under consideration in this case is complex and technical. Before setting out her conclusions, the Commissioner would note that it falls outwith her remit to comment on the methodology employed by Transport Scotland in assessing the proposal to dual the A9. Likewise, she cannot comment on the accuracy or veracity of any analyses undertaken, how Transport Scotland has chosen to interpret the information it holds, or whether it is entitled to make public statements based on the information it holds.
19. Similarly, the Commissioner cannot arbitrate in a dispute regarding the accuracy of any claims that have been made by an authority nor can she validate (or otherwise) any such claims. While she is aware that RFG has concerns in this respect, the Commissioner's locus extends only to determining whether Transport Scotland complied with the EIRs when responding to RFG's information request, and whether it identified all relevant recorded information that it held in doing so.
20. The Commissioner has considered the information identified by Transport Scotland and its explanation of the searches it carried out. Having done so, the Commissioner is satisfied that Transport Scotland has taken adequate, proportionate steps to establish what information it holds falling within the scope of the request and that it provided links to the relevant information where it appears on its website. For these reasons, the Commissioner is satisfied that Transport Scotland complied with the terms of RFG's request and, in doing so, complied with regulation 5(1) of the EIRs.
21. The Commissioner is satisfied that, by the end of the investigation, Transport Scotland had identified all relevant information which fell within the scope of RFG's request. However, by failing initially to identify and disclose the document referenced at paragraph 16 above, Transport Scotland failed to comply completely with regulation 5(1) of the EIRs.
22. RFG has expressed the view that the information it received fails to provide evidence to support Transport Scotland's conclusions on the dualling of the A9. However, as noted above, it is not within the Commissioner's remit to comment on this. The Commissioner is satisfied that the information identified by Transport Scotland is information which (in its view) shows evidence of the analyses it has undertaken, and which therefore meets the terms of RFG's request.

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

23. Regulation 10(4)(a) of the EIRs states that a Scottish public authority may refuse to make environmental information available to the extent that it does not hold that information when an applicant's request is received.

24. In its response to RFG's requirement for review, Transport Scotland stated that, in relation to question 3, it did not hold any of the information sought by RFG.
25. In its submissions to the Commissioner, Transport Scotland stated that, at the time it received RFG's request, it held no information which would answer questions 3(i), (v) and (vi). Transport Scotland explained that no information existed at the time of the request in relation to these questions. Transport Scotland acknowledged that its original response to RFG should have made it clearer which aspects of question 3 could not be answered by the information it held.
26. In this case, the Commissioner has considered the submissions made by Transport Scotland concerning the searches that it undertook in order to locate and retrieve all relevant information. Having done so, the Commissioner is satisfied that Transport Scotland did not hold information falling within the scope of questions 3(i), (v) and (vi) at the time it received RFG's request.
27. The exception in regulation 10(4)(a) is subject to the public interest test in regulation 10(1)(b) of the EIRs and can only apply if, in all the circumstances, the public interest in maintaining the exception outweighs the public interest in making the information available.
28. In this case, the Commissioner is satisfied that Transport Scotland did not hold information which would fulfil questions 3(i), (v) and (vi). Consequently, she does not consider there to be any conceivable public interest in requiring that any information falling within these parts be made available. The Commissioner therefore concludes that the public interest in making the requested information available is outweighed by that in maintaining the exception in regulation 10(4)(a) of the EIRs.
29. The Commissioner finds that, by failing to give notice that the information requested in questions 3(i), (v) and (vi) was excepted from disclosure in terms of regulation 10(4)(a) of the EIRs, Transport Scotland failed to deal with the request in accordance with regulation 5(1).

Decision

The Commissioner finds that Transport Scotland partially complied with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by Rail Freight Group (RFG).

The Commissioner finds that by providing RFG with links to information that it held, Transport Scotland complied with regulation 5(1) of the EIRs.

However, by failing initially to identify and disclose all relevant information that it held, Transport Scotland failed to comply with regulation 5(1) of the EIRs.

The Commissioner also finds that, by failing to give notice that some of the information was excepted from disclosure in terms of regulation 10(4)(a), Transport Scotland failed to comply with regulation 5(1) of the EIRs.

Appeal

Should either Rail Freight Group 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.

Margaret Keyse
Head of Enforcement
6 May 2014

Appendix

Relevant statutory provisions

The Environmental Information (Scotland) Regulations 2004

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.
 - (2) In considering the application of the exceptions referred to in paragraphs (4) and (5), a Scottish public authority shall-
 - (a) interpret those paragraphs in a restrictive way; and
 - (b) apply a presumption in favour of disclosure.
- ...
- (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;

...

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