

Decision Notice

Decision 167/2015: Organisation S and Transport Scotland

Business displacement and Sustaining Dunbar

Reference No: 201501156

Decision Date: 4 November 2015



Scottish Information
Commissioner

Summary

On 19 August 2014, Organisation S asked Transport Scotland for information it held about Cycling Scotland relating to business displacement and the community development trust, Sustaining Dunbar.

Transport Scotland disclosed some information and stated that it did not hold any further information.

Following an investigation, the Commissioner found that Transport Scotland partially failed to respond to Organisation S' request for information in accordance with the EIRs. The Commissioner accepts that Transport Scotland did not hold any further information falling within the scope of the request, but finds that it failed to respond to the request within the statutory time limit.

Relevant statutory provisions

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (Interpretation) (paragraphs (a) and (c) of definition of "environmental information"); 5(1) and (2) (Duty to make available environmental information on request); 10(1) 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 Appendix 1 to this decision. The Appendix forms part of this decision.

Background

1. On 19 August 2014, Organisation S made a request for information to Transport Scotland. The information requested was:
 1. FUNDING APPLICATIONS, MONITORING, OBJECTIVES
 - 1.1 All information contained within documents or records regarding applications by Sustaining Dunbar to CS [Cycling Scotland] for funding for projects including copies of such applications and all Sustaining Dunbar correspondence relating to such funding between CS and Sustaining Dunbar.
 - 1.2 All information contained within relevant documents or records setting out the terms on which grant funding has been made to Sustaining Dunbar by CS.
 - 1.3 All information contained within documents or records which result from the monitoring of spending by Sustaining Dunbar of funding granted by CS or which account for such spending.
 - 1.4 All information contained within documents or records considering displacement of private business as a result of CS funding of projects in Scotland generally including how displacement was considered by CS prior to making funding for projects available.
 - 1.5 All information contained within documents or records considering displacement of private business by the proposed activities of Sustaining Dunbar.

2. PERFORMANCE OF SUSTAINING DUNBAR

- 2.1 All information contained within documents or records regarding communications between officers or personnel of CS and Sustaining Dunbar regarding activities and proposed activities which may be out of scope of the projects funded by CS.

3. COMPLAINTS AGAINST SUSTAINING DUNBAR

- 3.1 All information contained within documents or records regarding complaints made by third parties about activities of Sustaining Dunbar and the responses of CS.

2. Transport Scotland responded on 1 October 2014, and gave notice that it did not hold information falling within any part of the request, except for part 1.5, for which it disclosed some information. It provided some general information in response to part 1.2 of the request. In relation to the other parts of the request, Transport Scotland cited the exception in regulation 10(4)(a) of the EIRs.
3. On 25 November 2014, Organisation S emailed Transport Scotland requesting a review of its decision on the basis that it considered that Transport Scotland had not disclosed all the information it held. Organisation S also commented that the public interest test associated with regulation 10(4)(a) meant that it would be inappropriate for Transport Scotland to avoid releasing documents which it held on the basis of the terms and conditions of the grant to Cycling Scotland.
4. Transport Scotland notified Organisation S of the outcome of its review on 23 December 2014, which confirmed the original decision without modification.
5. On 17 June 2015, Organisation S wrote to the Commissioner. Organisation S applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Organisation S stated it was dissatisfied with the outcome of Transport Scotland's review and reiterated the comments made in the request for review.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that Organisation S made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to her for a decision. The case was then allocated to an investigating officer.
7. Transport Scotland is an agency of the Scottish Ministers (the Ministers). Subsequent references to contact with or submissions from Transport Scotland should be read as including contact with or submissions made by the Ministers on behalf of Transport Scotland.
8. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. On 28 July 2015, the investigating officer notified Transport Scotland in writing that Organisation S had made a valid application. Transport Scotland was invited to comment on this application and to answer specific questions. These questions focused on the searches it had conducted to identify information covered by the request. Transport Scotland responded on 13 August 2015.
9. On 13 August 2015, Transport Scotland was asked to provide further comments on the questions raised in Organisation S' review request, and further information on the searches it had conducted. It was also asked for copies of two quarterly funding reports from Cycling Scotland. Transport Scotland provided further information on this point.

10. On 13 October 2015, Transport Scotland was asked for comments on part of its review response in which it indicated that it had forwarded Organisation S' letter to colleagues to check whether they held any recorded information falling within scope. Transport Scotland responded on 27 October 2015.

Commissioner's analysis and findings

11. 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 Organisation S and Transport Scotland. She is satisfied that no matter of relevance has been overlooked.

Application of the EIRs

12. The Commissioner is satisfied that the information covered by this request is environmental information, as defined in regulation 2(1) of the EIRs (paragraphs (a) and (c) of the definition of "environmental information"). The information relates substantially to the funding of an organisation to promote cycling and reduce the effect of carbon-emitting vehicles on the environment. Organisation S has not disputed Transport Scotland's decision to handle the request under the EIRs and the Commissioner will consider the information solely in terms of the EIRs in what follows.

Was all relevant information identified, located and provided by Transport Scotland?

13. 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. This obligation relates to the information held by an authority when it receives a request.
14. Organisation S considered that Transport Scotland held more information than it had identified and disclosed in its response. Transport Scotland submitted that it had provided all the information it held that fell within the scope of part 1.5 of Organisation S' request and did not hold the remaining requested information.

Searches carried out by Transport Scotland

15. Transport Scotland explained that Cycling Scotland is an independent charity and company limited by guarantee, and is in receipt of a grant from Transport Scotland, but it does not hold information on behalf of Transport Scotland.
16. Transport Scotland explained that grants can be provided where the aims of the grantee align with Scottish Government policy and may support delivery of a wider policy objective. The Scottish Government is likely to have an interest in their undertakings in order to ensure the proper use of public funds and may be likely to hold some grant-related accounts or financial data with regard to the group receiving the grant, but the Scottish Government would not expect to hold or to see correspondence between the grantee and any other body that they may choose to provide funding to.
17. Transport Scotland stated that it has a representative on the Cycling Scotland Board in an observer role, but has no relationship with Sustaining Dunbar. Transport Scotland is aware that Cycling Scotland provides grant funding to Sustaining Dunbar, but is not involved in any correspondence with or oversight of Sustaining Dunbar's work, viewing this as Cycling Scotland's responsibility.
18. Transport Scotland stated that it had not received any correspondence directly from Sustaining Dunbar. Any information provided by Cycling Scotland was likely to be sent to, or

by, the Sustainable Transport Team within Transport Scotland's Policy Division. Any information held by Transport Scotland would be stored in the Scottish Government's electronic Records and Document Management (eRDM) system or held on the networked computer system by individual team members or potentially in hard copy.

19. Transport Scotland explained that it adheres to the same storage principles as the Scottish Government and information is stored into the eRDM when it is required for the public record. Information is not retained if it does not form part of the public record.
20. Transport Scotland provided details of the search terms it had used in searching the eRDM and explained that it had searched for any documents that would fall within the scope of the request. Personal computers, emails and hard copy files and folders of team members were also searched. This included the files of the official who responded to the initial request from Organisation S, who (according to Transport Scotland) would have been the only person to correspond with Cycling Scotland and to save information created for the public record. The time period covered by the searches was 1 January 2010 to 19 August 2014.
21. Transport Scotland was asked to provide further details of its searches. It provided the names of the individuals who were asked to conduct searches and a copy of the email sent to these individuals. Transport Scotland stated that these individuals had all confirmed that they did not hold any information.
22. The Ministers provided copies of two grant award letters to Cycling Scotland and copies of two quarterly reports associated with one of these awarded grants, so that they could be checked to see if they contained any reference to Sustaining Dunbar or monies being given to other organisations. The Commissioner is satisfied that these documents did not contain any references to Sustaining Dunbar or to funding for any other organisation.
23. Organisation S identified two pieces of correspondence which it considered would fall within the scope of its request and would prove that Transport Scotland held further information. Transport Scotland explained that the first piece of correspondence related to another information request from Organisation S. The second piece of correspondence related to the Scottish Government correspondence and it was not in regard to any particular piece of correspondence from Organisation S, but was in response to multiple complaints, letters, emails and telephone calls that were received from Organisation S over a prolonged period of time. The Commissioner has considered both documents and is satisfied that neither falls within the scope of the Organisation S' request of 19 August 2014.
24. During the investigation, Organisation S queried the part of Transport Scotland's review response in which it indicated that Organisation S' letter dated 4 December 2014 had been forwarded to colleagues for consideration as to whether further information fell within scope of the request. Organisation S asked the Commissioner whether Transport Scotland had provided any comments on this point.
25. Transport Scotland explained that Organisation S' letter of 4 December 2014 had been forwarded to two colleagues in Transport Scotland for further consideration, but was not copied to any other policy area or anyone in the Scottish Government. Transport Scotland's conclusion was that no further action was required as it did not hold the information which Organisation S had requested, as confirmed in its response of 1 October 2014.

The Commissioner's finding

26. Having considered all the relevant submissions, the Commissioner is satisfied that Transport Scotland has taken adequate and proportionate steps to establish the information it held which fell within the scope of Organisation S' request, and that it does not hold any more information covered by that request.
27. In reaching this conclusion, the Commissioner has taken into account the following:
- the official conducting the search for the requested information had experience and knowledge of the subject matter of the request and had been the key official liaising with Cycling Scotland;
 - Transport Scotland has provided evidence of its searches to the Commissioner;
 - the searches detailed by Transport Scotland appear reasonable, proportionate and thorough, and used search terms likely to identify any relevant information;
 - Transport Scotland has explained its relationship with Cycling Scotland; although it provides grant funding to Cycling Scotland, this does not mean that Cycling Scotland is required to provide Transport Scotland with correspondence or information relating to organisations to which Cycling Scotland gives financial support;
 - Transport Scotland has conducted further searches of its records at the Commissioner's request; no further information has been identified.
28. The Commissioner is satisfied, on the balance of probabilities, that Organisation S has received all the information held by Transport Scotland that falls within the scope of part 1.5 of its request. She therefore finds that Transport Scotland complied with regulation 5(1) of the EIRs in responding to part 1.5 of Organisation S' request.

Regulation 10(4)(a)

29. Transport Scotland stated that it did not hold any information falling within the remainder of Organisation S' request, and cited the exception in regulation 10(4)(a) of the EIRs in relation to this information.
30. The exception in regulation 10(4)(a) of the EIRs applies to information which is requested, but which is not held by the Scottish public authority.
31. As explained above, the Commissioner is satisfied that Transport Scotland carried out reasonable searches for information about Cycling Scotland relating to issues of displacement and issues relating to Sustaining Dunbar. On the basis of these searches, she accepts that it holds no relevant information. She is therefore satisfied that the exception in regulation 10(4)(a) of the EIRs applies to information which would fall within the scope of the remainder of the request.
32. 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 be upheld if, in all the circumstances, the public interest in maintaining the exception outweighs the public interest in making the information available. The Commissioner is satisfied that Transport Scotland does not hold the information in question. Consequently, she does not consider there to be any conceivable public interest in requiring that the information 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.

33. The Commissioner is satisfied that Transport Scotland was entitled to rely on the exception in regulation 10(4)(a), on the basis that it did not hold the requested information.

Failure to comply with timescales

34. Regulation 5(2) of the EIRs allows Scottish public authorities a maximum of 20 working days after receipt of a request to comply with a request for information, subject to certain exceptions which are not applicable in this case.

35. Transport Scotland explained that the official responding to the request was unable to meet the initial 20 day deadline because of a period of annual leave. Transport Scotland commented that it had contacted Organisation S to apologise that the final response would be later than expected, and sought to provide a full response as quickly as possible after that date.

36. The Commissioner notes this explanation, but finds it is a matter of fact that Transport Scotland failed to respond to the request from Organisation S within 20 working days, and therefore failed to comply with regulation 5(2) of the EIRs in this respect.

37. The Commissioner has noted this failure but does not require Transport Scotland to take any action in relation to this breach in respect of this application.

Decision

The Commissioner finds that Transport Scotland partially complied with the EIRs in responding to the information request made by Organisation S.

The Commissioner finds that Transport Scotland did not hold any further information falling within scope of part 1.5 of the request and therefore its response to this part of the request complied with regulation 5(1) of the EIRs.

In relation to the remainder of the request, the Commissioner accepts that Transport Scotland correctly applied the exception in regulation 10(4)(a) of the EIRs to information which it did not hold.

However, Transport Scotland failed to comply with the time limit for response in regulation 5(2) of the EIRs.

The Commissioner does not require Transport Scotland to take any action in respect of this failure in response to Organisation S' application.

Appeal

Should either Organisation S 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

4 November 2015

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)-

(a) shall be complied with as soon as possible and in any event no later than 20 working days after the date of receipt of the request; and

(b) is subject to regulations 6 to 12.

...

10 Exceptions from duty to make environmental information available–

(1) A Scottish public authority may refuse 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;

...

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