



Scottish Information
Commissioner
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Decision Notice 108/2022

Maintenance work undertaken behind the Old Mill Inn

Authority: Aberdeenshire Council

Case Ref: 202101347

Summary

The Applicant asked the Authority for information about work undertaken on the lane behind the Old Mill Inn which leads to three houses at Inchferry. The Authority informed the Applicant that it did not hold any information falling within scope of the request. The Commissioner investigated and found that the Authority had been entitled to inform the Applicant that no relevant information was held.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) section 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), (b) and (c) 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); 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 18 March 2021, the Applicant made a request for information to the Authority. He asked for all information relating to work undertaken on the lane behind the Old Mill Inn which leads to three houses at Inchferry. He specifically asked for all information from the 1980s to the present day.
2. The Authority responded on 24 May 2021. In its response, the Authority noted that it had processed the request under the EIRs and relied on the exception in regulation 10(4)(a) for notifying the Applicant that it did not hold any information falling within scope of his request.
3. The Authority explained that it did not have any records of any work being undertaken at the location covered by the Applicant's request. It also explained that the road was not adopted and attached a spreadsheet showing a list of private, unadopted roads. The Authority also explained that it was no longer its policy to carry out works on private roads (on a 75%/25% share basis) and there would be no contribution from it.
4. On 6 June 2021, the Applicant wrote to the Authority requesting a review of its decision. The Applicant stated that he was dissatisfied with the decision for the following reasons:
 - (i) The surfacing of the Inchferry Lane was a large project in 1989, so there must have been a lot of correspondence about it.
 - (ii) The Applicant stated that he knew there was correspondence about the maintenance of the lane in 2005, and work was undertaken.
 - (iii) The Applicant considered there must have been other correspondence since 1989, referring in particular to correspondence about maintenance in 2014.
5. The Authority notified the Applicant of the outcome of its review on 30 June 2021. In doing so, it upheld its application of the exception in regulation 10(4)(a) of the EIRs to information covered by the Applicant's request.
6. In its statement of reasons for upholding its original decision, the Authority explained that the document retention policy which was relevant to information covered by the request indicated that "all general correspondence and complaints are kept for three years from end of year in which they are received". It commented that, as the road in question was not, and never had been, adopted by it, any communication relating to it would fall within this three-year retention category.
7. On 27 October 2021, 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 was unhappy that the Authority refused to supply any information at all. The Applicant considered there must have been lots of correspondence (both internal and external) in the Authority previously responsible for this area as well as the current Authority, relating to the matter covered by his request. The Applicant specifically referred to correspondence he considered the Authority should hold.

Investigation

8. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
9. On 1 December 2021, the Authority was notified in writing that the Applicant had made a valid application. The case was allocated to an investigating officer.
10. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Authority was invited to comment on this application and to answer specific questions. These related to details of the searches carried out by the Authority to establish that it held no recorded information which would fulfil the Applicant's request. Comments, submissions and further searches were also sought around correspondence the Applicant considered should be held by the Authority.
11. Further searches were also requested from the Authority during investigation.

Commissioner's analysis and findings

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

Handling in terms of the EIRs

13. The Authority processed and responded to the Applicant's request and requirement for review in accordance with the EIRs.
14. 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.
15. The Applicant has not challenged the Authority's decision to deal with the information as environmental information. The Commissioner is satisfied that the information does comprise environmental information (see in particular paragraphs (a), (b) and (c) of the definition in regulation 2(1) of the EIRs) and will consider the handling of the request in what follows solely in terms of the EIRs.

Regulation 5(1) – Information falling within scope of the request

16. 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 an 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.
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. If no such information is held by the authority, relation 10(4)(a) of the EIRs permits the authority to give the applicant notice to that effect.

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

18. The Authority is relying on the exception in regulation 10(4)(a) of the EIRs for information which would fulfil the Applicant's request.
19. The Commissioner has taken account of the submissions provided by the Applicant, in which he explains why he believes the Authority should hold information which would fulfil his request. While the Applicant clearly has genuine reasons for believing the Authority should hold information of the nature covered by his request, the Commissioner can only consider whether or not the Authority identified and located the information it actually held.

Test to be applied in the use of the exception

20. 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. He 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 (as indicated above) 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

21. The Authority provided a spreadsheet and map which shows that the lane, which is the subject of the request, is an unadopted road, and is treated by the Authority as a private road. Therefore, it submitted, it has no statutory duty to maintain the road.
22. The Authority informed the Commissioner of the different staff members who had been asked to carry out searches for the requested information, together with the systems and folders searched. The Authority explained that no time frame had been attached to the search parameters used.
23. Some information was returned as a result of the searches, but the Authority indicated that this related to correspondence between itself and the Applicant on a different matter.
24. The Authority also provided the Commissioner with an extract from its Records Retention Schedule applicable to information covered by the Applicant's request. This sets out the length of time records of the nature covered by the request should be retained by the Authority.
25. The Records Retention Schedule shows that records relating to maintenance should be retained for 12 years, as should records which concern construction projects. Records relating to general complaints have a retention timescale of three years.
26. The Authority explained that a complaint about a matter such as a pothole would normally be dealt with as a service request and logged within its "Confirm" asset management system. Where this leads to a maintenance activity, this record would be retained for 12 years. However, a general complaint which requires a service response, but does not lead to a maintenance activity, will usually only be kept for three years.
27. Within its submissions, the Authority acknowledged that the previous Authority responsible for the lane at Inchferry behind the Old Mill Inn had, in 1989, agreed to tarmac the lane. This work was carried out on the basis that the previous Authority would pay 75% of the cost, with

the remaining 25% being borne by the home owners. The Authority also recognised that further maintenance work was completed up to 2005, but in 2021 it refused to carry out any further works. The Authority stated that it no longer retained records of the actual maintenance works carried out.

28. The Authority submitted that, as the road in question was unadopted, maintenance works were part of its discretionary function, not a statutory duty. Since 2005, the Authority's financial position had changed. This resulted in funding being withdrawn for many discretionary functions, including private roads. The Authority believed it had acted in line with section 14 of the Roads (Scotland) Act 1984 (Power to contribute to, or carry out, work on private roads) and that there was no requirement for it to continue maintenance of the road.
29. The Authority acknowledged that there had been communication between itself and the Applicant in the past, and there is evidence within its systems that the Applicant had contacted the Council on more than one occasion to maintain the road in question. However, any correspondence with the Applicant over maintenance issues from 1989 to 2005 was no longer retained.
30. During the course of the investigation, further searches were carried out by the Authority. This led to the identification of some email communications over the matter of whether the Authority was responsible for maintaining the lane, and a complaint about the worsening condition of it.

The Applicant's submissions about the exception

31. As mentioned above, the Applicant was dissatisfied with the Authority's response because he considered that, as there had been a lot of correspondence between himself and the Authority over the period 2005 to 2021 regarding maintenance of the lane, information should be held by the Authority.
32. The Applicant also pointed to correspondence which occurred with the previous Authority responsible for the area covering the lane, in 1988 and 1989, which he again considered would have led to a lot of correspondence before and after the work was undertaken.

The Commissioner's view about the exception

33. The Commissioner considers the searches carried out by the Authority, by the conclusion of the investigation, were thorough and encompassed all areas where information of the type covered by the Applicant's request would have been likely to be held. He is also satisfied that those members of staff involved in carrying out the searches were the most appropriate to do so, based on their knowledge of the systems in use and their role within the Authority.
34. While the Authority acknowledged that it did undertake work on the lane in/or around 1989 and up to 2005, it is evident from reading the Records Retention Schedule in place that it would be highly unlikely that any information relating to these works would still be held by the Council. Furthermore, the personnel involved and the searches carried out would have been likely to identify any relevant information, if it was held.
35. Given the change in the Council's position (regarding discretionary funding) in 2005, and the fact that the road in question is unadopted, the Commissioner accepts that it is unlikely that other information would be held regarding work undertaken on the lane.
36. While the Commissioner recognises that the Applicant has provided evidence of correspondence he has had with the current, and previous, Authority over the matter of

maintenance of the lane, it is evident from the Records Retention Schedule in use by the Council that, even if these records were to be retained for the maximum timescale of 12 years, this would have elapsed (in respect of some of the correspondence and records held) by the time he made his request.

37. In relation to the later correspondence, the Commissioner is satisfied, based on the outcome of the searches carried out by the Authority during the investigation, that while some information was identified, this did not relate to work “undertaken” on the lane. This concerned debate over the matter of whether the Authority was responsible for maintaining the lane and a complaint about the worsening state of the road surface of the lane.
38. In all the circumstances, therefore, the Commissioner is satisfied, on the balance of probabilities, that the Authority does not (and did not, at the time the request was received from the Applicant) hold recorded information which would fulfil the Applicant’s request. 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.
39. This exception is subject to the public interest test in regulation 10(1)(b) of the EIRs, but the Commissioner can identify no conceivable public interest in requiring disclosure of information which the Authority does not hold: on balance, therefore, the Commissioner is satisfied that the public interest in maintaining the exception should prevail.

Decision

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

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.

Margaret Keyse
Head of Enforcement

24 October 2022

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;
- (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in paragraph (a);
- (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.

...

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;

...

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

...