

Decision Notice 042/2020

Transport Scotland's actions regarding the A75 at Springholm

Applicant: The Applicants

Public authority: Transport Scotland

Case Ref: 201901711



Scottish Information
Commissioner

Summary

Transport Scotland was asked for information on topics including the timescale in which the Applicants' restricted contact status would be reviewed and engineering actions proposed on the A75 at Springholm with a view to addressing speeding.

Transport Scotland provided information for parts of the request and argued that it did not have to provide other information it considered reasonably accessible to the Applicants.

During the investigation, Transport Scotland changed its position and stated it did not hold certain of the information it had previously considered to be otherwise accessible to the Applicants, or information for part of the request it had previously claimed had been fulfilled in full.

The Commissioner investigated and found that Transport Scotland had failed to comply with FOISA in responding to the request. While he was satisfied that Transport Scotland did not hold the information requested in parts e) and f) of the Applicants' request, he found that it had wrongly informed the Applicants that some of the information was otherwise accessible to them and that other information had been disclosed which satisfied part e).

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), and (4) (General entitlement); 17(1) (Notice that information is not held); 73 (Interpretation) (definition of "information")

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 21 February 2019, the Applicants made a request for information to Transport Scotland. The request was in several parts, including the following:
 - e) *Assuming our current appeal is refused we wish to know the timescale within which Transport Scotland's Management Board will be invited to review our restricted contact status and what opportunity in terms of natural justice or otherwise we shall then be afforded to make representations to the Board in advance of the conclusion of their periodic review.*
 - f) *We wish to know what action(s) in terms of revised hard engineered carriageway design, as adopted as a first resort calming intervention at many other trunk road residential street gateways e.g. Crocketford, or by some other measure, Transport Scotland proposes to take to address the actions of a very large number of speeding drivers, many of whom are revealed to be adopting speeds between twice and three times WHO road safety standards beside vulnerable pedestrians present on the exiting channels at Springholm as revealed by the ongoing speed bin data collected at the ATC SH1 channel 2 and SH4 channel 1 monitoring points. We have drawn specific attention to the speed data extract for SH4 channel 1 for the week 7-14 January 2019 wherein 3,370 drivers were revealed as adopting speeds there of 41mph and upward in the 30mph limit.*

It will suffice to send us an electronic reply with any appropriate file attachments.

2. Transport Scotland provided the following response to parts (e) and (f) of the request, on 15 March 2019:
 - e) Transport Scotland referred to its Unacceptable Actions Policy and advised that its Management Board would review the status of all complainants with restricted contact arrangements on a regular basis.
 - f) Transport Scotland relied on section 25(1) of FOISA as it considered information which would fulfil this part of the Applicants' request was reasonably accessible to them. To evidence this, Transport Scotland referred to previous discussions between itself and the Applicants and three letters sent to the Applicants, where it explained that it was not proposing to take any further action in terms of revised hard engineered carriageway design in Springholm. Transport Scotland confirmed that it could provide further copies of the letters if required. It also provided some further explanation in relation to speed data previously provided.
3. On 25 March 2019, the Applicants wrote to Transport Scotland requesting a review of its response on the basis that they were dissatisfied with its responses to parts e) and f) of its information request. They submitted that neither part had been answered adequately, with reasons detailing the kinds of further information required.
4. Transport Scotland notified the Applicants of the outcome of its review on 17 April 2019. In response to part e), Transport Scotland concluded that its original decision should be confirmed, with modifications. It drew the Applicants' attention to further information it considered relevant. Transport Scotland confirmed its response to part f) of the request, without modification.
5. On 9 September 2019, the Applicants wrote to the Commissioner. They applied to the Commissioner for a decision in terms of section 47(1) of FOISA. The Applicants stated they were dissatisfied with the outcome of Transport Scotland's review because of what they described as its refusal to supply the information covered by parts e) and f) of their information request.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that the Applicants 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. On 22 October 2019, Transport Scotland was notified in writing that the Applicants had made a valid application. The case was then allocated to an investigating officer.
8. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. Transport Scotland was invited to comment on this application and to answer specific questions. These related to the Applicants' view that Transport Scotland should hold more recorded information which would fulfil parts e) and f) of their information request. Submissions were requested about the searches carried out by Transport Scotland to identify and locate any relevant, recorded information. Transport Scotland was also asked to provide the Commissioner with copies of the previous correspondence identified in its response to part f) of the Applicants' request.
9. In response to the request for submissions, Transport Scotland explained that it was now of the view that it held no recorded information which would fulfil parts e) and f) of the

Applicants' request. Transport Scotland issued a revised review outcome for parts e) and f) to the Applicants on 2 December 2019 explaining this, in line with section 17(1) of FOISA.

Commissioner's analysis and findings

10. 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 Applicants and Transport Scotland. He is satisfied that no matter of relevance has been overlooked.

Section 17(1) – Notice that information is not held

11. In terms of section 1(4) of FOISA, the information to be provided in response to a request under section 1(1) is that falling within the scope of the request and held by the authority at the time the request is received. This is subject to qualifications, but these are not applicable here. If no such information is held by the authority, section 17(1) of FOISA requires the authority to give the applicant notice in writing to the effect.
12. "Information" is defined in section 73 of FOISA as "information recorded in any form". Given this definition, it is clear that FOISA does not require a public authority to create recorded information in order to respond to a request, or to provide information which is not held in a recorded form (e.g. about a person's intentions or opinions).
13. 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 of probabilities 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 about what information the authority should hold, ultimately the Commissioner's role is to determine what relevant recorded information is (or was, at the time the request was received) actually held by the public authority.
14. As mentioned already, in response to the request for submissions, Transport Scotland explained that it was now giving notice, in line with section 17(1) of FOISA, that it did not hold any recorded information which would fulfil parts e) and f) of the request.
15. The Commissioner will look at parts e) and f) separately below.

Part e) – review of restricted contact status

Submissions from the Applicants

16. In their submissions to the Commissioner, the Applicants commented that Transport Scotland's response failed to give an actual timescale as to when a review of their restricted status will be carried out.
17. The Applicants questioned Transport Scotland's stance that it claimed not to know the frequency of the review of their restricted complainant status, when it was the author/operator of the scheme and the only party that could determine when such a regular review of their status would be carried out.
18. The Applicants also argued that Transport Scotland's policy embodied no right of representation or appeal, and this, together with the lack of information as to when a review would be carried out, represented a denial of natural justice.

Submissions from Transport Scotland

19. Transport Scotland explained that, prior to responding to the Applicants' request, its Information Governance Team was asked to identify and locate any recorded information held which would fulfil part e) of the request. As the Information Governance Team is responsible for Transport Scotland's Unacceptable Actions Policy, it was not considered necessary for further searches to be conducted or for other officials to be consulted. Given that such restrictions are infrequent, it explained that there is no defined timescale for review.
20. Transport Scotland stated that the Information Governance Team located no information on any review schedule, other than the process set out in the Unacceptable Actions Policy. Transport Scotland submitted that its Unacceptable Actions Policy is an internal policy and it does not have a legal duty to hold information which would answer any of the elements of part e) of the request. It also commented that there is no internal or external guidance or policy that sets out an expectation that it will hold this information.
21. When handling the Applicants' requirement for review, Transport Scotland recognised that it had not provided a response to the second element of part e) of their request. It noted that further information regarding the content of the Unacceptable Actions Policy could have been provided to the Applicants at the initial response stage and so a link to the Policy was given to the Applicants, specifically highlighting the process for "Appealing a decision to restrict contact". At the time of providing this link, it considered this was helpful information in relation to the second element of part e): it later recognised that it does not answer that part fully.
22. Transport Scotland acknowledged that the Unacceptable Actions Policy sets out the process, but does not include the type of measure mentioned by the Applicants to allow complainants to make representations to its Management Board in advance of the periodic review of restricted contact. Therefore, it concluded that it did not hold the information requested in this part of the Applicants' request.
23. Transport Scotland acknowledged that it could have explained more clearly that it did not hold the specific information requested. As its Unacceptable Actions Policy does not set out a specific timescale within which it reviews the restricted contact status of complainants and, because its policy or procedures do not contain any measures providing an opportunity for complainants with restricted contact status to make representations to its Management Board in advance of the conclusion of its periodic review, it was satisfied that it did not hold the information requested in part e) of the request.

Commissioner's conclusions on part e)

24. Having considered all relevant submissions and the terms of part e) of the Applicants' request, the Commissioner is satisfied that, by the end of the investigation, Transport Scotland had taken adequate, proportionate steps in the circumstances to establish whether it held any recorded information that fell within scope of this part of the request. He is satisfied that the searches and discussions described by Transport Scotland would have been capable of identifying any information held relevant to the request.
25. He has also taken into account the explanations submitted by Transport Scotland, describing the level of information it does hold and the reasons why it does not believe it requires to hold the level of detail sought by the Applicants.
26. As explained previously, the Commissioner can only consider what relevant information is actually held by Transport Scotland (or was held by it at the time it received the Applicants'

request). He cannot consider what information it should hold, or what the Applicants might believe it should hold.

27. In conclusion, Commissioner is satisfied, on the balance of probabilities, that Transport Scotland does not (and did not, on receipt of the request) hold recorded information which would fulfil either element of part e) of the Applicants' request. He therefore finds that Transport Scotland failed to comply with section 1(1) when it responded to the Applicants' request and requirement for review.
28. Because Transport Scotland has now given the Applicants a notice, in line with section 17(1) of FOISA that no recorded information is held, the Commissioner does not require it to take any action in relation to this breach.

Part f) – revised hard engineered carriageway design

Submissions from the Applicants

29. The Applicants have questioned Transport Scotland's decision to give a notice, in line with section 17(1) of FOISA, that it held no information, given that they received a letter from Transport Scotland which indicated that it had tasked Scotland Transerv (the company responsible for managing and maintaining the A75) with investigating gateway mitigations to address the numbers of speeding drivers.

Submissions from Transport Scotland

30. In relation to its response to part f) of the request, Transport Scotland submitted that it interpreted this question as asking for information regarding actions taken as a result of the ongoing speed bin data collected, not only in relation to the specific week mentioned.
31. Transport Scotland commented that, in their request for review, it understood the Applicants clarified their area of interest to be focussed specifically on any revised hard engineered carriageway design measures proposed to address the actions of very large numbers of speeding drivers, following the data collected for the week 7-14 January 2019.
32. Transport Scotland explained that the speed management system in Springholm was a pilot of its type and was subject to ongoing monitoring to enable Transport Scotland to have a fully established evidence base for any future decisions. Transport Scotland submitted that it neither assessed the data nor made proposals on intended action, specifically on data collected in any particular one-week period, and therefore had not made any proposals in response to the data collected for the week 7-14 January 2019. Therefore, it does not hold any information on proposed measures falling within the scope of this part of the request.
33. Transport Scotland explained that it had previously considered several other measures, as well as revised hard engineered carriageway design, to manage driver behaviour on the A75 at Springholm, but commented that it decided not to proceed with these alternative measures. Transport Scotland also indicated that it had no plans to consider any other measures at this stage and noted that this position had been explained to the Applicants in the correspondence referred to in its response to their information request, as well as to the wider community at a public meeting in March 2019.
34. Transport Scotland submitted that it did not think that it would be expected to hold information on proposed measures in relation to one specific week when monitoring the whole system in Springholm. It considered that any future measures would be based on a wider data set than for the week referred to by the Applicants, and a detailed analysis of the data held would not be undertaken until a future date. As a consequence, Transport

Scotland submitted that it did not hold any recorded information on future measures, as that particular work has not been undertaken. It acknowledged that it should have more clearly explained this to the Applicants, i.e. that it did not hold the specific information requested.

35. In terms of the searches carried out to determine whether any relevant, recorded information was held, the Trunk Road Casualty Reduction Team (the Team responsible for implementing the speed management system on the A75 at Springholm) was asked to provide any relevant information. Transport Scotland explained that it considered officials in this team would be most likely to hold any information for this part of the request.
36. Other searches were also carried out in an effort to identify any correspondence held in relation to part f) of this request, which were described.
37. Transport Scotland explained that it considered these searches to be sufficient to capture all information held falling within scope of part f) of this request, and it did not consider it necessary to carry out additional searches, or consult any other colleagues to locate relevant information.

Commissioner's conclusions on part f)

38. Having considered all relevant submissions, the Commissioner is satisfied that, by the end of the investigation, Transport Scotland had taken adequate and appropriate steps to establish whether it held any recorded information to fulfil this part of the request. The Commissioner is satisfied that the searches described by Transport Scotland would have been capable of identifying any information held relevant to the request. He is also satisfied that, on the basis of the explanation provided by Transport Scotland in relation to any future measures, no relevant recorded information is held which would fulfil part f) of this request (whether in relation to one specified week or some other period).
39. The Commissioner is therefore satisfied, on the balance of probabilities, that Transport Scotland does not (and did not, on receipt of the request) hold recorded information which would fulfil part f) of the Applicants' request. He therefore finds that Transport Scotland failed to comply with section 1(1) when it responded to the Applicants' request and requirement for review.
40. However, because Transport Scotland has now given the Applicants a notice – in line with section 17(1) of FOISA – that no recorded information is held, the Commissioner does not require it to take any action in relation to this breach.

Decision

The Commissioner finds that Transport Scotland failed to comply with Part 1, and in particular section 1(1), of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by the Applicants.

The Commissioner finds Transport Scotland was correct, during the investigation, to notify the Applicants – in line with section 17(1) of FOISA – that it did not hold the information requested in parts e) and f) of their request.

However, he also finds that Transport Scotland wrongly informed the Applicants, in its original review outcome, that it had provided all information held which would satisfy part e) of their request, and also that information which would satisfy part f) was otherwise accessible to them.

Given the revised review outcome for parts e) and f), issued during the investigation, notifying the Applicants that no relevant recorded information was held, the Commissioner does not require Transport Scotland to take any action in respect of this failure, in response to the Applicants' application.

Appeal

Should either the Applicants 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

28 February 2020

Freedom of Information (Scotland) Act 2002

1 General entitlement

- (1) A person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority.

...

- (4) The information to be given by the authority is that held by it at the time the request is received, except that, subject to subsection (5), any amendment or deletion which would have been made, regardless of the receipt of the request, between that time and the time it gives the information may be made before the information is given.

...

17 Notice that information is not held

- (1) Where-
- (a) a Scottish public authority receives a request which would require it either-
- (i) to comply with section 1(1); or
- (ii) to determine any question arising by virtue of paragraph (a) or (b) of section 2(1),

if it held the information to which the request relates; but

- (b) the authority does not hold that information,

it must, within the time allowed by or by virtue of section 10 for complying with the request, give the applicant notice in writing that it does not hold it.

...

73 Interpretation

In this Act, unless the context requires a different interpretation –

...

“information” (subject to sections 50(9) and 64(2)) means information recorded in any form;

...

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