

Decision Notice 044/2021

Is Abellio Scotrail Ltd subject to the EIRs?

Applicant: The Applicant

Public authority: Abellio Scotrail Ltd

Case Ref: 201901948



Scottish Information
Commissioner

Summary

The Applicant asked ASL for information about the Borders Railway. This decision finds that ASL is a Scottish public authority for the purposes of paragraph (d) of regulation 2(1) of the EIRs. The decision also finds that the information ASL was asked for was environmental information and that ASL failed to respond to the request (and request for review) within the timescales allowed by the EIRs.

The Commissioner requires ASL to respond to the Applicant's request for review.

Relevant statutory provisions

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (paragraphs (a), (b), (c) and (f) of definition of "environmental information" and paragraph (d) of definition of "Scottish public authority") (Interpretation); 5(1) and (2)(a) (Duty to make available environmental information on request); 16(4) (Review by Scottish public authority)

Directive 2003/4/EC of the European Parliament and of the Council 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC Article 2(2)(a), (b) and (c) (definition of '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 21 January 2019, the Applicant made a request for information to Abellio Scotrail Ltd (ASL). The information requested was about the Borders Railway (Edinburgh – Tweedbank) and was for:
 - (i) the number of passengers recorded on each train from January 2018 to January 2019
 - (ii) the type and number of carriages used on each train from January 2018 to January 2019 and
 - (iii) the type and number of carriages scheduled for all future trains.
2. Having received no response to his request, the Applicant wrote to ASL on 26 February 2019, requesting a review of its failure to respond.
3. As the Applicant did not receive any response to his requirement for a review, he wrote to the Commissioner on 1 April 2019, applying for a decision in terms of section 47(1) of the Freedom of Information (Scotland) Act 2002 (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 ASL's failure to respond to his request and requirement for review.
4. The Applicant was initially informed on 2 April 2019 that his application was not valid as ASL was not considered to be a Scottish public authority for the purposes of the EIRs.
5. The Applicant responded and provided detailed arguments as to why he considered ASL was a Scottish public authority for the purposes of the EIRs.

6. Following further correspondence between the Applicant and the Commissioner, and consideration by the Commissioner, the Applicant was notified on 23 October 2019 that the Commissioner could revisit his earlier determination. The Applicant was invited to provide further submissions on whether:
 - (i) ASL was a Scottish public authority for the purposes of the EIRs and
 - (ii) his request was seeking environmental information for the purposes of the EIRs.
7. In response, the Applicant referred to the submissions he had made earlier. The case was allocated to an investigating officer to complete the validation process.
8. ASL was notified in writing on 4 November 2019 that an application had been received from the Applicant and was invited to comment on the application of the EIRs to itself and to the request.
9. On 29 November 2019, ASL informed the investigating officer that it was not a body covered by FOISA, a publicly owned company or any other form of public body. ASL explained that it was a private company whose immediate parent was Abellio Group and ultimate parent was NS (the principal rail operator of passenger rail services in the Netherlands).
10. It acknowledged that, as there was a franchise agreement between itself and Transport Scotland, it had to make an assessment as to whether it was a Scottish public authority under paragraph (d) of the definition in regulation 2(1) of the EIRs. Having carried out an assessment, ASL concluded that it was not a Scottish public authority under regulation 2(1) (and so was not subject to the EIRs). It had also considered whether the request could be said to be seeking environmental information, for the purposes of the EIRs, and concluded that it could not. ASL provided submissions detailing how it reached these conclusions.

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 him by both the Applicant and ASL. He is satisfied that no matter of relevance has been overlooked.

Is ASL a Scottish public authority?

12. ASL is private limited company which has been set up specifically to deliver the requirements of the franchise agreement awarded to it by Transport Scotland in 2014 for the provision of a passenger rail service in Scotland. If ASL falls within any of the limbs of the definition of a Scottish public authority in regulation 2(1), it will be covered by the EIRs and will therefore be required to respond to requests it receives for environmental information.

Submissions from Applicant

13. The Applicant set out a number of reasons why he considered ASL to be a Scottish public authority in terms of paragraph (d) of the definition in regulation 2(1). The Applicant considered ASL to be under the control of the Scottish Ministers for the purposes of delivering the ScotRail franchise. Having reviewed the franchise agreement between the Scottish Ministers and ASL, the Applicant commented that this is different from a standard contract for the supply of goods or services, due to the high degree of contractual control given to the Scottish Ministers over how ASL was to deliver its franchise obligations. The Applicant noted that the franchise agreement placed significant legal duties on ASL and

provided mechanisms to ensure ASL was held accountable for its performance under the franchise. He set out examples.

14. The Applicant submitted that as, the train operating company operating around 2,400 train services every day on the Scottish rail network on behalf of the Scottish Ministers, ASL clearly provided a public service. (These are pre-pandemic figures.)
15. The Applicant was also of the view that this public service delivered by ASL related to the environment, because the operation of a train service affected the elements and factors referred to in paragraphs (a) and (b) of the definition of environmental information in regulation 2(1) of the EIRs. The Applicant submitted that trains create substantial amounts of noise, waste, emissions, discharges and other releases into the environment. Furthermore, he considered ASL to have responsibilities in relation to measures affecting or likely to affect the elements and factors referred to in paragraphs (a) and (b) of the definition. Again, he provided examples. The Applicant considered that these responsibilities were also independent “public responsibilities relating to the environment”.

Submissions from ASL

16. In its submissions as to whether it was a Scottish public authority for the purposes of the EIRs, ASL commented that, as the franchised operator of passenger rail services in Scotland, it operated as a commercial business, carried on at arms-length from the Scottish Government. It was responsible for the day-to-day management of the business, and for determining the manner in which its business and franchise objectives were achieved.
17. ASL also argued that its public functions were not environmental in nature and that it did not provide services relating to the environment. ASL explained that the franchise agreement provided a contractual framework for the regulation and funding of the provision of the rail services by Transport Scotland: the framework of obligations under the franchise agreement was principally concerned with transport and not environmental matters.
18. ASL noted that its targets for reducing overall energy usage over the lifetime of the franchise were managed internally, and that it had broad discretion and autonomy in the matter in which it achieved these.

Commissioner's conclusions

19. Having considered the terms of the franchise agreement between Transport Scotland (acting as an agency for the Scottish Ministers) and ASL, the Commissioner is satisfied that ASL is under the control of the Scottish Ministers for the purposes of the delivery of the ScotRail franchise. The Commissioner recognises that ASL was set up for the sole purpose of delivering the ScotRail franchise.
20. The Commissioner agrees with the Applicant that the franchise agreement in place is far more prescriptive than a standard contract for the provision of goods and/or services. The Commissioner also considers it to be exceptional in the terms and mechanisms which allow the Scottish Ministers to unilaterally vary the terms. Such variation has been effected twice during the current COVID-19 pandemic, changes being made to the timetable to reduce the number of trains running. The Scottish Ministers are also able to decide what, if any, sum of compensation would be paid to cover any financial loss to ASL as a consequence of the timetable changes. Whilst the Commissioner acknowledges that a dispute resolution process is in place should ASL disagree with the Scottish Ministers' decision making, ASL would have to implement the variations prior to going through this process. The

Commissioner considers such variations by the Scottish Ministers can have a significant impact on the service to be provided..

21. In the Commissioner's view, this aligns with the comment made in the key decision of the European Court of Justice (ECJ) in the case of *Fish Legal v Information Commissioner*¹, which considered the definition of "public authority" in Directive 2003/4, on which the EIRs were based. The ECJ stated (at paragraph 68) that:

"Those factors [relating to the meaning of the concept of control, in the context of the Directive's underlying objectives] lead to the adoption of an interpretation of 'control', within the meaning of Article 2(2)(c) of Directive 2003/4, under which this third, residual, category of public authorities covers any entity which does not determine in a genuinely autonomous manner the way in which it performs the functions in the environment field which are vested in it, since a public authority covered by Article 2(2)(a) or (b) of the directive is in a position to exert decisive influence on the entity's action in that field."

This decision also went on to say (at paragraph 73) that:

"In the light of the foregoing ... undertakings, such as the water companies concerned, which provide public services relating to the environment are under the control of a body or person falling within Article 2(2)(a) or (b) of Directive 2003/4, and should therefore be classified as 'public authorities' by virtue of Article 2(2)(c) of that directive, if they do not determine in a genuinely autonomous manner the way in which they provide those services since a public authority covered by Article 2(2)(a) or (b) of the directive is in a position to exert decisive influence on their action in the environmental field."

22. The Commissioner recognises that ASL has also, for the purposes of delivering the ScotRail franchise, entered into an Alliance Agreement with Network Rail to ensure that their trains can use Network Rail's track when providing the service, at the same time as allowing other train operators to have slots on the tracks. The Commissioner does not believe the existence of this contract undermines his conclusion that ASL is under the control of the Scottish Ministers, particularly as the contract with Network Rail provides third party rights to the Scottish Ministers allowing them to vary the service, as shown during the current pandemic.
23. As the Commissioner is satisfied that ASL is under the control of the Scottish Ministers for the purposes of delivering the ScotRail passenger rail service, he must now consider whether ASL provide public services relating to the environment.
24. Clearly, the delivery of a passenger rail service in Scotland is the provision of a public service. The franchise agreement in place between the Scottish Ministers and ASL sets out a number of obligations it is required to meet, when delivering this service, in relation to the environment. These include a requirement to allocate funding to support research and development into innovative solutions relating to carbon and energy use reduction to address environmental issues in the railway environment. The agreement requires all proposed research and development projects to be assessed by a panel, including representatives from the Scottish Ministers. ASL is also required to carry out an energy audit in an effort to agree baselines from which energy use per passenger kilometre shall be reduced over the franchise term. The methodology for the audit is to be submitted to the Scottish Ministers.

¹ <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62012CJ0279:EN:HTML>

25. The Commissioner also recognises that a passenger rail service is of particular importance as part of the overall public transport infrastructure in Scotland and plays a significant role in the drive to divert travellers to more sustainable modes of transport, in an effort to meet emission targets.
26. For these reasons, the Commissioner concludes that ASL is providing a public service relating to the environment.
27. In all the circumstances, therefore, the Commissioner finds that ASL is properly considered to be a Scottish public authority within the meaning of paragraph (d) of the definition in regulation 2(1) of the EIRs.

Did the Applicant request environmental information?

28. In his request, the Applicant asked for information about the passenger numbers on trains between Edinburgh and Tweedbank, as well as the type and number of carriages used on each train, together with those scheduled for all future trains.
29. The Applicant provided detailed submissions as to why he considered that the information requested was environmental information, noting the various ways in which trains impact on the environment. ASL provided submissions on this question, suggesting that the information would be unlikely to provide any insight into its environmental performance.
30. Having considered the terms of the request, the Commissioner is satisfied that this is a request for environmental information: the type and number of carriages used on a train, currently and in the future, is a measure which will affect, or be likely to affect, the state of the elements of the environment, engaging factors such as noise, waste, discharges and emissions. The Commissioner also accepts that those elements of the request relating to the numbers of passengers and carriages can be said to concern the state of human health and safety, in so much as they are or may be affected by measures affecting or likely to affect the elements of the environment: levels of overcrowding (or its absence) are clearly relevant in this regard. This is therefore information which would fall within scope of parts (a), (b), (c) and (f) of the definition of environmental information in regulation 2(1) of the EIRs. Even if it were the case, as ASL commented, that the information would not provide any insight into its environmental performance, this does not mean that the information is not environmental information for the purposes of the EIRs.
31. As the Commissioner is satisfied that the Applicant did request environmental information and ASL is a Scottish public authority for the purposes of the EIRs, he will go on to determine whether ASL handled and responded to the Applicant's request and requirement for review in line with the EIRs.

Conclusions on handling

32. Regulation 5(2)(a) of the EIRs gives Scottish public authorities a maximum of 20 working days following the date of receipt of the request to comply with a request for information. This is subject to qualifications which are not relevant in this case.
33. It is a matter of fact that ASL did not provide a response to the Applicant's request for information within 20 working days, so the Commissioner finds that it failed to comply with regulation 5(2)(a) of the EIRs.
34. Regulation 16(4) of the EIRs gives Scottish public authorities a maximum of 20 working days following the date of receipt of the requirement to comply with a requirement for review.

35. It is a matter of fact that ASL did not provide a response to the Applicant's requirement for review within 20 working days, so the Commissioner finds that it failed to comply with regulation 16(4) of the EIRs.
36. The remainder of regulation 16 sets out the process for carrying out a review. The Commissioner must require ASL to conduct a review now, meeting the requirements of regulation 16.

Decision

The Commissioner finds that Abellio Scotrail Ltd (ASL) failed to comply with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by the Applicant. In particular, ASL (having failed to recognise that it was a Scottish public authority in terms of regulation 2(1) of the EIRs) failed to respond to the Applicant's request for information and requirement for review within the timescale laid down by regulation 5(2) and 16(4) of the EIRs.

The Commissioner requires ASL to respond to the request received from the Applicant in this case in line with the requirements in the EIRs (in particular, by carrying out a review in accordance with regulation 16) by **10 May 2021**.

Appeal

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

Daren Fitzhenry
Scottish Information Commissioner

24 March 2021

Appendix 1: Relevant statutory provisions

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 -

- (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;
- ...
- (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in paragraph (a) or, through those elements, by any of the matters referred to in paragraphs (b) and (c);

...

"Scottish public authority" means –

...

- (d) any other person who is neither a public body nor the holder of a public office and who is under the control of a person or body falling within paragraphs (a), (b) or (c) of this definition and
 - (i) has public responsibilities relating to the environment;
 - (ii) exercises functions of a public nature relating to the environment; or
 - (iii) provides public services relating to the environment; and

...

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

...

16 Review by Scottish public authority

...

- (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.

...

Directive 2003/4/EC of the European Parliament and of the Council 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC

Article 2(2) of Directive 2003/4 defines 'public authority' as follows:

"...

- (a) government or other public administration, including public advisory bodies, at national, regional or local level;
- (b) any natural or legal person performing public administrative functions under national law, including specific duties, activities or services in relation to the environment; and
- (c) any natural or legal person having public responsibilities or functions, or providing public services, relating to the environment under the control of a body or person falling within (a) or (b).

Member States may provide that this definition shall not include bodies or institutions when acting in a judicial or legislative capacity. If their constitutional provisions at the date of adoption of this Directive make no provision for a review procedure within the meaning of Article 6, Member States may exclude those bodies or institutions from that definition".

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