

Decision Notice

Decision 074/2017: Mr Angus Pattison and East Dunbartonshire Council

Bears Way Cycleway Project

Reference No: 201700077

Decision Date: 12 May 2017



Scottish Information
Commissioner

Summary

The Council was asked for information relating to Phase 1 of the Bears Way Cycleway Project. The Council disclosed the information it held.

An application was made to the Commissioner, questioning whether the Council held more information. The Commissioner was satisfied that the Council had carried out appropriate searches and disclosed all the information it held.

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)

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

All references in this decision to "the Commissioner" are to Margaret Keyse, who has been appointed by the Scottish Parliamentary Corporate Body to discharge the functions of the Commissioner under section 42(8) of FOISA.

Background

1. On 13 July 2016, in respect of the Bears Way Cycleway Project Phase 1, Mr Pattison made the following request for information to the Council:
 - a) ... a copy of the Feasibility Report for this Phase with all supporting and referenced documentation.
 - b) ... a copy of the Options Study for this Phase with all supporting and referenced documentation and details of the preferred Option demonstrating best Value for Money.
2. On 29 August 2016, Mr Pattison wrote to the Council, requesting a review in respect of its failure to respond to his request.
3. On 5 October 2016, Mr Pattison wrote to the Commissioner's office, stating he was dissatisfied with the Council's failures to respond to his request and requirement for review. This resulted in the Commissioner issuing *Decision Notice 272/2016 Mr Angus Pattison and East Dunbartonshire Council*¹.
4. The Council notified Mr Pattison of the outcome of its review on 28 November 2016, which, as outlined in *Decision 272/2016*, it stated it had sent to Mr Pattison on 27 July 2016. In relation to part a) of his request, Mr Pattison was informed that a relevant Scottish Transport

¹ <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2016/201601822.aspx>

Appraisal Guidance (STAG) study was carried out in 2008 and updated in 2015. It provided a link to where the 2015 STAG Study was available online. In relation to part b) of his request, the Council provided Mr Pattison with an Options Appraisal Summary Report, stating this was all of the information it held.

5. On 29 November 2016, Mr Pattison wrote to the Council and acknowledged the review outcome. In relation to part a) of his request, he stated that the 2015 STAG Study provided post-dated the time when the Phase 1 Feasibility Report, as requested, would have been prepared. In relation to part b) of his request, he made comment regarding information he had expected to receive. The Council did not respond to Mr Pattison.
6. On 16 January 2017, Mr Pattison wrote to the Commissioner. Mr Pattison applied 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. Mr Pattison stated he was dissatisfied with the outcome of the Council's review for the reasons outlined in his email to the Council dated 29 November 2016. In effect, Mr Pattison was not satisfied that the Council had provided all of the information that it held falling within the scope of his request.

Investigation

7. The application was accepted as valid. The Commissioner confirmed that Mr Pattison 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.
8. On 20 January 2017, the Council was notified in writing that Mr Pattison had made a valid application. The case was allocated to an investigating officer.
9. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Council was invited to comment on Mr Pattison's request and answer specific questions, in particular to explain the steps it had taken to identify and locate the information requested.
10. The Council responded, providing submissions in support of its position that, other than the information it had provided to Mr Pattison, it did not hold any relevant information. In relation to part a) of the request, it explained that it could have issued Mr Pattison with a notice (in terms of section 17(1) of FOISA and regulation 10(4)(a) of the EIRs) that it did not hold the information requested but, in the interests of transparency, it provided Mr Pattison with the nearest equivalent (the STAG Study).
11. On 23 February 2017, the Council again wrote to Mr Pattison and explained that it did not hold a Feasibility Report as requested. It advised that the STAG Study was the closest it held to a Feasibility Report. It provided Mr Pattison with a copy of the 2008 STAG report, which had been located during the investigation.
12. Mr Pattison acknowledged receipt of the Council's further response of 23 February 2017. He also provided further submissions to the Commissioner as to why he believed further information should be held.

Commissioner's analysis and findings

13. 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 Mr Pattison and the Council. She is satisfied that no matter of relevance has been overlooked.

FOISA or EIRs?

14. It is apparent from the terms of the request that at least some of the information caught by it will be environmental information as defined by regulation 2(1) of the EIRs. In *Decision 218/2007 Professor A D Hawkins and Transport Scotland*², the Commissioner confirmed (at paragraph 51) that where environmental information is concerned, there are two separate statutory frameworks for access to that information and, in terms of the legislation, an authority is required to consider the request under both FOISA and EIRs.

Information held by the Council

15. Section 1(1) of FOISA provides that a person who requests information from a Scottish public authority which holds it is entitled to be given that information by the authority, subject to qualifications which, by virtue of section 1(6) of FOISA, allow Scottish public authorities to withhold information or charge a fee for it. The qualifications contained in section 1(6) are not applicable in this case.
16. The information to be given is that held by the authority at the time the request is received, as defined in section 1(4). This is not necessarily to be equated with information an applicant believes the authority should hold, although the applicant's reasons may be relevant to the investigation of what is actually held. If no such information is held by the authority, section 17(1) of FOISA requires that it give the application notice in writing to that effect.
17. 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. While this duty is subject to certain qualifications, none of them appear to be relevant in this case. 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 is not in fact held at that time). If no such information is held by the authority, regulation 10(4)(a) of the EIRs requires that it give the application notice to that effect.
18. The Commissioner has taken account of the submissions provided by Mr Pattison, in which he provides reasons why he considers the Council should hold further information falling within the scope of his request. While Mr Pattison may have genuine reasons for believing that the Council should hold further information, the Commissioner can only consider whether or not the Council identified and located the information it actually held.
19. The Council provided submissions in response to the questions put by the investigating officer on this matter. The Council explained that all the information it held relating to the Bears Way Cycleway Project was held by the project manager. It described where such information was held and provided explanation as to its records retention schedule, including details of how long information would be retained for. It provided explanation to the effect that the initial STAG Study produced in 2008 had been updated in 2015, as it had explained to Mr Pattison.

² <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2007/200600654.aspx>

20. The Council submitted that it had initially understood the STAG Study produced in 2008 to have been destroyed in 2015, in line with its retention schedule. However, during the investigation, it confirmed that it still held a copy of the 2008 Study. It confirmed that this had been provided to Mr Pattison, who acknowledged receipt.
21. In light of this discovery, the Council carried out further searches during the investigation, to ensure that all relevant information had been identified and located.
22. The Council provided further submissions to the effect that it, in relation to part a) of the request, it could have informed Mr Pattison that it did not hold any information as it did not hold a Feasibility Report. It explained that while such a report was not held, the STAG 2015 report was identified as the nearest equivalent. It stated that this was provided to Mr Pattison in the interests of transparency
23. While acknowledging the Council's efforts to be transparent by providing Mr Pattison with the STAG Report, given that the Council did not hold a Feasibility Report, the Commissioner notes that the Council had a duty to issue a notice in writing to that effect, to comply with the terms of section 17(1) of FOISA and 10(4)(a) of the EIRs.
24. The Commissioner notes, however, that the Council wrote to Mr Pattison during the investigation confirming that it did not hold a Feasibility Report. In the circumstances, she does not require the Council to take any action.
25. During the investigation, in an effort to resolve any areas of misunderstanding, Mr Pattison met with the Council on 23 March 2017. Following this meeting, Mr Pattison was still dissatisfied that he had been provided with all of the information the Council should hold and provided comments as to why he believed further information should be held.
26. The standard 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. She 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 is to determine what relevant information is actually held by the public authority (or was, at the time it received the request).
27. As stated in many previous decisions, the Commissioner's remit extends only to consideration of whether a Scottish public authority actually holds the requested information and whether it has complied with Part 1 of FOISA or the EIRs in responding to a request. The Commissioner cannot comment on whether a public authority should have taken particular action or, if it has, what records it should maintain in relation to that action.
28. Having considered the Council's submissions, the Commissioner is satisfied that the Council carried out adequate searches, with a view to identifying and locating the information requested by Mr Pattison. She accepts that Mr Pattison was provided with all of the information held by the Council and falling within the scope of his request. Consequently, the Commissioner is satisfied that in regard to the matters under investigation, the Council complied with section 1(1) of FOISA and regulation 5(1) of the EIRs.

Decision

The Commissioner finds that, in respect of the matters raised in Mr Pattison's application, East Dunbartonshire Council complied with Part 1 of the Freedom of Information (Scotland) Act 2002 and the Environmental Information (Scotland) Regulations 2004, in responding to the information request made by Mr Pattison.

Appeal

Should either Mr Pattison or the Council 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
Acting Scottish Information Commissioner

12 May 2017

Appendix 1: Relevant statutory provisions

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.

...

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

-

(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.

...

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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