

# Decision Notice

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## Decision 101/2015: National Alliance Against Tolls and Transport Scotland

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### Breakdown of estimated cost for Forth Replacement Crossing

Reference No: 201402885

Decision Date: 1 July 2015



Scottish Information  
Commissioner

## Summary

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On 23 September 2014, National Alliance Against Tolls (NAAT) asked Transport Scotland for a breakdown of the latest estimated cost of the Forth Replacement Crossing.

Transport Scotland considered NAAT's request under the EIRs, applying regulation 6(1)(b) to some of the information on the basis that it was available on Transport Scotland's website. It also withheld information it did not consider to be finalised, under regulation 10(4)(d) of the EIRs. Following a review, Transport Scotland provided a breakdown of the estimated cost.

NAAT was not satisfied with the breakdown provided and the Commissioner investigated. She found that Transport Scotland failed to respond to the request in full and therefore failed to comply with regulation 5(1) of the EIRs. This failure was addressed during the investigation, so she did not require Transport Scotland to take any action.

## Relevant statutory provisions

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 39(2) (Health, safety and the environment)

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (Interpretation) (paragraphs (a), (b), (c) and (f) of definition of "environmental information"); 5(1) and (2)(b) (Duty to make available environmental information on request)

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

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1. On 23 September 2014, NAAT made a request for information to Transport Scotland. The information requested was a breakdown of the estimated cost of the Forth Replacement Crossing, with an amount for each item. NAAT referred to information published on Transport Scotland's website<sup>1</sup>, which stated:

"The estimated scheme cost is £1.4 billion to £1.45 billion in outturn costs. This allows for optimism bias, VAT and cost of capital to Scottish Government. The principal contract (the bridge and approach roads) was awarded on 21 March 2011 for £790 million."

NAAT also asked that, where Transport Scotland held a more recent estimated cost than that on the website, then that most recent estimate should be provided rather than the one on the website.

2. On 29 September 2014, Transport Scotland acknowledged receipt of NAAT's request. On 21 October 2014, it informed NAAT that there would be a delay in providing a response and apologised for this.

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<sup>1</sup> <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section35/Section35.asp>  
<http://www.transportscotland.gov.uk/road/forth-replacement-crossing/frc-fags#Economic>

3. Transport Scotland responded on 22 October 2014, applying the exemption in section 39(2) of FOISA (and therefore responding under the EIRs) because it considered the information sought by NAAT to be environmental information. Transport Scotland withheld some information under regulation 6(1)(b) of the EIRs, explaining that this was already publicly available and easily accessible on its website. It provided a link to where that information could be accessed<sup>2</sup>. It withheld other information under regulation 10(4)(d) of the EIRs, informing NAAT that the information could not be disclosed as it was not finalised.
4. On 24 October 2014, NAAT wrote to Transport Scotland requiring a review of its decision. It questioned the application of the EIRs to the request and did not consider the publicly available information adequate. It also challenged Transport Scotland's application of regulation 10(4)(d), pointing out that it was seeking estimated (rather than actual) costs.
5. Transport Scotland informed NAAT of the outcome of its review on 20 November 2014. Noting that the request was for a breakdown of the estimated (rather than the final) cost, it overturned its original decision and provided a breakdown of a reduced £1.4 billion estimate. It also explained why it considered the information to be environmental information.
6. On 22 January 2015, following further correspondence with Transport Scotland, NAAT wrote to the Commissioner and applied 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. NAAT stated it was dissatisfied with the outcome of Transport Scotland's review because it did not consider the breakdown provided to be sufficiently detailed to meet the request. It did not believe Transport Scotland had addressed the issue of the latest estimate. NAAT also asked the Commissioner to consider whether Transport Scotland was correct to consider the request under the EIRs, as opposed to FOISA.

## Investigation

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7. The application was accepted as valid. The Commissioner confirmed that NAAT 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. 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.
9. On 16 January 2015, Transport Scotland was notified in writing that NAAT had made a valid application. Transport Scotland was asked to send the Commissioner any information withheld from NAAT. Transport Scotland provided a document from which the information given to NAAT had been extracted, explaining that no information had been withheld in this case. 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. Transport Scotland was invited to

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<sup>2</sup> <http://www.transportscotland.gov.uk/road/forth-replacement-crossing/procurement>

comment on this application and answer specific questions, referring to the points raised by NAAT in its application.

## **Commissioner's analysis and findings**

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11. In coming to a decision on this matter, the Commissioner has considered all of the relevant submissions, or parts of submissions, made to her by both NAAT and Transport Scotland. She is satisfied that no matter of relevance has been overlooked.

### **Handling in terms of the EIRs**

12. Transport Scotland dealt with NAAT's request under the EIRs, having concluded that the information requested was environmental information as defined in regulation 2(1) of the EIRs.
13. Where information falls within the scope of this definition, a person has a right to access it (and the public authority has a corresponding obligation to respond) under the EIRs, subject to the various restrictions and exceptions contained in the EIRs.
14. The information requested by NAAT concerns the estimated costs associated with the Forth Replacement Crossing, an infrastructure project described by Transport Scotland as involving a range of measures (including the planning process, contract agreements and building works) which would in time be likely to affect the elements of the environment, particularly the land and built environment, and involve factors such as energy, noise and waste. The Commissioner accepts this as a reasonable description and, in the circumstances, is satisfied that the information requested by NAAT falls within the definition of environmental information set out in regulation 2(1), in particular paragraphs (a), (b), (c) and (f) of that definition.

### *Section 39(2) of FOISA - Environmental information*

15. The exemption in section 39(2) of FOISA provides, in effect, that environmental information (as defined by regulation 2(1) of the EIRs) is exempt from disclosure under FOISA, thereby allowing any such information to be considered solely in terms of the EIRs. In this case, the Commissioner accepts that Transport Scotland was entitled to apply the exemption to the information withheld under FOISA, given her conclusion that it is properly classified as environmental information.
16. As there is a statutory right of access to environmental information available to NAAT in this case, the Commissioner accepts, in all the circumstances, that the public interest in maintaining this exemption (and responding to the request under the EIRs) outweighs any public interest in disclosing the information under FOISA. NAAT's concerns about the request being considered under the EIRs are not clear, but both regimes are intended to promote public access to information and there would appear to be no reason why (in this particular case) disclosure of the information should be more likely under FOISA than under the EIRs.
17. The Commissioner therefore concludes that Transport Scotland was correct (and indeed required) to apply section 39(2) of FOISA, and consider NAAT's information request under the EIRs.

## Information provided to NAAT

18. In response to NAAT's request for a breakdown of the latest estimated cost of the Forth Replacement Crossing, Transport Scotland provided (in the review outcome) a breakdown of a reduced estimated budget amount of £1.4 billion. This detailed individual amounts for the elements of:
  - (i) Principal Contract
  - (ii) M9 Junction 1a Contract
  - (iii) Fife ITS Contract
  - (iv) Contact and Education Centre
  - (v) Employer's Direct Costs
  - (vi) Risk, Optimism Bias, Project Contingency and Non-recoverable VAT
  - (vii) Price Fluctuation High.
19. On 1 December 2014, NAAT wrote to Transport Scotland, expressing dissatisfaction that:
  - (i) no explanation had been given for the elements of "Employer's Direct Costs" and "Price Fluctuation High";
  - (ii) the four items of "Risk", "Optimism Bias", "Project Contingency" and "Non-recoverable VAT" had not been itemised separately, or defined ;
  - (iii) an (unspecified) amount for "Optimism Bias" had been included after the contract stage;
  - (iv) the estimate on Transport Scotland's website had included "cost of capital to Scottish Government", which was not listed in the breakdown provided.

NAAT also queried whether this was the latest estimate.
20. During the investigation, NAAT informed the investigating officer that answers to the points at paragraph 19 (i) - (iv) above would be sufficient to satisfy the terms of its request.
21. On 3 March 2015, Transport Scotland provided NAAT with a further response. It gave explanations of "Employer's Direct Costs" (with a list of the items making up this element), "Price Fluctuation High" and "Optimism Bias". It provided individual costs for each of "Risk", "Optimism Bias", "Project Contingency" and "Non-recoverable VAT". It explained why the cost of capital to the Scottish Government was no longer included in the budgeted figure.
22. On 9 March 2015, NAAT wrote to Transport Scotland. It believed Transport Scotland should have provided individual amounts for each of the items which made up "Employer's Direct Costs" (as listed in the letter of 3 March), and had failed to confirm whether there was a later estimate (as at the time of the original request). NAAT also submitted additional questions to Transport Scotland which (on its own admission) do not fall within the scope of this investigation.
23. On 13 March 2015, NAAT informed the Commissioner that it remained dissatisfied with the level of information provided, and confirmed it wished the Commissioner to issue a decision.

## Interpretation of request

24. In its submissions to the Commissioner, Transport Scotland maintained it had not considered it necessary to seek clarification of the level of breakdown required. It explained that NAAT's request had included a direct link to the relevant area of Transport Scotland's website and made specific reference to the information requested, i.e. a breakdown showing what made up the estimated cost giving an amount for each item. The items referred to in the highlighted paragraph from the website were optimism bias, VAT and cost of capital to Scottish Government. Transport Scotland confirmed that it had taken this to be the level of detail sought, and argued that it had provided NAAT with an unambiguous reference to its website to provide a breakdown showing what made up the estimated cost with an amount for each item.
25. During the investigation, NAAT confirmed that it had intentionally not specified the level of detail it expected to receive in its request, as that might have given Transport Scotland an excuse for not complying with the request. NAAT also noted that it could ask a "follow-up question" if dissatisfied with the level of detail received. Dialogue on the level of detail continued between NAAT and Transport Scotland, both before and after the application to the Commissioner.
26. From this dialogue, it is apparent to the Commissioner that NAAT was tending to use each response from Transport Scotland as an opportunity to ask further "follow-up questions". The Commissioner cannot consider the further questions made after Transport Scotland issued its review response in reaching her conclusions about whether Transport Scotland applied the EIRs correctly. She must confine herself to what she is asked to consider in the application to her, based on the outcome of the authority's review. The only relevance the further questions can have to this decision is whether, as a result, NAAT has now been provided with all of the relevant information.
27. On the face of it, Transport Scotland's interpretation of the request appears to have been a reasonable one, given the terms of the request read as a whole. There may be circumstances in which it is appropriate for a Scottish public authority to clarify what a requester means by a "breakdown", in line with its duty to provide advice and assistance under regulation 9 of the EIRs. Having considered all the circumstances of this case, including NAAT's approach to seeking information from public authorities, the Commissioner does not consider this one to have been such a case. It appears unlikely to her that attempts to clarify this request would have led to an outcome any more satisfactory to the requester.
28. That said, Transport Scotland failed (in providing a breakdown in response to NAAT's requirement for review) to provide individual figures for optimism bias, VAT and cost of capital to Scottish Government, the items it acknowledged required to be covered in any breakdown meeting the terms of the request. In failing to provide such a breakdown, or explain (where applicable) that figures could not be provided for any specific item, Transport Scotland failed to comply with regulation 5(1) of the EIRs. Given the information provided to NAAT during the investigation, the Commissioner is satisfied that these items have now been addressed fully by Transport Scotland. Consequently, she does not require Transport Scotland to take any action in response to this failure.
29. Regarding NAAT's stipulation that it be provided with the latest estimate, Transport Scotland's review outcome provided a breakdown of a reduced estimated cost of £1.4 billion. In subsequent correspondence with both NAAT and the Commissioner, Transport Scotland

explained that the estimated cost of £1.4 - £1.45 billion (as published on Transport Scotland's website at the time of the request), was revised down to £1.35 - £1.4 billion in October 2014, the "high end" of this being used in the review outcome of 20 November 2014.

30. Given this explanation, and Transport Scotland's clear understanding (as expressed in its correspondence with NAAT) that NAAT was seeking a breakdown of the latest estimate, the Commissioner is satisfied that Transport Scotland interpreted this element of the request reasonably and responded on the basis of the latest estimated cost it held at the time. Reading all of the correspondence between NAAT and Transport Scotland on this matter, she can identify no reasons that could have led NAAT to assume that this point had not been addressed.

## Decision

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The Commissioner finds that Transport Scotland partially complied with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by National Alliance Against Tolls (NAAT).

The Commissioner finds that Transport Scotland was correct to apply section 39(2) of the Freedom of Information (Scotland) Act 2002 (FOISA) to the information requested, and consider it under the EIRs.

However, the Commissioner finds that Transport Scotland did not provide all the information requested and therefore failed to comply with regulation 5(1) of the EIRs. Given that, by the end of the investigation, Transport Scotland had provided the information requested in full, the Commissioner does not require Transport Scotland to take any action in respect of this failure.

## Appeal

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Should either National Alliance Against Tolls 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.

**Rosemary Agnew**  
**Scottish Information Commissioner**

**1 July 2015**

### 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.

...

- (6) This section is subject to sections 2, 9, 12 and 14.

#### 2 Effect of exemptions

- (1) To information which is exempt information by virtue of any provision of Part 2, section 1 applies only to the extent that –

...

- (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

...

#### 39 Health, safety and the environment

...

- (2) Information is exempt information if a Scottish public authority-
- (a) is obliged by regulations under section 62 to make it available to the public in accordance with the regulations; or
  - (b) would be so obliged but for any exemption contained in the regulations.

....

# 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;
- (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);

...

## 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.

...

**Scottish Information Commissioner**

Kinburn Castle  
Doubledykes Road  
St Andrews, Fife  
KY16 9DS

t 01334 464610

f 01334 464611

[enquiries@itspublicknowledge.info](mailto:enquiries@itspublicknowledge.info)

**[www.itspublicknowledge.info](http://www.itspublicknowledge.info)**