

Decision Notice

Decision 022/2019: Mr and Mrs H and South Lanarkshire Council

Cost of repairs/compensation claims – Clydeford Road, Cambuslang

Reference No: 201800411

Decision Date: 18 February 2019



Scottish Information
Commissioner

Summary

The Council was asked for the costs of repairs and details of compensation claims for a specific section of Clydeford Road, Cambuslang.

In response, the Council identified and disclosed some information. It later disclosed a total figure for compensation payments, after the Commissioner's investigation had started.

The Commissioner was not satisfied with how the Council interpreted the scope of the request. He requires the Council to revisit this and provide a fresh response.

Relevant statutory provisions

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (paragraphs (a), (c) and (f) of definition of "environmental information"); 5(1) and (2)(b) (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.

Background

1. Mrs H made a six-part request for information to South Lanarkshire Council (the Council), which the Council received on 27 November 2017. The information requested pertained to a specific section of Clydeford Road, Cambuslang and to the period 1 November 2007 to 1 November 2017. The information she asked for was:
 - 1) Between the two roundabouts at the Glasgow side and the Cambuslang side how many repairs have been carried out to the road surface?
 - 2) How many claims have been made from everyone against [the Council] regarding damage caused to all forms of transport on this section of road?
 - 3) How many repairs have [the Council] carried out on the Glasgow side of the bridge separate to the South Lanarkshire side?
 - 4) What is the percentage of claims that have resulted in [the Council] paying compensation?
 - 5) How much in pounds have [the Council] paid out in compensation resulting in claims from all?
 - 6) What has been the cost to the public purse to carry out said repairs?
2. As Mrs H had used her husband's email address to submit the request, the Council responded to her husband on 3 January 2018. The Council disclosed information for parts 1) to 4) inclusive, but withheld personal data for part 5). It also stated that no information was held for part 6).

3. On 31 January 2018, Mr and Mrs H wrote to the Council, requesting a review of its decision. This followed communications with the Council as to whether the request was from Mr or Mrs H (or both). The email of 31 January asked the Council to provide any further responses to both of them and gave Mrs H's permission to communicate with Mr H in relation to the request.
4. The request for review highlighted perceived disparities between the response to the current request and the Council's response to a previous request (in 2011), and queried whether the current responses truly reflected the information held, on a reasonable interpretation of the request. Mr and Mrs H also challenged what they considered to be a failure to respond to parts 5) and 6) of the current request.
5. On 2 March 2018, the Council notified both Mr and Mrs H of the outcome of its review. The Council did not consider the requirement for review to be valid insofar as it sought comparison of the two requests, or in questioning elements of the Council's administrative arrangements. In all other respects raised by Mr and Mrs H, the Council concluded that it had responded correctly to the original request.
6. On 9 April 2018, Mr and Mrs H wrote to the Commissioner. They applied to the Commissioner 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. Mr and Mrs H stated they were dissatisfied with the outcome of the Council's review, questioning whether the responses given for parts 1) to 4) reflected the information held, bearing in mind the earlier request. They did not agree that the Council was entitled to respond to parts 5) and 6) as it had.

Investigation

7. The application was accepted as valid. The Commissioner confirmed that Mr and Mrs H 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.
8. On 10 April 2018, the Council was notified in writing that Mr and Mrs H 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 this application and answer specific questions, with particular reference to the steps taken to identify and locate any relevant information.
10. The Council provided submissions on 26 June 2018, indicating it no longer wished to withhold information for part 5) of the request. Information for this request was disclosed on 3 July 2018.
11. The Council provided further clarifications and evidence of searches – and of its interpretation of the request – to the investigating officer during the investigation.

Commissioner's analysis and findings

12. 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 Mr H and the Council. He is satisfied that no matter of relevance has been overlooked.

Application of the EIRs

13. It is clear from the Council's correspondence with both Mr and Mrs H and the Commissioner that any information falling within the scope of this request would be environmental information, as defined in regulation 2(1) of the EIRs. Mr and Mrs H have asked for information which relates to repairs to the road surfaces (which are built structures). The condition of the roads, which are exposed to the elements, is an underlying theme in this request, as is quantifying the compensation payments directly related to this section of road, and its condition. As such, the Commissioner is satisfied that any information covered by the request would fall within paragraphs (a), (c) and (f) of the definition in regulation 2(1) (reproduced in Appendix 1).
14. Mr and Mrs H have not disputed the Council's decision to handle the request under the EIRs and the Commissioner will consider the information in what follows solely in terms of the EIRs

Information disclosed during this investigation – part 5)

15. As noted above, the Council disclosed a figure for part 5) of Mr and Mrs H's request, but did not do so until during this investigation.
16. By not doing so earlier, either in its initial response or when issuing its review decision, the Commissioner finds that the Council failed to comply with regulation 5(1) of the EIRs. The Commissioner will also consider the adequacy of this disclosure further below.

Has all relevant information been identified, located and provided?

17. The Council disclosed information for parts 1) to 4) of the request. For part 6), it indicated that it did not hold information, applying regulation 10(4)(a) of the EIRs.
18. In terms of regulation 5(1) of the EIRs, the Council was required to make available to Mr and Mrs H any information it held on receipt of the request and which fell within the scope of the request.
19. In their application, Mr and Mrs H noted that a separate request (from a third party) on the same subject had produced what they considered to be very different figures. They questioned whether the figures provided to them were correct.
20. With reference to this third party request, the Council noted that it covered a longer timeframe – 1 April 2007 to 30 January 2018, as opposed to 1 November 2007 to 1 November 2017 for the Hs' request. The third party request was for different information, i.e. the number of potholes repaired as opposed to the number of repairs carried out to the road surface.
21. The Commissioner has no locus to comment on the accuracy of the information held by a public authority, nor can he comment on whether a public authority should have taken particular action in respect of potholes, nor what records it should maintain in relation to any such action. Nor can he comment on the information furnished in connection with the other information request, except to the extent that one is wholly within the scope of the other. In this case, he can only pursue the question of whether the Council has identified, located and provided Mr and Mrs H with all relevant information.
22. 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 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.

Interpretation and scoping of searches

23. During this investigation, the Council supplied a map showing three colour coded sections of road. These were:
 - Section 19 (blue area) - the bridge and bridge deck over the River Clyde, maintained by the Council
 - Section 5 (red area) - a slip road at the south end of the bridge, also the Council's responsibility to maintain, adjoining the edge of the blue area and connecting to the roundabout
 - Section 15 (yellow area) - a slip road coming from the roundabout and also adjoining the edge of the blue area.
24. The Commissioner notes that Mr and Mrs Hs' request, at part 1, stipulated "between" roundabouts. It is clear the Council was required to interpret a request containing a textual description of a piece of road and there is nothing to suggest that it considered whether Mr and Mrs H's request required clarification. It did not advise Mr and Mrs H on what it categorised as the "roundabout", for example.
25. The Council confirmed during the investigation that it searched for, and counted, the 23 records it held pertaining to section 19. It either failed to search for, or (if it did search) disregarded, data identifying repairs within the areas identified as sections 5 and 15. The Council was asked to explain this apparent omission. It stated it did not consider these sections as being within the scope of the request. The Council took the view that the yellow and red areas were part of the "roundabout" so need not be counted.
26. The Commissioner is concerned that the Council does not appear to have considered Mr and Mrs Hs' understanding of what all three sections of road may be. Any lay person who did not know the Council's data systems and was simply looking at a road map would, the Commissioner believes, be very unlikely to accept that the red and yellow areas were entirely part of the "roundabout".
27. The Commissioner holds the view that parts (though not the entirety of) the connecting stretches of road from the roundabout to the blue area on the map (i.e. the "slip roads") do fall within the scope of Mr and Mrs H's request. He does not consider it reasonable to classify as "roundabout" sections of road leading to and from the roundabout proper (i.e. the circular piece of road devoted to traffic circulating in a single direction). He has noted that the locational content of the records for sections 5 and 15 describe some, but not all, repairs as on the roundabout. This supports the view that there is a distinction within the yellow and red areas between what is roundabout and what is connecting road. The Commissioner believes this should have been taken into account in interpreting the request, and clarification sought from Mr and Mrs H as appropriate.
28. In the absence of a clarification request to Mr and Mrs H at the time of receipt, the Commissioner considers the Council should have interpreted the request to include those

parts of section 5 and 15 not forming part of the roundabout. The Commissioner is not satisfied that it did this. Consequently, he is not satisfied that the Council placed a reasonable interpretation of the request, with regard to the extent of road covered: in failing to do so, it failed to deal with the request in accordance with regulation 5(1) of the EIRs.

Searches carried out

29. The Council described the systems used for recording information on repairs and claims, noting that all relevant officers used the same systems and no separate information would be held on individual computers. It identified the search parameters used and provided screen shots and reports confirming the results of searches. It confirmed that the searches carried out would identify all repairs covered by the request.
30. The Council also confirmed that its searches took account of its responsibility for maintaining the whole of the Clydeford Bridge. For clarification, there is a council boundary along the centre of the River Clyde. The Council, in agreement with Glasgow City Council, is responsible for the maintenance of the whole bridge, including the road surface on the bridge deck (but the Council does not own the entire bridge structure or road surface). It noted, with supporting documentation, that the respective responsibilities of the two councils were clarified in 2012.
31. In relation to part 6) of the request, the Council explained that it was not possible to apportion repair costs accurately to a particular section of road, bearing in mind that some repairs would be the result of safety inspections including additional sections of road. It did not agree with Mr and Mrs H's assertion that its response to this part of the request contradicted its response to part 5): the amount of compensation paid in relation to a particular section of road (which could be identified) was not the same as the cost of repairs to that same section (which could not).
32. With regard to the previous request made by Mr and Mrs H and referred to by them at review stage and subsequently, the Council confirmed that it had searched its records for 2011 and 2012 but did not hold a copy of the request or its response. The retention period for such information, it explained, was "current year plus 3 years", so any paper copies would have been destroyed.
33. In the absence of the earlier request and response, the Council was unable to comment on their content. However, it noted that responses to requests for this kind of information made in 2011/12 and 2018 would refer to different information. The records from which the information was sought were "living" records and information would have been deleted or added with the passage of time. In any event, the Council submitted, the issue was whether the response issued to Mr and Mrs H took account of all the information held by the Council at the time of the 2018 request and whether its response accurately reflected the information identified.
34. As highlighted above, the Commissioner has no locus to verify the accuracy of records: his remit is to establish what records exist and the extent to which the information actually requested is held.

Commissioner's conclusions

35. In all the circumstances, the Commissioner is satisfied that the Council carried out adequate and proportionate searches for the requested information, within the parameters created by its interpretation of the request. The methodology used, in other words, was adequate and proportionate. The Commissioner is also satisfied with the Council's explanations in relation

to part 6) of the request, and so is satisfied (without any further enquiry) that it would be reasonable to conclude that no information (providing a total cost of the kind required) is held for this part. In this regard, it was entitled to apply the exception in regulation 10(4)(a) of the EIRs to withhold this information: the exception is subject to the public interest test in regulation 10(1)(b), but the Commissioner can identify no public interest in making available information a Scottish public authority does not actually hold when asked for it.

36. For parts 1) to 5) of the request, however, the Commissioner is not satisfied that the Council can be said to have taken fully adequate steps to identify and locate the requested information, given that the searches carried out failed to include those parts of sections 5 and 15 not forming part of the roundabout. As indicated above, this was a failure to deal with the request fully in accordance with regulation 5(1) of the EIRs.
37. Consequently, the Commissioner requires the Council to ensure that adequate searches are carried out for those parts of sections 5 and 15 not forming part of the roundabout, and to provide Mr and Mrs H with a fresh review outcome for parts 1) to 5) of the request, on the basis that these parts fall within the scope of the request.

Decision

The Commissioner finds that, in respect of the matters specified in the application, South Lanarkshire Council (the Council) partially failed to comply with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by Mr and Mrs H.

The Commissioner finds that, to the extent that it disclosed information it held, based on its interpretation of the request, the Council complied with the EIRs. For part 6) of the request, he accepts that the Council held no information and was correct to apply regulation 10(4)(a) of the EIRs to refuse that part.

However, the Commissioner is not satisfied that the Council's interpretation of the request was reasonable in the circumstances, with regard to the extent of road covered, as more particularly described in paragraphs 27 and 28 above. In interpreting the request unduly restrictively, the Council failed to comply fully with regulation 5(1) of the EIRs: to ensure compliance, the Commissioner requires the Council to provide Mr and Mrs H with a fresh review outcome in terms of regulation 16 of the EIRs, encompassing the full length of affected road for parts 1) to 5) of the request.

The Commissioner notes that the Council disclosed information for part 5) of the request during the investigation. In failing to do so until the Commissioner investigated, the Council breached regulation 5(1) of the EIRs. Given that this disclosure was based on the interpretation of the request rejected by the Commissioner above, part 5) of the request is included in the requirement set out in the preceding paragraph.

Appeal

Should either Mr and Mrs H 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
Head of Enforcement

18 February 2019

Appendix 1: Relevant statutory provisions

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;

...

(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.

...

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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