

Decision Notice

Decision 057/2019: Mr R and East Lothian Council

Road repairs and inspections

Reference No: 201801905

Decision Date: 10 April 2019



Scottish Information
Commissioner

Summary

The Council was asked about defects and inspections in relation to a named road. The Council disclosed some information in response to the request, and further information during the investigation.

By the end of the investigation, the Commissioner was satisfied that the Council had carried out appropriate searches and did not hold any other relevant information. However, he found that the Council failed to respond to the request within the prescribed timescale and failed to provide all of the information it held when responding to the request.

Relevant statutory provisions

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

1. On 26 June 2018, Mr R made a request for information to East Lothian Council (the Council). He commented about the state of the road in front of his house, referred to an engineer’s detailed report, and asked for all reports relating to this matter.
2. On 28 June 2018, the Council disclosed some information and provided additional explanation. Mr R responded the same day and asked the Council for all reports relating to the road at his house since 2010, including road inspections.
3. The Council responded on 22 August 2018 and provided Mr R with a roads report covering the period 1 January 2010 to 12 July 2018 (RMMS Report).
4. On 27 August 2018, Mr R emailed the Council requesting a review of its decision. He believed the Council held more information than had been disclosed.
5. The Council notified Mr R of the outcome of its review on 18 September 2018. It acknowledged that it had failed to respond within the required timescale, and had not provided the correct information as requested. The Council provided a revised roads report and apologised for the inconvenience caused by the delayed response.
6. On 31 October 2018, Mr R 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 R considered that the Council held more information than it had disclosed.

Investigation

7. The application was accepted as valid. The Commissioner confirmed that Mr R 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. In correspondence with Mr R on 14 and 15 January 2019, it was agreed that the Commissioner would investigate the following matters in connection with the Council's handling of his request:
 - all reports relating to road inspections and road defects for the road outside his house;
 - whether all of the information falling within scope of his request had been disclosed; and
 - the time taken by the Council to respond to his request.
9. On 18 January 2019, the Council was notified in writing that Mr R had made a valid application. The case was then allocated to an investigator.
10. 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 to answer specific questions. These related to the information it held about road repairs and inspections, and the information it had provided to Mr R.
11. The Council responded on 14 February 2019. It provided copies of the information disclosed to Mr R, and details of the searches it had undertaken. It also provided copies of correspondence with Mr R to support its position that it had disclosed all relevant information falling within scope of the request.
12. The investigating officer and the Council entered into dialogue regarding the process for reporting defects and undertaking inspections of roads within the Council area.
13. Mr R was provided with a summary of the investigation findings, and asked if he had any further comments he would like to submit as to why he considered that further information was held by the Council besides that already disclosed. Mr R's comments will be considered below.
14. As part of its submissions, the Council provided a copy of a spreadsheet which summarised the state of repair of the Council's roads following an inspection (Needs Assessment reports). The Council disclosed this information to Mr R on 3 April 2019.

Commissioner's analysis and findings

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

Application of the EIRs

16. The Commissioner is satisfied that the information covered by this request is environmental information, as defined in regulation 2(1) of the EIRs (paragraphs (a), (b) and (c) of the definition of "environmental information"- see Appendix 1). The information relates to the repair and inspection of a road.

17. Mr R has not disputed the Council’s decision to handle the request under the EIRs and the Commissioner will consider the information solely in terms of the EIRs in what follows.

Information falling in scope

Mr R’s submissions

18. During the investigation, Mr R was asked if he wanted to provide any further comments as to why he considered that the Council held more information falling within scope of his request.
19. In summary, Mr R did not accept the Council’s reasoning for delaying repairs to the road and considered that the Council was not meeting the requirements of its Roads Policy.

The Council’s submissions

20. The Council provided details of the searches it had undertaken to identify the information falling within scope of the request. Its searches encompassed the following destinations and used the following words:

Electronic records (databases, shared folders etc)	Safety Inspection Records Accessed via (WDM) works / asset management system. IDOX Files RNManagement/Design Team/Local Distributors
Emails (incl sub-folders, vault etc)	E-mail, E-mail archive
Keywords used for electronic searches	[redacted], C99

21. The Council also provided details of the individuals who had searched their records and copies of the RMMS reports it had disclosed to Mr R on 22 August and 18 September 2018. It explained that the first version disclosed was the wrong report, so it had then disclosed the correct report.

Road inspections

22. The Council explained that safety inspections are undertaken every six months under the Council’s Policy for Road Inspections¹ (a copy of the policy was provided to the Commissioner), and a “needs assessment” is undertaken yearly. Following a road inspection, information is uploaded to WDM (an asset management system) and a report is run to extract the information for the needs assessment process.
23. The Needs Assessment report gathers together all the information held within the WDM from the safety and service inspections. An overall visual condition inspection is undertaken as part of the needs assessment process, but specific defects are not recorded at this time.
24. The Council confirmed that its Roads Policy was provided to Mr R on 28 June 2018. The Council also provided copies of its Needs Assessment reports for 2014 to 2018.
25. During the investigation, the Council and investigating officer discussed whether the Needs Assessment reports fell within scope of Mr R’s request. The investigating officer advised the Council that, as these reports included the results of inspections of the road in question, the Needs Assessment reports fell within scope of the information requested by Mr R and

¹ https://www.eastlothian.gov.uk/downloads/file/23183/policy_for_road_inspectons

suggested that this information could be provided to him. The Council disclosed this information on 1 April 2019.

Road defects

26. The Council explained that, once a defect is identified and a risk assessment rating is given by the Roads Officer in accordance with the Council policy for road inspections, it is then added to the WDM. The risk assessment rating will determine the next course of action. If for example it was classed as an R1 or R2, a Safety/Immediate Repairs Worksheet would be issued to the contractor (paper copy) and then returned on completion to be closed as complete within the WDM system.
27. A Safety/Immediate repairs worksheet is issued to a contractor to repair the road. The Council provided an example of this worksheet, and stated that, once the defect has been completed, the worksheet is disposed of.
28. The Council confirmed that the only information held about inspections and defects is that contained within the RMMS Report and the Needs Assessment report.

Correspondence about the road outside Mr R's house

29. In his application, Mr R stated that a meeting had taken place between himself, his wife and a Roads Manager from the Council in 2012 and that he expected information to be held about this meeting and for the Council to have documented some actions.
30. The Council confirmed that it has corresponded directly with Mr R about the condition of the road in question. The Council provided a copy of its correspondence with Mr R in 2012/2013 following a meeting to discuss the condition of the road. Within the correspondence, Mr R states that he understands that the road would be improved, with the removal of the dip, whilst the Council's email refers to widening of the road.
31. The Council submitted that it held no record of the meeting in March 2012 with Mr R. The Council officer at the time confirmed that his folders prior to May 2017 had been deleted in 2017 and he only holds information from May 2017 onwards.
32. On 28 June 2018, the current Service Manager for Roads emailed Mr R to state that, following the 2012 discussion, his understanding was that the road may be widened. He also responded to Mr R's comments about the road condition and attached photographs of the road condition, and the Council's Roads policy.
33. The Council submitted that, following an inspection in 2018, an instruction to fill in some potholes was made on the road in question, but, again the position remained that the dip was not classified as a defect. Therefore, no further works were undertaken at this time. The Council stated that Mr R was advised at the time that the Council had no plans to undertake any additional works other than filling in potholes which it had identified as part of the site inspection on 27 June 2018. The Council advised that it will undertake further needs assessments in line with its policy later in the year and, depending on this assessment, this location may be programmed for remedial work in next year's works programme.

The Commissioner's findings

34. The standard proof to determine whether a Scottish public authority holds information is the civil standard of the balance of probabilities. In determining this, 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 the information is not held, and any reason offered by the requester

to explain why information is likely to be held. While it may be relevant as part of this exercise to explore what information should be held, ultimately the Commissioner's role is to determine what relevant information is (or was, at the time the request was received) held by the public authority.

The 2012 meeting

35. It is clear that, after his meeting with a Council officer in 2012, Mr R expected that the road in front of his house would be improved and that this work had been scheduled in the Council's programme of works. This did not happen.
36. From the submissions provided by the Council, the Commissioner concludes that there does not appear to have been any formal record of the meeting in 2012, or an agreed list of actions. The Council officer who attended the meeting has stated that he does not hold a record of the meeting and that his records prior to May 2017 have been destroyed.
37. The Council has consistently stated that it does not hold a record of the meeting. The Commissioner notes that any such meeting records would have been at least six years old at the date of the request. The Commissioner accepts the Council's explanation that its records in relation to the meeting in 2012 have been deleted and so were not held by it when it received Mr R's request.

Road defects and inspections

38. The Council has explained in detail the processes it follows inspecting and repairing roads. The Council submitted that the only two sources of information are the RMMS roads report and the Needs Assessment reports.
39. The Commissioner acknowledges that Mr R clearly expected the Council to hold more detailed records about the inspections and repairs of its roads. However, on the basis of the submissions provided, the Commissioner is satisfied that the Council does not hold any further information falling within scope of Mr R's request.
40. The Commissioner is satisfied that the Council has now taken adequate, proportionate steps to establish whether it held any more information falling within the scope of the request. Taking all of the above into consideration, the Commissioner is satisfied, on the balance of probabilities, that the Council does not hold any more information falling within the scope of Mr R's request than it has already provided.
41. The Council failed to identify and provide all information falling within scope of Mr R's request when responding to his request and request for review. In this respect, the Commissioner finds that the Council failed to comply fully with regulation 5(1) of the EIRs when responding to Mr R's request.

Timescales

42. Mr R expressed dissatisfaction with the Council's failure to respond to his initial request within the required timeframe.
43. 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.
44. The Commissioner notes that the Council failed to provide Mr R with a response within this timescale and therefore failed to comply with regulation 5(2) of the EIRs in this regard. He

also notes that the Council acknowledged this failure and apologised to Mr R in its review outcome of 18 September 2018.

Decision

The Commissioner finds that East Lothian Council (the Council) partially complied with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by Mr R.

The Commissioner finds that:

- by the end of the investigation, the Council had identified and disclosed all the information it held that fell within scope of the request;
- by initially failing to identify and provide all information covered by Mr R's request, the Council failed to comply fully with regulation 5(1) of the EIRs; and
- the Council failed to comply with the timescale in regulation 5(2)(a) of the EIRs when responding to the request.

The Commissioner does not require the Council to take any further action in relation to these breaches.

Appeal

Should either Mr R 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

10 April 2019

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;

...

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

...

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