

Decision Notice

Decision 067/2019: Mr P and Midlothian Council

Road defect reports and claims

Reference No: 201801853

Decision Date: 2 May 2019



Scottish Information
Commissioner

Summary

Midlothian Council (the Council) was asked about road defect reports and claims. The Council provided some information and (after issuing a review outcome) provided further information, stating at this point that it held nothing further.

The Commissioner found that the Council should have dealt with the request under the EIRs. He found that the Council failed to comply with the EIRs by not providing Mr P with all the information it held falling within the scope of the request. However, he was satisfied that, by the end of his investigation, the Council had identified and disclosed all the information it held and which fell within the scope of Mr P's request.

Relevant statutory provisions

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (paragraphs (a) and (c) 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

1. On 23 July 2018, Mr P made a request for information to Midlothian Council (the Council). The information requested was:

For the financial years 2015 to 2016, 2016 to 2017 and 2017 to 2018, for each road defect on a stretch of road (along Harper's Brae):
 - (i) Location of defect on the road;
 - (ii) Date Council first became aware of defect;
 - (iii) Whether awareness through public reporting or inspection;
 - (iv) Number of times defect reported before being repaired;
 - (v) Details of the defect given by the reporter;
 - (vi) Date defect repaired, or if it still unrepaired;
 - (vii) With regard to any claims made arising from the defects:
 - Number of claims paid out
 - Number of claims rejected
 - Number of claims currently settled
 - A copy of the full road repair policy.
2. The Council responded on 14 August 2018 and provided information to Mr P.
3. An exchange of further correspondence followed between Mr P and the Council, in the course of which further information was disclosed to Mr P.

4. On 23 September 2018, Mr P wrote to the Council, requesting a review of its decision and raising the following points:
 - Point (i) of his request – the location was not precise enough;
 - Points (ii), (iii), (iv) and (v) – no attempt had been made to answer these points, apart from expanding on the information disclosed (for point (v) regarding the dates 14 and 15 March 2018);
 - Point (vi) of his request was partially answered but no details were given as to which area was repaired.
5. The Council notified Mr P of the outcome of its review on 2 October 2018. The Council advised Mr P that it had provided all the information it held falling within the scope of his request. This was reiterated by the Council in the course of further correspondence with Mr P.
6. On 25 October 2018, Mr P wrote to the Commissioner. He 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 P was dissatisfied with the outcome of the Council's review because he considered that:
 - Bearing in mind that the Council was not inputting all reports of defects into its PMS (Pavement Management System) logging system, he believed it unlikely that he had been given details of all relevant complaints
 - He was unhappy with the time taken to provide him with information.
7. On 26 October 2018, the Council contacted Mr P, providing corrected information on the first report of a specific defect.

Investigation

8. The application was accepted as valid. The Commissioner confirmed that Mr P 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.
9. On 22 November 2018, the Council was notified in writing that Mr P had made a valid application and 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. The Council was invited to comment on this application and to answer specific questions. These related to the searches carried out and whether any further information might be held by the Council.
11. Mr P was also asked for any further submissions he wished to make.
12. Submissions were received from both Mr P and the Council.

Commissioner's analysis and findings

13. In coming to a decision on this matter, the Commissioner considered the relevant submissions, or parts of submissions, made to him by both Mr P and the Council. He is satisfied that no matter of relevance has been overlooked.

Application of the EIRs

14. It is clear that any information falling within the scope of the request would be environmental information, as defined in regulation 2(1) of the EIRs. The information in question relates to the condition of the roads (i.e. land), which are exposed to the elements, and to measures taken to address that condition and, as such, the Commissioner is satisfied that it would fall within either paragraph (a) or paragraph (c) of the definition of environmental information in regulation 2(1) of the EIRs (reproduced in Appendix 1 to this decision).
15. As the Council did not respond to the request as a request for environmental information, the Commissioner must find that it failed to comply with regulation 5(1) of the EIRs. He will consider the information in what follows solely in terms of the EIRs.

Has all relevant information been identified, located and provided?

16. The Commissioner asked the Council for details of the searches that it carried out before concluding that no further information was held other than that which had been already disclosed to Mr P.

Searches carried out

17. The Council stated that in order to locate some of the information provided after the initial disclosure, it interrogated the electronic file directory accessed by the Roads Teams within the Resources Directorate. Electronic copies of e-mails, letters and reports were stored within this directory. The Council emphasised that this was a short term solution applied during a period of extreme work pressure, when it had not been able to log information on the PMS timeously.
18. It was the Council's policy, it explained, to operate a "confirm" database, incorporating the PMS. Inspection reports from roads inspectors are input directly onto the PMS. Calls to the Council's contact centre received from the public are input into the Council's customer reporting system and directed to the generic e-mail address of roadsdefects@midlothian.gov.uk, as are complaints received through the Council's public portal. The Council explained that the information not logged on the PMS timeously had been some road defects e-mails received through the generic e-mail address, including the information on which a correction was provided on 26 October 2018.
19. The Council explained that the PMS system can be interrogated using various ways to establish all enquiries logged onto the system, for specific streets, specified time periods or specific types of defect.
20. In relation to Mr P's information request, the searches carried out related to the time periods specified by him, the location of Harper's Brae, Penicuik, and the term "carriageway pothole". The searches also involved contacting the Council's Insurance Officer, given that Mr P had also asked for the number of claims paid out, rejected or awaiting settlement.

The Commissioner's conclusions

21. The Commissioner finds that the Council failed to comply with the EIRs, in particular regulation 5(1), by failing to identify and disclose all the information falling within the scope of Mr P's request until (in one case) after it had issued its review response.
22. The Commissioner is, however, satisfied that the Council has now carried out adequate, proportionate searches and enquiries to ascertain what information it held and which fell within the scope of Mr P's request. The Commissioner accepts that the Council searched all relevant systems, rather than relying solely the PMS system. In doing so, it located further information which it disclosed to Mr P.
23. On balance, the Commissioner is satisfied that the Council has now identified and located all relevant information it holds. Whether there is a need for additional or more robust records management by the Council in recording and storing road defect reports is not a matter which falls within the Commissioner's remit. That would be a matter for the Scottish Public Services Ombudsman.

Decision

The Commissioner finds that Midlothian Council (the Council) failed to comply fully with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by Mr P.

He finds that the Council failed to comply with the EIRs, and particularly regulation 5(1), by failing to identify the information requested as environmental information and deal with the request accordingly under the EIRs.

Also, by failing to identify and disclose all relevant information that it held until after its review outcome, the Council failed to comply with regulation 5(1) of the EIRs.

Given that all relevant information held by the Council has now been provided to Mr P, the Commissioner does not require the Council to take any action regarding these failures, in response to Mr P's application.

Appeal

Should either Mr P 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

2 May 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

–

(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.

(2) The duty under paragraph (1)-

...

(b) is subject to regulations 6 to 12.

...

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