

Decision Notice

Decision 133/2019: the Applicant and Perth and Kinross Council

Road safety and defects relating to a specific section of road

Reference No: 201900233

Decision Date: 12 September 2019



Scottish Information
Commissioner

Summary

The Council was asked for information about defects and maintenance, on a specific stretch of road outside Braco Primary School.

The Council disclosed information and also gave weblinks to some information which it had already published online.

Following an investigation, the Commissioner was satisfied that the published information was reasonably accessible, but he also found that the Council had failed to recognise the information as being “environmental” information or to interpret the scope of the request adequately: he required further searches to be carried out.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) (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), (c) and (f) of definition of “environmental information”); 5(1) and (2)(b) (Duty to make environmental information available on request); 6(1)(b) and (2) (Form and format of information)

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 12 December 2018, the Applicant made a five-part request for information to Perth and Kinross Council (the Council). For a specified section of road outside Braco Primary School, the information requested was:
 - (i) Parts 1 to 3 - the Roads Asset Management Plan, the Road Maintenance Strategy and the Road Safety Inspection and Defect Categorisation Policy (all to be current versions)
 - (ii) Parts 4 and 5 - any reports made of road defects and safety concerns relating to the piece of road in question in the past three years, records of any inspections made following these reports, to include specified details, and records of all routine inspections of the piece of road and their outcomes, again for the past three years.

From the terms of his email, it was apparent that the Applicant’s primary concern was with road markings in the vicinity of the school.

2. The Council responded on 11 January 2019, advising that the information for parts 1 to 3 was already published online (weblinks included) and citing section 25(1) of FOISA on the basis that it was reasonably obtainable. For parts 4 and 5, the Council disclosed information.
3. On 14 January 2019, the Applicant wrote to the Council requesting a review of its decision. He did not consider the information for parts 1 to 3 to be reasonably obtainable, although he confirmed he now had the information. He was unhappy with aspects of the disclosures for

parts 4 and 5 as he believed more information should have been provided: he offered examples and again referred to road markings.

4. The Council notified the Applicant of the outcome of its review on 7 February 2019. With regard of parts 1 to 3, the Council upheld its original response and stated its reasons. For parts 4 and 5, a small amount of additional information was identified and disclosed, with an apology for this not being provided earlier. Within this disclosure, some personal details were withheld under section 38(1)(b) (Personal information) of FOISA.
5. Later that day, the Applicant wrote to the Commissioner's office. He 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. The Applicant stated he was dissatisfied with the outcome of the Council's review because, for parts 1-3, he was not satisfied that he could reasonably obtain the information online. For parts 4 and 5, he believed the response was incomplete for a number of reasons.
6. The Applicant has not expressed dissatisfaction in his application with the Council's withholding of personal data under section 38 (1)(b) of FOISA. For this reason, the Commissioner need not consider this information in his Decision Notice.

Investigation

7. The application was accepted as valid. The Commissioner confirmed that the Applicant 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 27 February 2019 the Council was notified in writing that the Applicant 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 to answer specific questions. These related to its claim that information was reasonably obtainable, its searches in relation to parts 4 and 5 of the request and the potential application of the EIRs.

Commissioner's analysis and findings

10. 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 the Applicant and the Council. He is satisfied that no matter of relevance has been overlooked.

Handling in terms of the EIRs

11. The Council handled the request under FOISA rather than the EIRs. The investigating officer invited comment on whether all of the information requested was environmental information, as defined in regulation 2(1) of the EIRs. The Council acknowledged that the information was environmental and that the request should, therefore, have been dealt with under the EIRs, confirming that it wished to apply section 39(2) of FOISA
12. For parts 1 to 3 of the request, the Council confirmed that it should have applied regulation 6(1)(b) of the EIRs (which relates to the information already publicly available and easily

accessible to the applicant in another form or format). For parts 4 and 5, it maintained that it had provided all the information it held.

13. Looking at the information, the Commissioner is satisfied that the withheld information, relating to the condition of the road and its maintenance, falls within the definition of environmental information in regulation 2(1), particularly paragraphs (a), (c) and (f) of that definition (see Appendix 1). The Council should, however, have reached this conclusion when dealing with the request itself.
14. 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 the Council was entitled to apply the exemption to the information withheld in this case, given his conclusion that it is properly classified as environmental information.
15. The exception in section 39(2) is subject to the public interest test in section 2(1)(b) of FOISA. As there is a statutory right of access to environmental information available to the Applicant 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. 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 any information held should be more likely under FOISA than under the EIRs.
16. The Commissioner therefore concludes that the Council failed to identify the information as environmental information in terms of regulation 2(1) of the EIRs, at the time of asking, and thereby failed to comply with regulation 5(1) of the EIRs.
17. In what follows, the Commissioner will consider this case solely in terms of the EIRs.

Regulation 6(1)(b) – Form and format of information

18. For parts 1 to 3 of his request, the Applicant submitted that the documents were not easily accessible on the Council's website: he did not accept that they were reasonably obtainable from the internet, "as there was no way of a reasonable person being able to find those links through internet searches or a search of the [Council] website." The Applicant also submitted that it was not possible to confirm that the versions identified were the current ones (as specified in his request).
19. In this regard, the Council relied on regulation 6(1)(b) of the EIRs. This states that a Scottish public authority is not obliged to provide information in a particular form or format, where the information is already publicly available and easily accessible to the applicant in another form or format. For these purposes, the Council considered the reasoning in its review outcome, in relation to section 25(1) of FOISA, to remain applicable.
20. In its review outcome, the Council disagreed with the Applicant's assertion that a reasonable person would not be able to find the links to the information through internet searches or the Council's website. In the Council's view, the information was available through internet searches, by means of a basic search engine such as Google. The Council believed this was arguably the first place a person would use for such a search. It noted that Google identified all of the relevant documents (for which it had already provided weblinks) on the first page of the search results, without having to look any further.

Conclusions

21. In order to determine whether the Council dealt with parts 1 to 3 of the Applicant's requests correctly, the Commissioner must be satisfied as to whether, at the time it responded to the Applicant's requirement for review, the information held by the Council (and which fell within the scope of parts 1 to 3 of the request) was both publicly available and easily accessible to the Applicant in another form or format.
22. Having looked at the submissions from both the Applicant and the Council, together with the information itself, the Commissioner is satisfied that the information in question was publicly accessible and that it was not unreasonable to expect the Applicants or members of the public to locate it using the details provided by the Council in its responses. He appreciates the Applicant would not necessarily know his way around the Council's website, but the Council gave exact web links so a single mouse click would take the Applicant to the area of the website which held the material in question.
23. In the circumstances, the information in question was – as a matter of fact – publicly available and easily accessible to the Applicant (who was given the means to access it readily). It is not clear why there should be any reason to doubt that the versions identified by the Council as the current versions were in fact the current versions.
24. Consequently, the Commissioner is satisfied that the Council was entitled to apply regulation 6(1)(b) of the EIRs to parts 1 to 3 of the Applicant's request.

Whether more information is held?

25. The Applicant submitted that the Council did not disclose all the information capable of addressing fully parts 4 and 5 of his request. He contended that the Council should hold more information capable of disclosure.
26. In his application, the Applicant submitted that the Council should have more detailed records of its inspections. He also referred to reports of defects he understood to have been made by the Head Teacher of the primary school (in which context his requirement for review had referred to faded road markings outside the school).
27. During the investigation, the Council was asked to explain the steps it took to establish what relevant information it held and which fell within the terms of the Applicant's request and to supply supporting evidence.
28. The Council explained that details of all reports of roads defects and records of inspections of roads were recorded on its Roads Maintenance System (RMS). It confirmed that this was the only system used by the Council's Traffic team and the Roads Maintenance Partnership to record reports of this nature.
29. A search was conducted of the RMS at both the response and review stages, the Council submitted, and the information extracted was disclosed to the Applicant. The Council identified the search parameters used, including the terms and the date range.
30. The investigating officer also asked the Council to comment on the Applicant's submission relating to reports by the Head Teacher.
31. The Council confirmed the former Head Teacher had searched their current email folders but found nothing relevant: anything relevant would have been saved in the school's email folders. The (current) Acting Head Teacher had searched their own emails (inbox and sent items included), as well as other folders of saved emails and documents at the school. An

email from Cycling Scotland on the subject of road markings (copied to the Head Teacher) was located. There had been other communications about parking enforcement, but not about the state of the markings: it was understood that the Acting Head Teacher had enquired about the state of the road markings and been informed that this would not be addressed over the winter, but no record of this exchange was identified.

32. The Council also asked other Roads staff for the area to check their records in case anything further was held: nothing was identified.
33. The Council concluded that the phrasing of the request “led the Council down a particular route to identify relevant information, particularly references to defect categorisation etc.” As a result, it explained, it only searched for information recorded in the RMS as a road-related defect. Exchanges relating to the road markings (which were regarded as matters for planned maintenance rather than defects) would not be captured by such searches.
34. Having considered all relevant submissions, including the evidence of searches, the Commissioner acknowledges that the searches carried out on the RMS and at the school were relevant to the subject matter of the request. It is not yet clear, however, whether searches have been carried out which would be capable of identifying any communications held by the Council relating to perceived inadequacies in the road markings. Given the full terms of the email containing the Applicant’s request, it is clear that the Applicant considered these to be defects for the purposes of his requests, whatever any technical classification system applied by the Council might have said.
35. It is important that public authorities read all requests carefully: an applicant’s assumptions as to the way in which information should be described will not necessarily conform to its own. In this case, the Commissioner is not satisfied that the Council did this. As a result, it failed to identify the full scope of the request and thus failed to deal with it in accordance with regulation 5(1) of the EIRs.
36. It is also unclear whether the email from Cycling Scotland has been disclosed to the Applicant. In the Commissioner’s view, it falls within the scope of the request and no reason has been offered for it being withheld: it should therefore be disclosed. Reasonable, proportionate searches should also be carried out to determine whether the Council holds any further information relating to the road markings and otherwise falling within the scope of the request: the Applicant should be informed of the outcome of these in a supplementary review outcome, so ensuring that the request is addressed in full.

Decision

The Commissioner finds that Perth and Kinross Council (the Council) failed to comply with the Environmental Information (Scotland) Regulations 2004 (the EIRs), in particular regulation 5(1), in responding to the information request made by the Applicant. Firstly, the Council failed to identify the information as environmental information in terms of regulation 2(1) of the EIRs, and so failed to deal with the request under the EIRs. Secondly, it failed to identify the full scope of the request.

As a result the Commissioner requires the Council to carry out further searches, focusing in particular on reports of defects in the road markings in the area in question, and to provide the Applicant with a further review outcome with the results of these searches, and disclosing Cycling Scotland's email, by 28 October 2019.

The Commissioner is satisfied, however, that the Council was entitled to apply regulation 6(1)(b) of the EIRs to parts 1 to 3 of the Applicant's request.

Appeal

Should either the Applicant 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

12 September 2019

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.

...

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 –

(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.

...

6 Form and format of information

(1) Where an applicant requests that environmental information be made available in a particular form or format, a Scottish public authority shall comply with that request unless-

...

- (b) the information is already publicly available and easily accessible to the applicant in another form or format.
- (2) Where a Scottish public authority relies on a provision of paragraph (1) not to make the information available in the form or format requested it shall-
 - (a) give its reasons for that decision as soon as possible and in any event no later than 20 working days after the date of receipt of the request for the information;
 - (b) give its reasons in writing if the applicant so requests;

...

Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews, Fife
KY16 9DS

t 01334 464610

f 01334 464611

enquiries@itspublicknowledge.info

www.itspublicknowledge.info