

Decision Notice

Decision 081/2019: Mr P and Argyll and Bute Council

Information relating to a specific road

Reference No: 201801881

Decision Date: 21 May 2019



Scottish Information
Commissioner

Summary

The Council was asked for information on the road known as “the Briars” for specified dates.

The Commissioner investigated and found that the Council had carried out appropriate searches and did not hold any other relevant information.

Relevant statutory provisions

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (definitions (a) and (c) of environmental information) (Interpretation); 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. On 9 August 2018, Mr P made a request for information to Argyll and Bute Council (the Council). The information requested was all information on the road known as “the Briars” dating back to 29 May 2017. Mr P made a number of stipulations as to what sorts of information he expected, including:
 - (i) a statement of work “in the expectation of how long your repairs last”, what guarantees were attached to work and inspection/sign off of the person(s) who quality checked the repair; and
 - (ii) a statement of what constituted high usage (referring to a hole filled in “then to completely disappear in less than 64 days”).He also stipulated that the information provided should “include light use and heavy use (main road) or side road as in this case. As this side road leads to @ 12 houses and then having say 70% of cars passing over the repair a day, how long before you return to replace that repair?”
2. The Council responded on 7 September 2018 under the Freedom of Information (Scotland) Act 2002 (FOISA), disclosing some information. As not all of the information was being provided within the required timescales, advice was given on how to seek a review.
3. On 7 and 9 September 2018, Mr P wrote to the Council requesting a review of its partial late response. He was not satisfied that he had received a complete response to his request.
4. The Council notified Mr P of the outcome of its review on 9 October 2018, apologising for the delays in responding. The Council acknowledged the information sought was environmental and proceeded under the EIRs. Some further information was disclosed, but the Council cited regulation 10(4)(a) of the EIRs on the basis it did not hold information for parts of the request.

5. On 9 October 2019, Mr P replied to the reviewer, noting that he remained dissatisfied with the Council's response. Following this communication, the Council provided further information.
6. On 1 November 2018, Mr P 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. Mr P stated he was dissatisfied with the outcome of the Council's review which he said did not appear to be for the correct location. He also queried inconsistencies which to him suggested incomplete, and inaccurate, information had been disclosed.

Investigation

7. 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.
8. On 6 December 2018, the Council was notified in writing that Mr P had made a valid application and 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 on the extent and quality of the searches, taking account of Mr P's comments about the location.

Commissioner's analysis and findings

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

Application of the EIRs

11. It is clear that any information falling within the scope of this request would be environmental as defined in regulation 2(1) of the EIRs. Any information falling within the scope of the request would relate to the condition of the roads (i.e. land), which are exposed to the elements, and to measures taken to address that condition. As such, the Commissioner is satisfied that it would fall within paragraphs (a) and/or (c) of the definition in regulation 2(1) of the EIRs (the text of each paragraph is reproduced in Appendix 1). In any event, Mr P has not expressed dissatisfaction with the Council's handling of this request under the EIRs and the Commissioner will consider that handling in what follows solely in terms of the EIRs.

Has all relevant information been identified, located and provided?

12. The Commissioner's remit is to investigate and reach a determination on recorded information, if held by a Scottish public authority. He cannot comment on what a public authority ought to hold, but he can consider whether the Council took adequate, proportionate steps to establish what information, if any, it held falling within the scope of Mr P's request. He cannot comment on the accuracy of any information held.
13. The standard of proof in considering whether a Scottish public authority holds information is the civil standard of the balance of probabilities. In determining this, the Commissioner will

consider the scope, quality, thoroughness and results of the searches carried out by the public authority. He will also consider, where appropriate, any reason offered by the public authority to explain why the information is not held.

14. In his application, Mr P submitted that the responses to date were incomplete. He also identified inconsistencies in the information provided by the Council, noting that the inspection report appeared to predate his accident and related to a different location.
15. The Council disclosed information to Mr P, but also informed him (in its review outcome) that no further information was held and that it considered regulation 10(4)(a) of the EIRs was engaged for this reason. A small amount of additional information was, however, disclosed after this.
16. Regulation 10(4)(a) of the EIRs states that a Scottish public authority may refuse to make environmental information available to the extent that it does not hold the information when the applicant's request is received. This exception is subject to the public interest test in regulation 10(1)(b) of the EIRs, so can only apply if, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in making the information available (although, logically, it is highly unlikely that there will ever be a public interest in disclosing information which is not, in fact, held).

Searches

17. The Council submitted that it had identified and located all information held showing defects identified during the period 1 January 2017 to 3 April 2019 on the inspection route including the location specified by Mr P. It submitted that none of the defects identified were at the location identified by Mr P.
18. The Council provided Mr Gowling with a copy of the incident report form, completed by the Roads Inspector following his public liability insurance claim. It also issued a Route Summary from its "WDM" case management system, covering the period 29 May 2017 to 29 May 2018. The Route Summary showed all the inspections carried out on the relevant route (including the location in question) during that period.
19. The Route Summary document also showed any defects noted and repaired as a result of those inspections. The Council confirmed that the parameters for this report were, in effect, the route number and the dates, known within the Council as a "fixed" report.
20. During this investigation, the Council conducted further checks, with a view to generating a further report covering complaints or reports from external parties. This was furnished to the Commissioner on 10 April 2019 and included the information previously searched (i.e. the Route Summary described above) along with details of the complaints/reports from the public, inspection dates, repairs and completion dates for these. This was a report run on the same case management system, but on wider parameters and covering a longer time period.

Conclusions

21. As indicated above, the Commissioner's remit here extends only to the consideration of whether the Council actually held the information requested and whether it complied with the EIRs in responding to Mr P's request. The Commissioner cannot comment on what should have been recorded in any of its systems or how accurate any of the records held records might be.

22. The Commissioner accepts that the Council took adequate and proportionate steps to establish what information it held and which was capable of addressing Mr P's request. He is satisfied that the location parameters used reflected how data was recorded by the Council and cannot comment on the absence of defects identified for the specific location referred to by Mr P. He is satisfied that the Council would not hold information falling within the remaining descriptions identified by Mr P: he would emphasise that, under the EIRs, authorities are not required to create information (if it does not already exist) in order to respond to requests.
23. In all the circumstances, the Commissioner accepts that the Council does not, and did not at the time it received Mr P's request, hold any information in addition to that now disclosed which was capable of addressing his request. The Commissioner accepts that regulation 10(4)(a) applies to Mr P's request, to the extent that it has not been responded to already.
24. In this case, the Commissioner is satisfied that the information in question is not held by the Council, and was not held at the time it received Mr P's request. Consequently, he does not consider there to be any conceivable public interest requiring that the information be made available. Given this conclusion, he is satisfied that the Council was entitled to refuse Mr P's request under regulation 10(4)(a).

Decision

The Commissioner finds that, in respect of the matters specified in the application, Argyll and Bute Council complied with the Environmental Information (Scotland) Regulations 2004 in responding to the information request made by Mr P.

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

21 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.

...

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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