

Decision Notice 021/2020

Remedial notices

Applicant: The Applicant

Public authority: Transport Scotland

Case Ref: 201901176



Scottish Information
Commissioner

Summary

Transport Scotland was asked for information (in three parts) relating to remedial notices issued to Scotrail since December 2018.

Transport Scotland addressed the first two parts of the request, but failed to answer the third part when initially responding to the request and failed to identify all of the relevant information at review. During the investigation, Transport Scotland located and disclosed further information.

The Commissioner found that Transport Scotland had failed to comply with section 1(1) of FOISA as it did not provide all the information it held until after his investigation had begun. However, the Commissioner was satisfied that, by the end of the investigation, Transport Scotland had carried out appropriate searches and had disclosed all the relevant information it held.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1 (1) and (4) (General entitlement)

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 6 March 2019, the Applicant made a request for information to Transport Scotland. The information requested was:
 - A copy of the remedial action plan agreed by Scotrail and Transport Scotland in relation to the remedial notice issued on 24 December 2018
 - Copies of any recorded information relating to the monitoring process agreed with Scotrail to assess its performance in relation to the remedial plan action plan
 - Copies of all correspondence between Scotrail and Transport Scotland relating to both remedial notices issued by Transport Scotland to Scotrail since December 2018.
2. Transport Scotland responded on 2 April 2019. Transport Scotland provided information for the first two parts of the request but not the third.
3. On 10 April 2019, the Applicant wrote to Transport Scotland, requesting a review of its decision on the basis that she had received no information falling within the third part of her request.
4. Transport Scotland notified the Applicant of the outcome of its review on 10 May 2019. The review identified information which should have been provided to the Applicant. Three documents were disclosed to the Applicant in response to the third part of her request, with links to attachments available online (for which Transport Scotland claimed section 25(1) of FOISA (Information otherwise accessible)). It apologised for not responding to this part earlier. Transport Scotland redacted small amounts of information that it said were personal details of third parties and therefore engaged section 38(1)(b) of FOISA (Personal information).

5. On 9 July 2019, the Applicant wrote to the Commissioner. She applied to the Commissioner for a decision in terms of section 47(1) of FOISA. The Applicant stated she was dissatisfied with the outcome of Transport Scotland's review because she considered Transport Scotland held further correspondence relating to the remedial notice (as she understood there was considerable communication between the Transport Scotland and Scotrail on the content of this notice).

Investigation

6. 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.
7. Transport Scotland is an agency of the Scottish Ministers (the Ministers). On 3 May 2019, in line with agreed procedures, the Ministers were notified in writing that the Applicant had made a valid application to the Commissioner. The case was allocated to an investigating officer.
8. Subsequent references to contact with or submissions from Transport Scotland are references to contact with or submissions made by the Ministers on behalf of Transport Scotland.
9. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. Transport Scotland was invited to comment on this application and to answer specific questions. These related to the steps taken by Transport Scotland to determine the information it held falling within the scope of the request. In response, Transport Scotland provided submissions.

Commissioner's analysis and findings

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

Information held by Transport Scotland

11. Section 1(1) of FOISA provides that a person who requests information from a Scottish public authority which holds it is entitled to be given that information by the authority. This is subject to qualifications which, by virtue of section 1(6) of FOISA, allow Scottish public authorities to withhold information or charge a fee for it. These qualifications do not apply in this case.
12. The information to be given is that held by the authority at the time the request is received, as defined in section 1(4). This is not necessarily to be equated with information an applicant believes an authority should hold. If no relevant information is held by the authority, section 17(1) of FOISA requires the authority to give the applicant notice to that effect.
13. The Commissioner's remit is to investigate and reach a determination on information held by a Scottish public authority. He cannot comment on what information Transport Scotland ought to hold, but he can consider whether Transport Scotland took adequate, proportionate steps to identify and locate information in response to the Applicant's request.

14. 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 and investigations carried out by the public authority.
15. The Applicant stated in her application to the Commissioner that she considered Transport Scotland must hold considerable communication between Scotrail and itself on the contents of the remedial notices.
16. In order to ascertain whether all relevant information had been identified, Transport Scotland was asked to explain the extent of any searches, and why these would have been likely to locate any information held that was covered by the request.
17. Transport Scotland explained that only a small group of staff would potentially have been involved with the remedial notices.
18. Transport Scotland provided evidence of the searches it had carried out of its records management system (during the investigation). It also provided correspondence from individuals who had been identified as being involved with the remedial notices. These individuals had been asked to check their Outlook mailboxes and individual records to identify any relevant information held.
19. During this exercise, further information falling within the scope of the request was located by Transport Scotland and disclosed to the Applicant (with some redaction of personal data).
20. Given the evidence provided of the searches carried out by Transport Scotland, the Commissioner is satisfied that all of the information falling within the scope of the Applicant's request had, by the end of the investigation, been identified and disclosed to the Applicant (with some redaction of personal data, which the applicant has not challenged).
21. The Commissioner is concerned, however, that this did not happen at the time of the Applicant's initial request or the Council's review. In this respect, the Council breached section 1(1) of FOISA.
22. Transport Scotland acknowledged that it did not address the third part of the Applicant's request at the initial request stage. It has apologised to the Applicant for the delay in finding and providing all of the information she requested. Given that Transport Scotland has now identified and disclosed all of the information held and falling within the scope of the request, the Commissioner does not require Transport Scotland to take any action in respect of this failure, in response to the Applicant's application.

Decision

The Commissioner finds that Transport Scotland partially complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by the Applicant.

The Commissioner finds that by responding to the first two parts of the Applicant's request, Transport Scotland complied with Part 1.

However, by failing to respond to the third part of the Applicant's request at all initially, and by failing to identify all of the relevant information when carrying out a review, Transport Scotland failed to comply with section 1(1) of FOISA.

Given that Transport Scotland has now identified and disclosed all of the information held and falling within the scope of the request, the Commissioner does not require Transport Scotland to take any action in respect of this failure, in response to the Applicant's application.

Appeal

Should either the Applicant or Transport Scotland 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

4 February 2020

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.

...

(4) The information to be given by the authority is that held by it at the time the request is received, except that, subject to subsection (5), any amendment or deletion which would have been made, regardless of the receipt of the request, between that time and the time it gives the information may be made before the information is given.

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