



Decision Notice 068/2023

Speed control measures on A75

Applicants:

Authority: Transport Scotland

Case Ref: 202101498

Summary

The Applicants asked the Authority for information relating to speed control measures in place on the A75 at Springholm and Crocketford. The Authority responded to the request partly as general correspondence and partly in line with the EIRs. The Authority made some information available by way of explanation and on review informed the Applicants that they did not hold information falling within scope of part of their request. The Commissioner found that the Authority had partially complied with the EIRs in responding to the request.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) section 47(1) and (2) (Application for decision by Commissioner)

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (definition of “the Act”, “applicant” and “the Commissioner” and paragraphs (a), (c) and (f) of the definition of “environmental information”) (Interpretation); 5(1) and (2)(b) (Duty to make environmental information available on request); 10(1) and (4)(a) (Exceptions from duty to make environmental information available); 17(1), (2)(a), (b) and (f) (Enforcement and appeal provisions)

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 24 September 2021, the Applicants made a request for information to the Authority. They asked for various pieces of information relating to speed control measures on the A75 at Springholm and Crocketford. Only part of the information request made by the Applicants is the subject of this appeal and that read as follows:

At the last public meeting of Springholm residents held on 26 March 2019, [...] stated that by the end of summer 2019 it was Transport Scotland's intention to seek approval of the reverse discrimination speed control traffic lights being trialled here for inclusion within the Traffic Signs Regulations and General Directions legislation with a view to identical enforcement status for red light disobedience as other traffic signals therein designated already have. We wish to know what progress, if any, has been made in this regard in the intervening 2 years and the anticipated timescales for such approval or indeed the present likelihood of obtaining such approval as these unenforceable red halt signals mean nothing to vast numbers of defiant speeding drivers. We also request disclosure of any written communication which refers, suggest or requests a reduction in red trigger activation frequency here as a prerequisite to obtaining such approval. Have you received any such communication?

2. The Authority responded on 22 October 2021. In doing so, it responded to part of the Applicants' request in line with the EIRs, explaining that it had not received any communication regarding a reduction in red trigger activation frequency. As such, it was relying on the exception in regulation 10(4)(a) for this information.
3. The Authority responded to the remaining part of the Applicants' request as general correspondence. It provided an explanation of the process to be followed where a change is being considered to The Traffic Signs Regulations and General Directions 2016. The Authority asserted that this would be required were the traffic signals covered by the Applicants' request to be included.
4. On 28 October 2021, the Applicants wrote to the Authority requesting a review of its decision. The Applicants stated that they were dissatisfied with the decision because the formal response appeared to omit statutory responses to some of the questions asked, and they did not want any non-statutory response to formal information requests.
5. The Applicants also commented that they would prefer a simple legally-based refusal, so they might take a view on the legal merits of the justification for such a refusal. The Applicants were also of the view that all parts of an initial response to a formal request should be made on the same formal public record, so that should any road safety incident occur in Springholm, safety deficit concerns would be laid bare and complete for any researcher of their road safety campaign FOI archives, in the public domain.
6. The Applicants highlighted those parts of their request for which they had not received a response, one of which was:

We wish to know what progress, if any, has been made in this regard in the intervening 2 years and the anticipated timescales for such approval or indeed the present likelihood of obtaining such approval as these unenforceable halt signals mean nothing to vast numbers of defiant speeding drivers.

7. The Authority notified the Applicants of the outcome of its review on 29 November 2021. In response to both parts of the request, the Authority relied on the exception in regulation 10(4)(a) of the EIRs and indicated that it did not hold information which would fulfil this part of the request. Having considered the application of the public interest test in regulation 10(1) of the EIRs, the Authority concluded that, on balance, the public interest lay in upholding the exception as it could not provide information it did not hold. The Authority provided an explanation of the timescale in which evaluation of a road safety scheme, of the type covered by the request, is carried out, along with how the findings from that evaluation would inform policy development.
8. On 3 December 2021, the Applicants wrote to the Commissioner, applying 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 Applicants stated they were dissatisfied with the outcome of the Authority's review because they considered it unsatisfactory for the Authority to inform them that an exception applied to the information covered by part of their request (as set out in italics in paragraph 6). The Applicants also disputed the Authority's contention that the balance of the public interest lay in maintaining the use of the exception.

Investigation

9. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
10. On 17 January 2022, the Authority was notified in writing that the Applicants had made a valid application. The case was subsequently allocated to an investigating officer.
11. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Authority was invited to comment on this application and to answer specific questions. These related to the nature of the searches carried out by the Authority to establish that it held no recorded information which would fulfil part of the Applicants request. Comments and submissions were also sought in response to the Applicants' view that relevant information should have been held.
12. Further submissions were requested and received from the Authority during the investigation.
13. During the investigation, the Authority advised that it was not relying on any exception in the EIRs for information which would fulfil the part of the Applicants' request set out in italics in paragraph 6. As indicated above (paragraph 3), this was responded to by the Authority in general correspondence: this appears to be a full response to the part in question, although the Authority did not make it clear to the Applicants that it was responding to that part. In the circumstances, the Commissioner must conclude that the Authority failed to comply with regulation 5(1) the EIRs in relying on the exception in regulation 10(4)(a) in response to the Applicants' requirement for review (whether it identified and disclosed all relevant information held is considered further below).

Commissioner's analysis and findings

14. The Commissioner has considered all of the submissions made to him by the Applicants and the Authority.

Handling of request

15. In its submissions, the Authority explained that it had not processed the information request from the Applicants entirely under the EIRs. It had, instead, separated the request into two responses, with part of the request being answered under the EIRs and the remainder responded to as general correspondence.
16. The Authority acknowledged that it should have responded to all parts of the request under the EIRs and apologised for this oversight. The Authority also stated that it had considered the learning points identified in this case.
17. As a consequence of the Authority's failure to respond to all parts of the Applicants' request, including that part covered by this appeal, under the EIRs, the Commissioner finds that it failed to comply with regulation 5(1) of the EIRs.

Handling in terms of the EIRs

18. The Authority processed and responded to part of the Applicants' request and all of their requirement for review in accordance with the EIRs.
19. As mentioned above, some parts of the Applicants' request were responded to as general correspondence.
20. Where information falls within the scope of the definition of "environmental information" in regulation 2(1) of the EIRs, a person has a right to access it (and the public authority a corresponding obligation to respond) under the EIRs, subject to various restrictions and exceptions contained in the EIRs.
21. The Applicants have not challenged the Authority's decision to deal with the information as environmental information. The Commissioner is satisfied that the information does comprise environmental information (see in particular paragraphs (a), (c) and (f) of the definition in regulation 2(1) of the EIRs) and will consider the handling of the request in what follows solely in terms of the EIRs.

Regulation 5(1) – Duty to make environmental information available

22. Regulation 5(1) of the EIRs requires a Scottish public authority which holds environmental information to make it available when requested to do so by an applicant. The obligation relates to information that is held by the authority when it receives a request.
23. On receipt of a request for environmental information, therefore, an authority must ascertain what information it holds falling within scope of the request. Having done so, regulation 5(1) requires the authority to provide that information to the requester, unless a qualification in regulations 6 to 12 applies (regulation 5(2)(b)).
24. In response to the Applicants' requirement for review, the Authority relied on the exception in regulation 10(4)(a) of the EIRs. However, as mentioned earlier, during the investigation, the Authority commented that it was not relying on any exception for information covered by part of the request, on the basis that it had disclosed all relevant, recorded information held.
25. It is clear from the Applicants' application and submissions that they do not agree that the Authority has provided them with all of the recorded information they hold which falls within scope of their request.

26. In part of their request, the Applicants asked:
- We wish to know what progress, if any, has been made in this regard in the intervening 2 years and the anticipated timescales for such approval or indeed the present likelihood of obtaining such approval.*
27. In order to ascertain whether all relevant information had been identified, the Authority was asked to explain the steps it took to establish what information it held that fell within the terms of that part of the Applicants' request. It was also asked to provide further submissions around the explanation given to the Applicants' in the Authority's response to their request and requirement for review.
28. The Applicants provided contextual information relating to the historic and current road safety issues of concern to them regarding the speed at which motorists travel along the A75 through Springholm and Crocketford. This included the trial use of the reverse discrimination speed control traffic lights currently in place.
29. From their submissions, it is evident the Applicants considered that, as a consequence of an undertaking given in 2019, the Authority should have been further on in respect of formally approving the use of the reverse discrimination speed control traffic lights for inclusion in the Traffic Signs Regulations and General Directions legislation at the time they submitted their request - and therefore, recorded information should be held documenting this.
30. The Applicants also expressed concern around the Authority's assertion that it held no information on matters which, in their view, must be central to its function/responsibilities.
31. The Authority considered that the explanation given to the Applicants within the general correspondence (dated 22 October 2022) provided an update and timescale in response to the first part of the request. This was, the Authority submitted, the extent of the information it held which would fall within scope of that part of the Applicants' request. As a consequence, the Authority stated that it was not relying on the exception in regulation 10(4)(a) of the EIRs for this information.
32. In further submissions, the Authority commented that, at the time it received the Applicants' request, it did not hold any recorded information about what had been done, or what was intended to be done, in relation to the full evaluation of the performance of the reverse speed discrimination signals referred to in its response of 22 October 2021. Furthermore, at the time of the request, the Authority was in the process of monitoring the reverse discrimination signals and collecting data.
33. The Authority explained that the gathering of data to analyse trends and evaluate the performance of road safety or road management measures is normally carried out over a minimum of a three-year period. This is considered best practice within the road safety profession and undertaken both prior to, and after, installation of a scheme.
34. In justification of this submission, the Authority signposted the Commissioner to the relevant part of the Scottish Trunk Road Network Management Contract. This sets out the requirements on how the trunk road network should be managed and maintained by the Operating Companies working on behalf of the Scottish Ministers.
35. The Authority also referred the Commissioner to guidance produced by the Royal Society for the Prevention of Accidents (RoSPA), which recommends that a "before and after" analysis is undertaken for a three-year period before and after implementation of the scheme.

36. The Authority explained that section 64 of the Road Traffic Regulation Act 1984 (read in conjunction with section 134(7) and (8) of the Act) details the requirement for the Scottish Ministers to undertake a consultation with relevant individuals and organisations prior to making regulations which would amend the Traffic Signals Regulations and General Directions 2016 to make these particular signals enforceable.
37. The Authority recognised that the Road Traffic Regulation Act 1984 is not prescriptive in respect of the ways in which consultation must be conducted, and there is no specific requirement for them to undertake an evaluation of evidence or to develop their policy. Nonetheless, the Authority submitted that the Ministers' duty to consult relevant individuals and organisations must be executed in a meaningful way that stands up to scrutiny.
38. As a consequence, it was the Authority's submission that the Ministers require to be able to provide those individuals and organisations with information based on evidence, enabling them to provide informed and meaningful consultation responses. The Authority also asserted that the development of a policy document, showing how it would intend to use this speed management measure elsewhere on the trunk road network, would also support informed and meaningful consultation responses.
39. The standard of proof to determine whether a public authority holds information is the civil standard of the balance of probabilities. In determining where the balance of probabilities lies, the Commissioner considers the scope, quality and thoroughness and results of searches carried out by the public authority. He also considers, where appropriate, any reason offered by the public authority to explain why it does not hold the information.
40. Having considered the submissions from both the Applicants and the Authority, the Commissioner acknowledges the very significant concerns the Applicants have around the safety of pedestrians and other road users as a consequence of the speed at which motorists travel along the A75 through Springholm and Crocketford. He also recognises the reasonable apprehension of the Applicants that, as a consequence of an undertaking given by a representative of the Authority in 2019, the Authority might hold recorded information detailing progress made in respect of the inclusion of the reverse discrimination speed control traffic lights in the Traffic Signs Regulations and General Directions legislation.
41. In its response to the Applicants' requirement for review, the Authority explained that evaluation of performance of a road safety scheme or highway improvement scheme, such as that covered by the subject matter of the request, is usually carried out after a minimum of three years of a scheme being installed. As the final change to the technology was undertaken in the summer of 2018, the Authority notified the Applicants that it was now in the process of commencing the full evaluation. The findings from this evaluation would, the Authority informed the Applicants, also inform the development of the policy on the use of these signals.
42. The Commissioner is aware that the reverse discrimination speed control traffic lights which are the subject of the request in this case were first introduced in the summer of 2018. As a consequence, based on the submissions and explanations from the Authority around the timescale over which the performance and efficiency of these signals should be measured, together with the requirements set down in relevant legislation around the duty to consult, the Commissioner accepts that it would be highly unlikely that the Authority would hold any additional recorded information to that already disclosed in the Authority's response to the Applicants' requirement for review.

43. In the circumstances, the Commissioner is satisfied, on the balance of probabilities, that the explanation provided to the Applicants in response to their requirement for review was all the relevant, recorded information held by the Authority and falling within scope of their request. Therefore, the Commissioner finds that the Authority complied with regulation 5(1) of the EIRs in responding to this part of the Applicants' request.

Decision

The Commissioner finds that the Authority partially complied with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by the Applicants'.

The Commissioner finds that, by making available the information it held which would fulfil part of the Applicants' request, the Authority complied with the EIRs.

However, by responding to part of the request as general correspondence, the Authority failed to comply with regulation 5(1) of the EIRs. The Commissioner also finds that by relying on the exception in regulation 10(4)(a) of the EIRs for certain information in response to the Applicants' requirement for review (which it subsequently withdrew), the Authority failed to comply with regulation 5(1) of the EIRs.

Given that the Commissioner is satisfied that the Authority made available to the Applicants all relevant, recorded information it held falling within scope of the request, the Commissioner does not require the Authority to take any action in respect of this failure, in response to the Applicants' application.

Appeal

Should either the Applicants or the Authority 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 July 2023

Appendix 1: Relevant statutory provisions

Freedom of Information (Scotland) Act 2002

47 Application for decision by Commissioner

- (1) A person who is dissatisfied with -
 - (a) a notice under section 21(5) or (9); or
 - (b) the failure of a Scottish public authority to which a requirement for review was made to give such a notice.

may make application to the Commissioner for a decision whether, in any respect specified in that application, the request for information to which the requirement relates has been dealt with in accordance with Part 1 of this Act.

- (2) An application under subsection (1) must -
 - (a) be in writing or in another form which, by reason of its having some permanency, is capable of being used for subsequent reference (as, for example, a recording made on audio or video tape);
 - (b) state the name of the applicant and an address for correspondence; and
 - (c) specify –
 - (i) the request for information to which the requirement for review relates;
 - (ii) the matter which was specified under sub-paragraph (ii) of section 20(3)(c); and
 - (iii) the matter which gives rise to the dissatisfaction mentioned in subsection (1).

...

The Environmental Information (Scotland) Regulations 2004

2 Interpretation

- (1) In these Regulations –

“the Act” means the Freedom of Information (Scotland) Act 2002;

“applicant” means any person who requests that environmental information be made available;

“the Commissioner” means the Scottish Information Commissioner constituted by section 42 of the Act;

...

“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.

...

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.

...

- (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.

...

17 Enforcement and appeal provisions

- (1) The provisions of Part 4 of the Act (Enforcement) including schedule 3 (powers of entry and inspection), shall apply for the purposes of these Regulations as they apply for the purposes of the Act but with the modifications specified in paragraph (2).
- (2) In the application of any provision of the Act by paragraph (1) any reference to -
 - (a) the Act is deemed to be a reference to these Regulations;
 - (b) the requirements of Part 1 of the Act is deemed to be a reference to the requirements of these Regulations;
 - ...
 - (f) a notice under section 21(5) or (9) (review by a Scottish public authority) of the Act is deemed to be a reference to a notice under regulation 16(4); and
 - ...