

Decision Notice 161/2021

Road defect repairs

Applicant: The Applicant

Public authority: Fife Council

Case Ref: 202100548



Scottish Information
Commissioner

Summary

The Council was asked about repairs made to specific road defects. The Council informed the Applicant that it did not hold any information falling within scope of the request.

Following an investigation, the Commissioner found the Council did hold information constituting a full response to part 3(b) of his request. It was therefore not entitled to inform the Applicant that no information was held.

Relevant statutory provisions

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (paragraphs (a), (b) and (c) of definition of “environmental information”) (Interpretation); 5(1) and 2(b) (Duty to make environmental information available 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 5 February 2021, the Applicant made a three-part request for information to Fife Council (the Council), only part 3(b) of which is the subject of this Decision Notice. The information requested in part 3(b) related to recorded road defects and the Applicant asked:
It is noted that only one fault has a date recorded in the “DATE COMPLETED” section. Please provide me with the repair dates for the other faults.
2. The Council processed the request in line with the EIRs and responded on 26 February 2021. In its response, the Council relied on regulation 10(4)(a) of the EIRs, informing the Applicant that it did not hold any information which would fulfil his request. It explained that the information requested in part 3(b) was not recorded and therefore could not be provided.
3. Later that day, the Applicant wrote to the Council, requesting a review of its decision on the basis that he did not accept that the repair dates he asked for at part 3(b) of his request were unavailable.
4. The Council notified the Applicant of the outcome of its review on 29 March 2021. The Council’s review focused on its response to part 3(b) of the Applicant’s request. The Council explained that the service in question had carried out a further search for the information and confirmed that nothing relevant was held. The information did not appear to have been logged on its systems.
5. On 29 April 2021, the Applicant wrote to the Commissioner, applying 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. The Applicant stated he was dissatisfied with the outcome of the Council’s review because he had been provided with information (repair orders) in response to a later request which demonstrated that the Council did hold information covered by part 3(b) of this request.

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. On 17 May 2021, the Council was notified in writing that the Applicant had made a valid application. The case was allocated to an investigating officer.
8. 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 searches and other enquiries undertaken by the Council to determine whether it held any recorded information falling within the scope of part 3(b) of the Applicant's request. The Council was asked to respond to the Applicant's submission that information which would fulfil part 3(b) of his request was indeed held by the Council at the time of his request.
9. The Council was also invited to comment on specific areas of concern expressed by the Applicant in relation to the thoroughness of the review carried out by the Council.

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

Handling in terms of the EIRs

11. Having considered the terms of the request, it is clear that any information falling within scope would be environmental information, as defined in regulation 2(1) of the EIRs. The information in question concerns repairs made to potholes in the road surface. The Commissioner is satisfied that this would fall within paragraphs (a), (b) and (c) of that definition. The Applicant has not challenged the Council's application of the EIRs in this case and so the Commissioner will consider the request in what follows solely in terms of the EIRs.

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

12. 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 any Applicant. This obligation relates to information that is held by the authority when it receives a request.
13. It is important to bear in mind that this obligation relates to information actually held by an authority when it receives the request, as opposed to information which an applicant believes the authority should hold.
14. On receipt of a request for environmental information, therefore, the authority must ascertain what information it holds falling within the scope of the request. Having done so, regulation 5(1) requires the authority to make that information available, unless a qualification in regulations 6 to 12 applies (regulation 5(2)(b)).

Regulation 10(4)(a) – Information not held

15. 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 that information when the request is received.
16. The standard of proof to determine whether a Scottish public authority holds the information is the civil standard on the balance of probabilities. In determining where the balance of probabilities lies, the Commissioner considers the scope, quality, thoroughness and results of the 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. While it may be relevant as part of this exercise to explore the expectations about what information the authority should hold, ultimately the Commissioner's role is to determine what relevant recorded information is (or was, at the time the request was received) actually held by the public authority.
17. In part 3(b) of his request, the Applicant asked for the repair dates for certain faults.

Submissions from the Applicant

18. In his application, the Applicant expressed concern that the requirement for review was not carried out diligently, and commented on various statements made in the Council's response. The Applicant specifically questioned the accuracy of the following comments:

- *I have examined the response to your request for information and I have gone back to the Service concerned to ask them to search their systems fully to ascertain if the information you seek is held.*

The Applicant commented that the systems were to be searched fully, but he was not satisfied that this happened.

- *The Service has advised me that after conducting a further search it does not hold the information.*

The Applicant was not satisfied as to the veracity of this statement, noting that the information was held.

- *The Service believes it is likely that all the road defects were repaired at the same time but cannot provide documentary evidence to confirm this.*

Again, the Applicant was not satisfied as to the veracity of this statement, noting that the information was held.

- *The service previously used a system, Bentley, for recording pothole defects, but this ceased on 21 August 2020 and all information logged or not was archived. Repair dates had to be manually input into the system on receipt of the completed works but due to the changed practises arising out of the Covid-19 pandemic, such as home working and self-isolation of staff, information in relation to your request has not been logged on the system.*

The Applicant submitted that whether details of the completed works were inputted on to this system was irrelevant: the information he sought was available (and held) on the completed orders and this should have been picked up by the review.

Submissions from the Council

19. In its submissions to the Commissioner, the Council acknowledged that the information requested by the Applicant had been found, and disclosed to him, as part of its response to a later request for works order sheets.

20. The Council explained that the appropriate service area complies with The Roads (Scotland) Act 1984 (Environmental Impact Assessment) Regulations 2017, together with its own internal processes, which require works orders to be raised when potholes are identified and a track of the work order completion. For this reason, the Council acknowledged that there was an expectation that the requested information would be held.
21. The Council acknowledged that it transpired that it held the information, albeit misplaced, at the time the Applicant submitted his request and when his requirement for review was being considered. The Council submitted that, due to the working arrangements in place due to the COVID-19 situation and long-term absence, it had been difficult to identify where these records were initially held. It was concluded that they were not held, although they were later located.
22. The Council advised that it previously used a system to record work done, where technicians would be required to complete a paper form following their inspection, which would then be passed back to the office for the details to be inputted manually into the system. Following the procurement of a new system, all work orders could be inputted and accessed electronically by the technicians themselves.
23. The Council provided the Commissioner with a copy of the completed work orders for five of the six pot holes concerned as well as a spreadsheet which detailed (amongst other information) the inspection date, completion date and status of the work required for each pothole. The Council explained that it did not hold a completion date for one of the work orders concerned because this was a duplicate entry. However, it included this, together with the date of completion of the original entry, in the spreadsheet.
24. A copy of this spreadsheet was provided to the Applicant during the investigation. While the Applicant acknowledged receipt of this information and recognised its relevance to this request, he commented that this was the same information that he received in response to a later request.
25. Despite being asked to, the Council did not provide any specific submissions on the nature of the searches undertaken prior to responding to the Applicant's request and requirement for review.

The Commissioner's conclusions

26. Having considered all the relevant submissions and the terms of the request, it is apparent from the Council's submission that the Council's own internal processes, at least, raise a reasonable expectation that information of the kind covered by the Applicant's request would be held by it.
27. In the absence of specific submissions regarding the actual searches undertaken, and in light of the acknowledgement from the Council that relevant recorded information was held by it and later identified, located and provided to the Applicant in response to a separate request, the Commissioner is not satisfied that the Council carried out adequate or proportionate searches to determine what, if any, recorded information it held falling within scope of part 3(b) of the Applicant's request, prior to responding to his request or after he asked for a review. At the very least, the scope of any searches undertaken must be called into question.
28. Had adequate and proportionate searches been undertaken by the Council at the time it received the Applicant's request, it is highly likely that relevant recorded information would have been identified. The Commissioner appreciates that the Covid-19 pandemic has

placed unprecedented demands and restrictions on the ability of authorities and their personnel to be able to work normally and to have access to all of the systems and records ordinarily available to them. He must emphasise, however, that the pandemic does not relieve (and has not done, at any point) any Scottish public authority from the obligation to identify all sources reasonably likely to hold information sought in a given request and to ensure that all of those sources are searched adequately.

29. It appears, from the submissions received from the Council, that more detailed, adequately scoped, searches of information available to, and accessible by, staff would have resulted in identification of the information necessary to fulfil the Applicant's request. For these reasons, the Commissioner finds that the Council was not entitled to rely on the exception in regulation 10(4)(a) of the EIRs in response to part 3(b) of the Applicant's request.
30. As the Commissioner has found the Council was not entitled to rely on the exception in regulation 10(4)(a), he is not required to go on to consider the application of the public interest test.
31. As the Council disclosed all the relevant information it held to the Applicant during the investigation, the Commissioner does not require it to take any action in relation to this breach, in response to this particular application. It is of some concern that the relevance of the work orders to this particular request does not appear to have been identified until during the present investigation, but adequately scoped and executed searches at the outset should have ensured that the orders were in fact identified, located and disclosed in response to this request and not later.
32. The Commissioner notes the Council's stated intention to ensure that more detailed searches will be carried out in future. The Commissioner is considering the extent to which he requires to explore this further with the Council, to ensure that any systemic issues in this area are addressed fully.

Decision

The Commissioner finds that Fife Council (the Council) failed to comply the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by the Applicant. The Council was not entitled to rely on the exception in regulation 10(4)(a) of the EIRs and inform the Applicant that it held no recorded information which would fulfil part 3(b) of his request.

Given that the Council disclosed the recorded information held by it which fulfils part 3(b) of the Applicant's request, the Commissioner does not require the Council to take any action in response to this failure, in response to the application under consideration here.

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

11 October 2021

Appendix 1: Relevant statutory provisions

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;
- (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in paragraph (a);
- (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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