

Decision Notice

Decision 075/2017: Mr Angus Pattison and East Dunbartonshire Council

Bears Way Cycleway Project

Reference No: 201700078

Decision Date: 15 May 2017



Scottish Information
Commissioner

Summary

The Council was asked for information relating to Phases 1 and 2 of the Bears Way Cycleway Project and related matters. The Council disclosed the information it held.

An application was made to the Commissioner, questioning whether the Council held more information. The Commissioner was satisfied that the Council had carried out appropriate searches and disclosed all the information it held.

Relevant statutory provisions

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

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (paragraphs (a) and (c) of definition of "environmental information"); 5(1) (Duty to make available environmental information on request)

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.

All references in this decision to "the Commissioner" are to Margaret Keyse, who has been appointed by the Scottish Parliamentary Corporate Body to discharge the functions of the Commissioner under section 42(8) of FOISA.

Background

1. On 5 August 2016, in respect of the Bears Way Cycleway Project Phase 1 and 2 and Burnbrae Roundabout proposals, Mr Pattison made the following a request for information to the Council:
 - a) *A hard copy of all reports, surveys, analyses, data, counts and advice in respect of actual or forecast usage by motor vehicles, cyclists, pedestrians and public transport users on the A81, Burnbrae Roundabout, B8030 and surrounding road networks.*
 - b) *A hard copy with dates of the actual data / counts for motor vehicles, cyclists, pedestrians and public transport users which form the baseline, prior to the commencement of the Bears Way project, from which all changes to the above counts are being or will be measured, for each of the Bears Way Phases and the Burnbrae Roundabout.*

Mr Pattison asked that he be provided with the information in hard copy format.

2. On 31 August 2016, the Council responded and explained that it could not provide the information in hard copy format as printing the information would make it unusable. It provided Mr Pattison with the information electronically in excel format.
3. On 2 September 2016, Mr Pattison wrote to the Council, requesting a review of its response on the basis that it did not fully satisfy his request. In effect, Mr Pattison did not consider the Council had provided all the information he sought.

4. On 5 October 2016, Mr Pattison wrote to the Commissioner's office, stating he was dissatisfied with the Council's failure to respond to his requirement for review. This resulted in the Commissioner issuing *Decision Notice 273/2016 Mr Angus Pattison and East Dunbartonshire Council*¹.
5. The Council notified Mr Pattison of the outcome of its review on 17 November 2016. In relation to part a) of his request, Mr Pattison was informed that all of the information held had been provided. It again provided the information held. In relation to part b), the Council explained that a cycle and pedestrian count was carried out in December 2011 over a 14 hour period, but this count did not provide robust information that could be used as a baseline. It provided further explanation as to the aim of the project.
6. On 28 November 2016, Mr Pattison wrote to the Council and stated that following review, no hard copies of any reports, surveys, analyses and advice in respect of actual or forecast usage had been provided for vehicles, cyclists, pedestrians and public transport users. He commented that these must exist. In relation to part b), he stated that he did not consider the review adequately addressed his request.
7. On 16 January 2017, Mr Pattison wrote to the Commissioner. Mr Pattison 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 Pattison stated he made application on the basis of his dissatisfaction outlined in his email to the Council of 28 November 2016.

Investigation

8. The application was accepted as valid. The Commissioner confirmed that Mr Pattison made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to her for a decision.
9. On 20 January 2017, the Council was notified in writing that Mr Pattison had made a valid application. The case was allocated to an investigating officer.
10. 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 Mr Pattison's request and answer specific questions in particular to explain the steps it had taken to identify and locate the information requested.
11. The Council responded, providing submissions in support of its position that, other than the information it had provided to Mr Pattison, it did not hold any relevant information. It explained that a modelling exercise had recently been completed for the proposed Bears Way Phase 2: although this was created following Mr Pattison's request, it provided him with this information.
12. Mr Pattison acknowledged receipt of the information provided by the Council, which he commented did not satisfy his request. He provided additional submissions to the Commissioner as to why he believed further information should be held by the Council.

¹ <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2016/201601830.aspx>

Commissioner's analysis and findings

13. In coming to a decision on this matter, the Commissioner considered all the relevant submissions, or parts of submissions, made to her by both Mr Pattison and the Council. She is satisfied that no matter of relevance has been overlooked.

FOISA or EIRs?

14. It is apparent from the terms of the request that at least some of the information caught by it will be environmental information as defined by regulation 2(1) of the EIRs. In *Decision 218/2007 Professor A D Hawkins and Transport Scotland*², the Commissioner confirmed (at paragraph 51) that where environmental information is concerned, there are two separate statutory frameworks for access to that information and, in terms of the legislation, an authority is required to consider the request under both FOISA and EIRs.

Information held by the Council

15. 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, 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. The qualifications contained in section 1(6) are not applicable in this case.
16. 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 the authority should hold, although the applicant's reasons may be relevant to the investigation of what is actually held.
17. 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. While this duty is subject to certain qualifications, none of them appear to be relevant in this case. It is again 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 an applicant believes the authority should hold (but which is not in fact held at that time).
18. The Commissioner has taken account of the submissions provided by Mr Pattison, in which he provides reasons why he considers the Council should hold further information falling within the scope of his request. While Mr Pattison may have genuine reasons for believing that the Council should hold further information, the Commissioner can only consider whether or not the Council identified the information it actually held.
19. The Council provided submissions in response to the questions put by the investigating officer on this matter. The Council explained that all information that it held relating to the Bears Way Cycleway Project was held by the project manager. It described where such information was held and provided explanation as to its records retention schedule, including details of how long information would be retained for. It provided evidence of the outcome of its searches.
20. The Council submitted that the information held had been provided to Mr Pattison in response to his request. It confirmed that no actual or forecast vehicle, cycle, pedestrian or

² <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2007/200600654.aspx>

public transport usage information was available for Phase 2 or Phase 3 at the time of Mr Pattison's request.

21. The Council advised the Commissioner that following Mr Pattison's request, and in considering its submissions to the Commissioner regarding this investigation, a modelling exercise had recently been completed for the proposed Bears Way Phase 2. Although the information was created post Mr Pattison's request, the Council provided Mr Pattison with a copy during the investigation.
22. The Council also wished the Commissioner to note that Council considered Bears Way Phase 2 in September 2016 and made a decision at that time not to proceed with this Phase of the project: therefore, no further modelling work was approved for completion.
23. During the investigation, in an effort to resolve any matters of misunderstanding, Mr Pattison met with the Council on 23 March 2017. Following this meeting, Mr Pattison was still dissatisfied that he had been provided with all of the information that the Council should hold and provided comments, making references to information that had been disclosed, as to why he believed further information should be held.
24. The standard proof to determine whether a Scottish public authority holds information is the civil standard of the balance of probabilities. In determining where the balance lies, the Commissioner considers the scope, quality, thoroughness and results of the searches carried out by the public authority. She 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 expectations as to what information the authority should hold, ultimately the Commissioner's role is to determine what relevant information is actually held by the public authority (or was, at the time it received the request).
25. As stated in many previous decisions, the Commissioner's remit extends only to consideration of whether a Scottish public authority actually holds the requested information and whether it has complied with Part 1 of FOISA or the EIRs in responding to a request. The Commissioner cannot comment on whether a public authority should have taken particular action or, if it has, what records it should maintain in relation to that action.
26. Having considered the Council's submissions, the Commissioner is satisfied that the Council carried out adequate searches, with a view to identifying and locating the information requested by Mr Pattison. She accepts that Mr Pattison was provided with all of the information held by the Council and falling within the scope of his request. Consequently, the Commissioner is satisfied that, in regard to the matters under investigation, the Council complied with section 1(1) of FOISA and regulation 5(1) of the EIRs.

Decision

The Commissioner finds that, in respect of the matters raised in Mr Pattison's application, East Dunbartonshire Council complied with Part 1 of the Freedom of Information (Scotland) Act 2002 and the Environmental Information (Scotland) Regulations 2004, in responding to the information request made by Mr Pattison.

Appeal

Should either Mr Pattison 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
Acting Scottish Information Commissioner

15 May 2017

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.

...

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

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- (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.

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