

Decision Notice



Decision 009/2010 Mr Carson and tie Limited

Delay with the Gogar tram depot, Edinburgh

Reference No: 200901284
Decision Date: 26 January 2010

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Kevin Dunion
Scottish Information Commissioner

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Summary

Mr Carson requested from tie Limited (tie) information relating to potential delay to the construction of the Gogar tram depot. Tie responded by providing Mr Carson with details of the delay and related background information. Following a review, Mr Carson remained dissatisfied and applied to the Commissioner for a decision on the basis that he did not consider the information provided to be accurate.

Following an investigation, the Commissioner found that tie had dealt with Mr Carson's request for information in accordance with the EIRs, by providing Mr Carson with the information which tie held. He did not require tie to take any action.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions) and 39(2) (Health, safety and the environment)

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

The full text of each of the statutory provisions cited above is reproduced in the Appendix to this decision. The Appendix forms part of this decision.

Background

1. On 8 May 2009, Mr Carson wrote to tie with the following information request: "Under the Freedom of Information Act could you please tell me how late the Tram depot at Gogars is." This request was made in the context of Mr Carson's ongoing correspondence with tie regarding the Edinburgh tram project.



2. Tie responded on 9 June 2009. It explained, amongst other things, that the delivery of the depot was dependent on the removal of existing spoil, to enable laying the foundations and other activities associated with the depot building to proceed. Tie said that the current construction programme indicated that the depot could be up to nine months late, but that this did not take account of several planned mitigation activities, nor the rate at which spoil was actually being removed, which was significantly in advance of the anticipated programme. Tie added that a new estimate was being compiled at the moment, taking into account these factors.
3. Tie informed Mr Carson that, with activity running ahead of the programme described, there was potential for a recovery of the depot programme activities of up to six months. Tie explained that it was working with its contractor on a number of initiatives which had an opportunity to deliver savings on the completion date. It noted further that it was working with Transport Scotland on proposals for the construction of a new heavy rail interchange at Gogar which could also impact on the programme, and so this would also be factored into future forecasts.
4. Tie stated that the information provided was a full release of all the information requested.
5. On 29 June 2009, Mr Carson wrote to tie requesting a review of its decision. In particular, Mr Carson stated that it was his view that tie was deliberately misrepresenting the true position with regard to the delays on the Gogar depot. In support of this claim, he referred to the Final Business Case for the tram project, which contained milestones and dates associated with the development of the Gogar depot. He noted that this indicated that the earthworks referred to by tie were listed as beginning in 2007, and the construction work that would follow this work was scheduled to begin in February 2008. Since tie's response of 9 June 2009 stated that the earthworks was in its sixth week at that time, Mr Carson claimed that the information provided regarding the delay was inaccurate.
6. Tie notified Mr Carson of the outcome of its review on 10 July 2009. Tie advised Mr Carson that it considered that the information he used in his calculations of the delay to be incorrect and that it might be out of date. Tie provided details of revised milestone dates which had been set following contract revisions in April and August 2008. It concluded that its initial response to Mr Carson's request was in line with the requirements of FOISA.
7. On 14 July 2009, Mr Carson wrote to the Commissioner, stating that he was dissatisfied with the outcome of tie's review and applying 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 certain specified modifications.
8. The application was validated by establishing that Mr Carson had made a request for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its response to that request.



Investigation

9. On 17 July 2009, tie was notified in writing that an application had been received from Mr Carson. The case was then allocated to an investigating officer.
10. The investigating officer subsequently contacted tie, giving it an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking it to respond to specific questions.
11. In particular, tie was advised by the investigating officer that the Commissioner was of the view that Mr Carson had requested environmental information as defined in regulation 2(1) of the EIRs. Tie were asked to comment on this point. In this context, tie was asked if it wished to rely on section 39(2) of FOISA, which allows Scottish public authorities to exempt information from disclosure under FOISA if it is environmental information which the public authority is obliged to make available to the public in accordance with the EIRs.
12. Tie was also asked to justify its reliance on any provisions of the EIRs it considered applicable to the information requested.
13. Tie responded on 7 September 2009, explaining that it had supplied Mr Carson with all the information it held which fell within the scope of his request. Tie further explained that it had met with Mr Carson and had provided advice and assistance where possible. It further accepted that the information covered by the request fell within the definition of environmental information and advised the investigating officer that it accordingly wished to rely on the exemption contained in section 39(2) of FOISA.
14. Tie's submissions will be considered more fully in the Commissioner's analysis and findings below.

Commissioner's analysis and findings

15. In coming to a decision on this matter, the Commissioner has considered all of the withheld information and the submissions made to him by both Mr Carson and tie and is satisfied that no matter of relevance has been overlooked.

FOISA or EIRs?

16. In *Decision 218/2007 Professor A D Hawkins and Transport Scotland*, the Commissioner considered the relationship between FOISA and the EIRs at some length and set out his understanding of the situation. This makes clear that any request for environmental information must be dealt with under the EIRs.



17. In responding to a request for environmental information under FOISA, an authority may claim the exemption in section 39(2). Doing so removes the need for an authority to further consider the request for information in terms of Part 1 of FOISA.
18. Environmental information is defined in regulation 2(1) of the EIRs, and this definition is reproduced in full in the Appendix to this decision. Where information falls within the scope of this definition, a person has a right to access it under the EIRs, subject to the exceptions contained within regulation 10 and the provisions of regulation 11, and certain other restrictions set out in the EIRs.
19. The Commissioner is satisfied that the information requested by Mr Carson in this case is information on measures – i.e. the development of the Edinburgh tram system, and the Gogar depot as a component of it – that will inevitably have a significant environmental impact. This programme will affect both the state of the elements of the environment, and factors that affect the state of those elements, given the construction work involved, as well as the project's potential for affecting future transport-related carbon dioxide emissions when subsequently in use.
20. The Commissioner is satisfied that any information held would fall within the definition of environmental information contained in the part (c) of the definition set out in of regulation 2(1) of the EIRs.

Section 39(2) of FOISA – exemption for environmental information

21. Given that the Commissioner's view is that the information requested by Mr Carson is environmental information, he has also concluded that the information is exempt in terms of section 39(2) of FOISA.
22. The exemption in section 39(2) is subject to the public interest test in section 2(1)(b) of FOISA. Since there is a separate legislative right of access to environmental information (via the EIRs), the Commissioner also accepts that in this case the public interest in maintaining this exemption and dealing with the requests under the EIRs outweighs any public interest there may be in considering the disclosure of any information under FOISA. In what follows, the Commissioner has therefore made his decision solely in terms of the EIRs.

tie's handling of the request

23. As noted at paragraph 5 above, Mr Carson has presented detailed arguments in support of his view that tie had misrepresented the position to him regarding delay to the Gogar depot. In his application to the Commissioner, Mr Carson expressed the view that it should be a relatively easy exercise to decide on the correct delay period.



24. Before going on, the Commissioner would emphasise that his role in making this decision is to establish whether or not tie has supplied all the information requested by Mr Carson. It would fall outside his remit to comment on the progress of the tram project, or the way in which tie records target dates for completion of the project and measures delays. Nor can the Commissioner comment on the accuracy or the extent of the information or records held by tie. The Commissioner is restricted to investigating whether or not tie dealt with Mr Carson's request in accordance with FOISA and the EIRs.
25. In this decision, the Commissioner is therefore required to consider whether tie has fulfilled its duty under regulation 5(1) of the EIRs, which provide that a public authority which holds environmental information under regulation 2(2) shall make it available when requested to do so by any applicant.
26. In this case, tie has not sought to withhold any information. Having questioned tie about the steps taken to identify relevant information in response to Mr Carson's request, the Commissioner is satisfied that the information provided is all that is held in response to his request.
27. In this case, the matter that has led to Mr Carson's concern appears to be one of interpretation of the information provided. Mr Carson believes that tie should be counting the delay in the development of the Gogar depot from the date specified in the Final Business Case where it was indicated that work would begin in 2007. Tie, on the other hand, has maintained that the dates set out in the Full Business Case were obsolete, and had been replaced by new ones which reflected new assumptions following the procurement of a contractor. The length of delay was calculated on these milestones, rather than those referred to by Mr Carson.
28. While the Commissioner recognises that Mr Carson may believe that the overall delay should be calculated on the basis he suggests, this is not a matter on which he can offer an opinion. Whether or not the delay calculated by tie is appropriately founded, this is the delay as they understand it, and so information is not held upon a delay calculated along the lines suggested by Mr Carson.
29. Having considered the submissions by both parties, the Commissioner is satisfied that the searches undertaken by tie for information falling within Mr Carson's request, and the provision of information to Mr Carson, were sufficient, and that Mr Carson has been provided with the information held. The Commissioner is also satisfied that tie has taken all reasonable steps to establish whether any other relevant information was available. The Commissioner is satisfied overall that tie acted in accordance with its duty under regulation 5(1) of the EIRs.



DECISION

The Commissioner finds that tie Limited complied with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by Mr Carson.

Appeal

Should either Mr Carson or tie wish to appeal against this decision, there is an 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 notice.

Margaret Keyse
Head of Enforcement
26 January 2010



Appendix

Relevant statutory provisions

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.

...

- (6) This section is subject to sections 2, 9, 12 and 14.

2 Effect of exemptions

- (1) To information which is exempt information by virtue of any provision of Part 2, section 1 applies only to the extent that –

...

- (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

...

39 Health, safety and the environment

...

- (2) Information is exempt information if a Scottish public authority-

- (a) is obliged by regulations under section 62 to make it available to the public in accordance with the regulations; or

- (b) would be so obliged but for any exemption contained in the regulations.

...



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.