

Decision Notice



Decision 150/2009 Mr David Robb and Transport Scotland

Estimated cost of the Aberdeen Western Peripheral Route

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www.itspublicknowledge.info

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Summary

Mr David Robb made two information requests to Transport Scotland for information relating to the cost estimate of the Aberdeen Western Peripheral Route (AWPR). Transport Scotland (an agency of the Scottish Ministers) responded by stating that it did not hold the information in the case of the first request and that the information was otherwise accessible in the case of the second request. Following a review, Mr Robb remained dissatisfied and applied to the Commissioner for a decision.

During the investigation, the Commissioner took the view that the information comprised environmental information. The Ministers indicated that should the Commissioner consider the case under the EIRs, they would wish to rely on regulations 6(1)(b) (Form and format of information) in respect of information which is already publicly available, and 10(4)(a) (Information not held) of the EIRs

Following an investigation, the Commissioner found that Transport Scotland had dealt with Mr Robb's request for information in accordance with the EIRs.

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)

Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (Interpretation – definition of “environmental information”); 6(1)(b) (Form and format of information) and 10(1) 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 the Appendix to this decision. The Appendix forms part of this decision.

Decision 218/2007 Professor A D Hawkins and Transport Scotland (the Hawkins Decision), 19 November 2007.

<http://www.itspublicknowledge.info/applicationsanddecisions/Decisions/2007/200600654.asp>



Background

1. The information requested by Mr Robb in this case pertains to the estimated cost of the Aberdeen Western Peripheral Route (the AWPR). The AWPR is a proposed new road developed with the aim of improving travel in and around Aberdeen and the north-east of Scotland. More information on this project can be found on the following website: www.awpr.co.uk.
2. The Scottish Ministers appointed Reporters to conduct the public local inquiry into the AWPR in April 2008. The public local inquiry closed in January 2009, and the Reporters' submitted their findings to the Ministers on 30 June 2009. On 21 December 2009 the Ministers announced that they had decided to allow the AWPR scheme to proceed. However, it should be noted that Mr Robb's request and review were made and considered prior to this decision.
3. On 1 September 2008 Mr Robb wrote to Transport Scotland and asked for "details of the quarterly reports prepared by the consultants/AWPR Managing Agents throughout 2007/08 which would make a total of 6". Subsequent to this, on 9 November 2008, Mr Robb made a further information request to Transport Scotland asking for "what you have in the way of updates on cost estimates" [for the AWPR].
4. Transport Scotland responded to these requests on 25 September 2008 and 18 November 2008 respectively. In relation to the first request, Transport Scotland stated that, having confirmed with the AWPR's Managing Agent and their consultants that no quarterly reports of the type sought by Mr Robb were prepared or provided, the information sought was not held. It also explained that, if the scheme is approved following the public local inquiry, the costings and further arrangements would be addressed as part of the procurement process.
5. In response to the second request, Transport Scotland provided details of the estimated cost of the scheme (£295m-£395m), which it stated had not changed since previous correspondence with Mr Robb, and would be updated as required as part of the procurement process. It also noted that documents available on the AWPR public local inquiry website included an estimate of £347 at Q4 2003 rates.
6. On 13 December 2008, Mr Robb wrote to Transport Scotland requesting a review of both of these decisions. In particular, Mr Robb drew Transport Scotland's attention to the fact that the costing estimate on the AWPR public local inquiry website was based on Q4 2003 rates. He stated that he had been informed by Transport Ministers and Transport Scotland that costs would be reviewed, but he had been informed that no information on how this was arrived at was available.



7. Transport Scotland notified Mr Robb of the outcome of its review of his two requests on 14 January 2009. It stated that the costing based on the 2003 rates was the most recent costing available and that it was its intention to produce an updated costing at the procurement stage should the scheme be approved by the Scottish Government. Transport Scotland explained that the costing was based on Q4 2003 rates to allow the public local inquiry to compare the proposed route for the AWPR with other routes that had been considered earlier in the project's development. It went on to state that any future cost estimates would reflect market conditions current at the time.
8. Transport Scotland's response also reiterated that no formal quarterly reports were prepared throughout 2007/08, and explained that there had instead been regular steering group meetings attended by the Managing Agent, consultants and Transport Scotland. It noted that Mr Robb had previously been provided with a paper which was presented to a particular steering group meeting.
9. On 15 June 2009, Mr Robb wrote to the Commissioner, stating that he was dissatisfied with the outcome of Transport Scotland'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.
10. The application was validated by establishing that Mr Robb 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. The case was then allocated to an investigating officer.

Investigation

11. As noted above, Transport Scotland is an agency of the Ministers and, in line with agreed procedures, the investigating officer subsequently contacted the Ministers, giving them an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA which, in line with regulation 17 of the EIRs, applies for the purposes of the EIRs as it applies for the purposes of FOISA) and asking them to respond to specific questions. In particular, the Ministers were asked to justify their reliance on any provisions of FOISA or the EIRs they considered applicable to the information requested.
12. The Ministers were also asked to confirm whether any revised costings were held other than that estimated at the Q4 2003 rates, and to provide any documentation they may hold which would confirm that a decision had been taken not to produce any further costings until government approval had been granted for the AWPR project.
13. In addition to this the Ministers were asked to advise as to whether or not prior to or subsequent to 2007/2008, any AWPR quarterly reports had been prepared and asked to detail the steps taken to ascertain that no such reports were prepared throughout 2007/08.



14. The Ministers provided their responses to these questions in a letter dated 27 August 2009. They also suggested at this stage that this case could be considered under the terms of the EIRs and indicated that if the Commissioner considered this appropriate, they would wish to rely on the exemption contained in section 39(2) of FOISA (which applies to any information falling within the definition of “environmental information” within the EIRs).
15. They indicated that the exception contained in regulations 6(1)(b) of the EIRs (which applies to information available to the applicant) would apply to the cost estimates in relation to the AWPR. They also stated that the exception in regulation 10(4)(a) of the EIRs (which relates to information not held) would apply in relation to Mr Robb’s request for quarterly reports.

Commissioner’s analysis and findings

16. 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 Robb and Transport Scotland and is satisfied that no matter of relevance has been overlooked.

FOISA or EIRs?

17. In the Commissioner's *Decision 218/2007 Professor A D Hawkins and Transport Scotland*, he considered the relationship between FOISA and the EIRs at some length and set out his understanding of the situation. Broadly, the Commissioner's general position on the interaction between the two regimes is as follows:
 - a. The definition of what constitutes environmental information should not be viewed narrowly
 - b. There are two separate statutory frameworks for access to environmental information and an authority is required to consider any request for environmental information under both FOISA and the EIRs
 - c. Any request for environmental information therefore must be dealt with under the EIRs
 - d. In responding to a request for environmental information under FOISA, an authority may claim the exemption in section 39(2)
 - e. If the authority does not choose to claim the section 39(2) exemption it must deal with the request fully under FOISA, by providing the information, withholding it under another exemption in Part 2, or claiming that it is not obliged to comply with the request by virtue of another provision in Part 1 (or a combination of these)
 - f. The Commissioner is entitled (and indeed obliged) where he considers a request for environmental information has not been dealt with under the EIRs to consider how it should have been dealt with under that regime.



18. Environmental information is defined in regulation 2(1) of the EIRs. In this case, the information requested by Mr Robb is for costings and management reports relating to the AWPR. The AWPR is a road building project which involves measures, activities, policies and plans which will have significant effects on the state of the elements of the environment, principally the air and landscape, and on factors such as substance, noise and emissions likely to affect the state of the elements of the environment.
19. In this case, the Commissioner is satisfied that the information requested by Mr Robb, by relating to the AWPR project would fall within the scope of regulation 2(1)(c) of the EIRs which states that information on 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, should be held to be environmental information.
20. The Commissioner is therefore satisfied that the requested information sought by Mr Robb, if held, would fall within the definition of environmental information as set out in regulation 2(1)(c) of the EIRs.

Section 39(2) of FOISA

21. As previously noted, the Ministers stated that they would claim the exemption in section 39(2) of FOISA should the Commissioner find the information to be environmental information as defined in regulation 2(1) of the EIRs.
22. As the Commissioner considers that the information requested by Mr Robb is environmental information, he also therefore considers that the Ministers were correct in their application of section 39(2) of FOISA.
23. This exemption is subject to the public interest test in section 2(1)(b) of FOISA. The Commissioner's view is that, in this case, as there is a separate statutory right of access to environmental information available to Mr Robb, the public interest in maintaining this exemption and dealing with the requests in line with the requirements of the EIRs outweighs any public interest in disclosure of information under FOISA. In what follows, the Commissioner has therefore made his decision solely in terms of the EIRs.

Section 6(1)(b) of the EIRs - cost estimates for the AWPR

24. The Ministers cited regulation 6(1)(b) in respect of the cost estimates for the AWPR sought by Mr Robb.
25. Regulation 6(1)(b) of the EIRs states that where an applicant requests that environmental information be made available in a particular form or format, a Scottish public authority shall comply with that request unless the information is already publicly available and easily accessible to the applicant in another form or format.



26. The Commissioner must however consider (i) whether the information requested by Mr Robb was readily available to him and also (ii) whether the Ministers held any information not readily available to him that would fall within the scope of this part of Mr Robb's request.
27. The Commissioner notes that (as mentioned in the preceding paragraphs) in their letter dated 18 November 2008 the Ministers had provided Mr Robb with what they asserted was the most updated version of the AWPR cost estimate calculated at the Q4 2003 rates and in that same letter directed Mr Robb to the website where he could access the Interim STAG Appraisal Report.
28. The Ministers submitted that Mr Robb was informed that it was the intention of Transport Scotland to produce an updated cost estimate as part of the procurement stage should the AWPR scheme be approved by Scottish Government and Parliament following their consideration of the recommendations of the public local inquiry Reporters. They went on to note that the Reporters' submitted their findings to the Scottish Ministers on 30 June 2009 and that the Scottish Government are currently considering the Report prior to making a decision on whether or not to proceed with the scheme. As no decision has been made, no updated cost estimate has been produced.
29. In support of the above submissions, the Ministers produced copies of correspondence between Transport Scotland and a Member of the Scottish Parliament, dated 12 February 2009 and 21 July 2009 which stated that it would not be prudent to re-estimate the 2003 costing until the full statutory process of an ongoing public local enquiry was complete and approval for the scheme to go ahead had been given by the Scottish Government.
30. During the investigation of this case, the Commissioner also noted a Scottish Parliamentary question [¹] on the AWPR, tabled on 27 July 2009 and answered on 13 August 2009. The response to the question states that the cost estimate at Q4 2003 rates is the most recent cost estimate available at the date of the parliamentary question.
31. The Commissioner accepts the Ministers' submission that 2003 Q4 costing is the most up to date for the AWPR and that this information is in the public domain. The Commissioner also accepts that it is information which is easily accessible to Mr Robb in terms of regulation 6(1)(b) other than by requesting it under the EIRs. Therefore, the Commissioner accepts that the Ministers were not required to make it available to Mr Robb under the terms of the EIRs.
32. The Commissioner also notes that Mr Robb was actually provided with the most recent cost estimate within Transport Scotland's response and he was directed to the website where the document containing this estimate could be found. As such the Commissioner believes that the Ministers followed good practice in this case in providing advice and assistance to Mr Robb.
33. The Commissioner is further satisfied that the Ministers hold no further information which would fall within the scope of this part of Mr Robb's request.

[¹] <http://www.scottish.parliament.uk/business/pqa/wa-09/wa0813.htm#9> (S3W – 26035)



Section 10(4)(a) of the EIRs - quarterly reports

34. The Ministers cited regulation 10(4)(a) in respect of the quarterly reports sought by Mr Robb.
35. 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 an applicant's request is received.
36. In determining whether the Ministers were correct to rely on this exception in relation to their response to Mr Robb's request, the Commissioner must be satisfied that the Ministers did not, at the time of Mr Robb's request, hold information in question.
37. In their submissions the Ministers stated that in response to Mr Robb's request for "details of quarterly reports prepared by the consultants/AWPR Managing Agents throughout 2007/2008, which would make a total of 6", they consulted the AWPR Managing Agent and received confirmation that neither the Agent nor the Agent's Consultant produced these quarterly reports.
38. Mr Robb submitted that he had talked to a former Government Minister who he said had confirmed that he (the Minister) received quarterly updates of the AWPR project during the specified period. However when this point was put to the Ministers by the investigating officer, they reiterated that neither the Managing Agent nor their Consultant produce or have in the past produced quarterly reports in relation to the AWPR.
39. The Ministers went on to say that what may have been referred to by the former Minister were updates received by him in relation to the Scottish Motorway and Trunk Road Programme and not specifically in relation to the AWPR. These updates, published on Transport Scotland's website, highlight the progress of each project currently under development and construction.
40. The Ministers noted that a copy of the current version of the Programme (dated March 2009) could be accessed at http://www.transportscotland.gov.uk/files/documents/roads/scottish_motorway_and_trunk_roads_programme_-_March_2009.pdf and that prior to this update the previous one was dated June 2007. They submitted that there were no updates to the programme between June 2007 and March 2009 and that no cost information is shown other than specifying each project within a scheme cost band and not involving updates to cost estimates.
41. Having considered the Ministers' submissions, their explanation of which specific reports were or were not available and the steps taken to ascertain that the information in question is not held, the Commissioner is satisfied that no information falling within the scope of Mr Robb's request for quarterly reports is held by the Ministers, nor was held by them at the time the request was received. The Commissioner is satisfied that the Ministers have taken all reasonable steps to establish whether any relevant information is available. The Commissioner has therefore concluded that the Ministers were correct in informing Mr Robb that they did not hold the information in question.



Public Interest Test

42. The exception set out in regulation 10(4)(a) is subject to the public interest test in regulation 10(1)(b) of the EIRs. Therefore, a public authority may only withhold information to which an exception applies where, in all the circumstances, the public interest in making the information available is outweighed by the public interest in maintaining the exception. In this case, the Commissioner is satisfied that the information in question is not (and was not at the time of Mr Robb's request) held by the Ministers. Consequently he does not consider there to be any conceivable public interest in requiring that the information be made available.
43. The Commissioner therefore concludes that the Ministers acted correctly in applying the exception in regulation 10(4)(a) of the EIRs to the information requested by Mr Robb.

DECISION

The Commissioner finds that Transport Scotland acted in accordance with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) and the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by David Robb in that the Ministers were entitled to refuse Mr Robb's request in terms of section 39(2) of FOISA and in terms of regulations 6(1)(b) and 10(4)(a) of the EIRs.

Appeal

Should either Mr Robb or Transport Scotland 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.

Kevin Dunion
Scottish Information Commissioner
22 December 2009



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;

...

6 Form and format of information–

- (1) Where an applicant requests that environmental information be made available in a particular form or format, a Scottish public authority shall comply with that request unless-
 - (a) it is reasonable for it to make the information available in another form or format;
 - or
 - (b) the information is already publicly available and easily accessible to the applicant in another form or format.

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;