

Decision Notice



Decision 300/2013 Ms Zerrin Lovett and the Scottish Ministers

Infrastructure Projects Database: construction project information

Reference No: 201301529

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www.itspublicknowledge.info

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Summary

On 3 May 2013, Ms Lovett asked the Scottish Ministers (the Ministers) for information relating to construction projects stored in their Infrastructure Database. The Ministers responded by informing Ms Lovett that some of the information was publicly available on their website, stating that they did not hold other information.

Following an investigation, the Commissioner found that the Ministers were correct to state that some information was publicly available and easily accessible to Ms Lovett, but wrong to do so in relation to other information which turned out not to be held by the Ministers. In the circumstances, the Commissioner did not require the Ministers to take any action.

Relevant statutory provisions

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (paragraph (c) of definition of “environmental information”); 5(1) and 2(b) (Duty to make available environmental information on request); 6(1)(b) (Form and format of information); 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 the Appendix to this decision. The Appendix forms part of this decision.

Background

1. On 3 May 2013, Ms Lovett wrote to the Ministers requesting a list of all construction projects, where information was stored in the Infrastructure Database (i.e. held centrally), including the following pieces of information:
 - I. Name/description of project
 - II. Tier 1 contractor
 - III. Location of project
 - IV. Contract form including option, e.g. NEC3 Option 3
 - V. How specified, i.e. design and build or client provided specification (traditional)
 - VI. Framework name if applicable



- VII. Type of work, i.e. refurbishment/new build/fit out
- VIII. Contract price for construction
- IX. Final price for construction
- X. Construction start date
- XI. Initial construction completion date
- XII. Actual construction completion date

Ms Lovett asked that her request be considered under the EIRs.

2. The Ministers responded on 6 June 2013, informing Ms Lovett that some of the requested information was available from an update it had published to its 2011 Infrastructure Investment Plan (IIP), which was available on the Scottish Government's website. The Ministers provided Ms Lovett with a link to assist her in accessing this. The Ministers explained that, under regulation 6(1)(b) of the EIRs, they did not have to provide Ms Lovett with information if it was already publicly available and easily accessible to her in another form or format. The Ministers did offer to provide Ms Lovett with hard copies of this information if she did not have internet access.
3. The Ministers relied on regulation 10(4)(a) of the EIRs for information covered by points II, IV, V and VI of Ms Lovett's request, as they explained that this was not held centrally in their Infrastructure Projects Database. Links were provided by the Ministers to websites for the Scottish Futures Trust and Public Contracts Scotland, where they explained certain relevant information could be found.
4. On 6 June 2013, Ms Lovett wrote to the Ministers requesting a review of their decision. In particular, Ms Lovett drew the Ministers attention to the fact that she was only seeking information that was already available, for completed projects.
5. The Ministers notified Ms Lovett of the outcome of their review on 28 June 2013, upholding their decision of 6 June 2013. They explained that, if Ms Lovett still required the information they stated was not held centrally, then she should more clearly define the timeframe for the completed projects, or use the information provided to identify projects that interested her. They also suggested that she might seek more detailed information on these projects from the contacts provided.
6. On 30 June 2013, Ms Lovett wrote to the Commissioner, stating that she was dissatisfied with the outcome of the Ministers 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. Ms Lovett explained that she had looked at the links provided, but did not accept that the information answered her questions (in the format in which it was published).



7. The application was validated by establishing that Ms Lovett made a request for information to a Scottish public authority and 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

8. On 31 July 2013, the Ministers were notified in writing that an application had been received from Ms Lovett and were invited to provide comments on the application (as required by section 49(3)(a) of FOISA). Questions focussed on the information the Ministers considered to be publicly available from the Scottish Government website, how this is reasonably accessible to Ms Lovett and why this answers parts of her request for information.
9. The Ministers were also asked questions regarding the steps taken to identify and locate relevant information covered by the remaining points of Ms Lovett's request.
10. A response was received from the Ministers on 21 August 2013. Points in this were clarified during the investigation. The Ministers confirmed that they did not hold information which would fulfil parts II, IV, V, VI, VII (although relevant details might be included in the project description in the published information), VIII (although relevant details might be included in the "total capital value" column in the published information), IX (although relevant details might be included in the "total capital value" column in the published information) and XII of Ms Lovett's request (and therefore wished to apply regulation 10(4)(a) of FOISA).
11. The Ministers explained that information which would fulfil parts X and XI of Ms Lovett's request was held for some projects only. They submitted that where it was not included in the published information it was not held in the database. They also explained that the published information did not specifically include a "location" field, but they considered the location of each project from other information there.
12. During the investigation, the Ministers provided Ms Lovett with a link to further published information they believed to be relevant to her request. Ms Lovett acknowledged that this information provided a description of the projects and a narrative about progress, but she considered the narrative made it very difficult for her to collate the information in any meaningful way. It was also, she submitted, a very small fragment of what she requested, in a form which made it useless without many hundreds of hours of work involving cross-comparison of information over many projects and reports.
13. At the close of the investigation, Ms Lovett did not consider she had been provided with information addressing parts IV, V, VIII, IX, X, XI and XII of her request.



Commissioner's analysis and findings

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

Background information

15. The Scottish Government holds an internet-based Infrastructure Projects Database system. This was set up in 2010 and is populated at source by the project owners. The database covers infrastructure projects with a capital value of at least £5m for which an Outline Business Case has been prepared. The database is updated on a quarterly basis by the relevant project areas within the Scottish Government and its Agencies, together with Non Departmental Public Bodies (NDPBs) and NHS Boards.
16. The Ministers explained that the database is populated with project information, such as capital value, funding and procurement route, current status, etc., as well as data relating to the delivery of the project.
17. The Ministers explained that the purpose of the database was as an internal reporting tool, and to provide public information for the public audit committee report and the project pipeline document. Both of these are publicly available. The Ministers made it clear that not all of the information held on the Infrastructure Projects Database went into these reports. Ms Lovett's request specified information held centrally in the Infrastructure Projects Database.

Regulation 6(1)(b)

18. Regulation 6(1)(b) of the EIRs states that, where an applicant requests that information is 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. In their response, the Ministers informed Ms Lovett that information which would fulfil parts I, III, VII, VIII, IX, X, XI and XII of her request was publicly available on the Scottish Government website and easily accessible.
19. The Ministers explained that this information could be found in the update to its 2011 IIP and provided a link. This includes an IIP Progress Report, an updated IIP Programme Pipeline and an IIP Project Pipeline.
20. In order to determine whether the Ministers dealt with Ms Lovett's request correctly, the Commissioner must be satisfied as to whether, at the time they received the request, the information held by the Ministers (and which fell within the scope of the request) was both publicly available and easily accessible to Ms Lovett in another form or format (i.e. that detailed in the preceding paragraph).



21. During the course of the investigation, the Ministers submitted that they did not actually hold information in the Infrastructure Projects Database which would fulfil parts VII, VIII, IX and XII of Ms Lovett's request. Consequently, the Ministers were seeking to rely on regulation 10(4)(a) of the EIRs. In effect, in part, this was also their submission in respect of part III of the request.
22. Having considered the information contained in the Infrastructure Projects Database and the information which is publicly available, the Commissioner is satisfied that information which would address parts I and X (where this is held by the Ministers in terms of the planned or actual start date) of Ms Lovett's request is publicly available. The Commissioner is also satisfied that this information was easily accessible to Ms Lovett in PDF, HTML or Excel format (depending on the information) at the time the Ministers responded to her request.
23. The Commissioner also finds that information which would fulfil parts III and VII of the request can, in some cases, be discerned from the information that is publicly available. This is consistent with the Ministers' submissions, read as a whole.
24. The Commissioner has also found that, contrary to the Ministers' submission, information regarding the location of the project is not held on the database and is only discernible in certain cases from the information which is publicly available.
25. Ms Lovett commented in her application that the published information was in a format that did not answer the questions she asked. While the Commissioner appreciates Ms Lovett's concern that she will have to do some comparison and analysis to extract the exact information she needs, the Commissioner is satisfied that information which would address parts I and X (where this is held by the Ministers in terms of the planned or actual start date), and in some cases parts III and VIII, of her request is organised in such a way that it is easily identifiable.
26. The Commissioner is therefore satisfied that the Ministers were entitled to apply regulation 6(1)(b) of the EIRs to information which would fulfil parts I and X, and in some cases parts III and VII, of Ms Lovett's request.
27. However, the Commissioner finds that the Ministers were wrong to rely on regulation 6(1)(b) for information covered by parts III and VII (where not publicly available), VIII, IX, XI and XII of Ms Lovett's request. Largely, except in relation to part XI, this was acknowledged by the Ministers during the investigation, but the Commissioner must find that their initial decision to apply regulation 6(1)(b) to this information was a breach of regulation 5(1) of the EIRs.
28. As the Ministers have relied on regulation 10(4)(a) of the EIRs in respect of information which would fulfil parts II, IV, V, VI, VII, VIII, IX and XII the Commissioner will consider this now.



Regulation 10(4)(a)

29. Under the EIRs, a public authority may refuse to make environmental information available if one or more of the exceptions in regulation 10 apply and, in all the circumstances of the case, the public interest in maintaining the exception or exceptions outweighs the public interest in making the information available.
30. 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 the information when an applicant's request is received. In terms of regulation 10(2) of the EIRs, public authorities must interpret the exceptions in a restrictive way and apply a presumption in favour of disclosure.
31. In response to Ms Lovett's request, the Ministers explained that they did not hold information which would cover parts II, IV, V and VI of the request. During the investigation, the Ministers extended this to cover parts II, IV, V, VI, VII, VIII, IX and XII of Ms Lovett's request.
32. As Ms Lovett's dissatisfaction stems from the fact that information which would cover parts IV, V, VIII, IX, XI and XII of her request has not been provided (bearing in mind she has found information covered by part X to be publicly available and easily accessible), that is what will be considered here.

Submissions from the Ministers

33. The Ministers explained that, as the unit which dealt with Ms Lovett's request managed the Infrastructure Projects Database, they were able to confirm which of the requested information was held within the database and which was not.
34. The Ministers submitted that, as Ms Lovett made clear in her request and requirement for review that she was only seeking information stored in the Infrastructure Projects Database, officials determined that searches beyond the database were not required.
35. The Ministers explained that the Infrastructure Projects Database did not have the facility to capture the type of information to which it had applied regulation 10(4)(a). The Ministers explained that the published "IIP Project Pipeline" to which Ms Lovett was given a link provided contact details for every project should further information on any project be required.
36. The Ministers also commented that information relevant to parts of Ms Lovett's request may be held by other parts of the Scottish Government in relation to some projects. The Ministers did not consider that this would come within scope of Ms Lovett's request as it was not stored in the database (and Ms Lovett clearly specified that she was seeking information held in the Infrastructure Projects Database).
37. During the investigation, the investigating officer met with staff from the Scottish Government Infrastructure Investment Unit. During this meeting, the investigating officer was shown the Infrastructure Projects Database.



38. During this meeting, the Ministers explained that, as a consequence of development work now completed on the Infrastructure Projects Database, the database could now hold the current timescale for construction completion. However, as this development only took place in July 2013, this information was not captured at the time of Ms Lovett's request or requirement for review. The Ministers also explained that not all fields in the database were completed for all projects. This was because some fields were added only after the completion of the project.
39. The Ministers also submitted that, although certain information was not specifically held in the Infrastructure Projects Database, it was possible to identify it, in some cases, from other information held and publicly available.

The Commissioner's conclusions

40. In deciding whether a Scottish public authority holds the requested information for the purposes of regulation 10(4)(a), the standard proof is the civil law standard of the balance of probabilities. In deciding where the balance lies, the Commissioner will consider the scope, quality, thoroughness and results of the steps taken by the public authority to identify and locate the information in question. She will consider whether these steps were proportionate, in the circumstances of that particular case. She will also consider, where appropriate, any other reason offered by the public authority to explain why the information is not held.
41. The Commissioner accepts that Ms Lovett's information request was very clear, in that she was seeking specific information stored in the Infrastructure Projects Database. She accepts that it was reasonable in the circumstances to confine searches to that database. In the circumstances, the Commissioner agrees with the Ministers that the scope of their searches was adequate in considering what relevant information they held in that database.
42. As mentioned above, the investigating officer viewed the Infrastructure Projects Database and saw the type of information held within it. The Commissioner is satisfied, on the balance of probabilities, that information which would fulfil parts IV, V, VIII, IX and XII of Ms Lovett's request is not (and was not) held in the database, and therefore is not (and was not) held by the Ministers for the purposes of Ms Lovett's request. Following the investigation, the Commissioner is also satisfied that no information is held in the Infrastructure Project Database which would fulfil part XI of Ms Lovett's request.
43. Although no recorded information is held in the database which would specifically address parts V and IX of Ms Lovett's request, the Commissioner acknowledges that in some cases it is possible to discern this from other information which is held, and is publicly available via the links given to Ms Lovett.

The public interest

44. The exception in regulation 10(4)(a) is subject to the public interest test in regulation 10(1)(b) of the EIRs and can only apply if, in all the circumstances, the public interest in maintaining the exception outweighs the public interest in making the information available.



45. In this case, the Commissioner is satisfied that the Ministers did not (and do not) hold information which would fulfil parts IV, V, VIII, IX, XI and XII of Ms Lovett's request. Consequently, she does not consider there to be any conceivable public interest in requiring that any information falling within these parts be made available. The Commissioner therefore concludes that the public interest in making the requested information available is outweighed by that in maintaining the exception in regulation 10(4)(a) of the EIRs.
46. The Commissioner is satisfied, therefore, that the Ministers were entitled to refuse Ms Lovett's request under regulation 10(4)(a) of the EIRs, on the basis that they did not hold certain of the requested information.
47. The Commissioner is concerned that, when they responded to Ms Lovett's request and requirement for review, the Ministers relied on regulation 10(4)(a) of the EIRs for information which would fulfil parts II, IV, V and VI of her information request only. At no time did the Ministers inform Ms Lovett that they were also dealing with parts VII, VIII, IX, XI and XII on the basis that the information was not held: this was also a failure to deal with the request in accordance with regulation 5(1) of the EIRs. As it is clear from this decision that the information of concern to Ms Lovett was not (and is not held) in the Infrastructure Project Database, the Commissioner does not require the Ministers to take any action in respect of this failure, in response to Ms Lovett's application.

DECISION

The Commissioner finds that the Scottish Ministers partially complied with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by Ms Lovett.

The Commissioner finds that by relying on the exception in regulations 6(1)(b) and 10(4)(a) for some information which would fulfil Ms Lovett's request, the Ministers complied with the EIRs.

However, the Commissioner finds that the Ministers were wrong to apply regulation 6(1)(b) to other information falling within scope of Ms Lovett's request, and to deal with certain information on the basis that it was held when it was not. In these respects, the Ministers failed to deal with the request in accordance with regulation 5(1) of the EIRs.

Given the Commissioner's conclusions that the requested information is either publicly available and easily accessible, or not held, the Commissioner does not require the Ministers to take any action in respect of these failures in response to Ms Lovett's application.



Appeal

Should either Ms Lovett or the Scottish Ministers 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
20 December 2013



Appendix

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;

...

(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.

...



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-
- ...
- (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.

...

- (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;

...