



Scottish Information
Commissioner
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Decision Notice 209/2025

Road and drainage network

Authority: Aberdeenshire Council

Case Ref: 202500348

Summary

The Applicant asked the Authority for information related to the roads and drainage network at Bush, St Cyrus, and the surrounding area within a radius of 500m. The Authority informed the Applicant that it did not hold the information requested. The Commissioner investigated and found that the Authority had been entitled to inform the Applicant that it did not hold the information requested.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (2) (General entitlement) and 47(1) and (2) (Application for decision by Commissioner).

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (definition of “the Act”, “applicant”, “the Commissioner” and “environmental information”) (Interpretation); 5(1) (Duty to make environmental information available on request); 10(1), (2) and (4)(a) (Exceptions from duty to make environmental information available); 17(1), (2)(a), (b) and (f) (Enforcement and appeal provisions).

Background

1. On 3 December 2024, the Applicant made a request for information to the Authority. He asked for information pertaining to the roads and drainage network at Bush, St Cyrus, DD10 0DH (56.7842471,-2.3901435) and the surrounding area within a radius of 500m. He specifically sought:

- (i) Design and construction of the “new” A92 which serves to bypass Bush (DD10 0DH).
 - Including road design and construction plans, road cross sections and drainage design.
 - Details on the road surface water drainage, including interconnected drains in this area and the routing and structure of these drains.
 - (ii) The transfer of the currently unadopted road (old A92) through Bush, from being an adopted road to an unadopted road.
 - Including process, records and who the road and associated land titles were returned to.
 - When was road unadopted and what provisions were made / stated at the time.
 - (iii) Records on design and surface water drainage for the old A92
 - Including details of drains, pipes, locations and exit locations to environment
 - (iv) Records and details of field drains, underground pipes, and utilities
 - (v) Contacts or organisations who would hold this data if not held by the Authority
2. The Authority responded on 6 January 2025. It informed the Applicant that it held no information falling within the scope of his request, and it cited regulation 10(4)(a) of the EIRs. The Authority also advised the Applicant that it considered it likely that the works were done when the A92 was part of the Trunk Road Network and it suggested that he contact Transport Scotland.
 3. On 30 January 2025, the Applicant wrote to the Authority requesting a review of its decision. The Applicant stated that he was dissatisfied with the decision because he found it hard to believe that the details associated with key road infrastructure did not exist. The Applicant noted that he had contacted Transport Scotland who had advised him that it did not hold the information and had suggested he contact the Authority. On 31 January 2025, the Applicant provided the Authority with further reasons explaining why he considered the information must be held.
 4. The Authority notified the Applicant of the outcome of its review on 5 March 2025. It upheld its original response without amendment and stated that, in terms of regulation 10(4)(a) of the EIRs, no information was held.
 5. On 5 March 2025, the Applicant wrote to the Commissioner, applying 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. The Applicant stated that he was dissatisfied with the outcome of the Authority’s review because he believed the information either existed or the Authority was fabricating certainty from undocumented conjecture, hypothesis and guess work.

Investigation

6. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
7. On 12 March 2025, the Authority was notified in writing that the Applicant had made a valid application, and the case was consequently 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 Authority was invited to comment on this application and to answer specific questions. These related to how the Authority interpreted the Applicant's request and the searches it had carried out to identify information falling within scope of the request.

Commissioner's analysis and findings

9. The Commissioner has considered all of the submissions made to him by the Applicant and the Authority.

Application of the EIRs

10. Having considered the subject matter and the terms of the request, the Commissioner accepts the decision of the Authority to deal with the request under the EIRs rather than under FOISA.
11. The Applicant has not disputed the Authority's decision to handle its request under the EIRs, and the Commissioner will consider the information 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 the 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. On receipt of a request for environmental information, 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 the information available, unless a qualification in regulation 6 to 12 applies (regulation 5(2)(b)).
14. Under the EIRs, a Scottish public authority may refuse to make environmental information available if one or more of the exceptions in regulation 10 applies.

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 information available to the extent that it does not hold the information when it received the request.
16. The standard of proof to determine whether a Scottish public authority holds the information is the civil standard of 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.

17. He also considers, where appropriate, any reasons 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 about what information the authority should hold, ultimately the Commissioner's role is to determine what relevant information is (or was, at the time the request was received) held by the public authority.

The Authority's comments

18. The Authority submitted that it had undertaken extensive searches for the information requested but it had not located any relevant records. Consequently, it had notified the Applicant that regulation 10(4)(a) of the EIRs applied.
19. The Authority provided the Commissioner with evidence of the searches it had carried out. It provided a form which recorded the searches that were carried out. This form included the names of the officers that conducted the searches, the date searches were carried out, and the search criteria used. This indicated that the "Gazetteer team" had carried out searches on "SharePoint" using "Kincardine and Mearns Stopping-up orders" as search criteria. It stated that "SharePoint" was also searched for Correspondence / Plans. In addition to these searches of "SearchPoint", the form recorded the fact that the Authority had also carried out a physical search for "Paper Drawings" relating to the request. In all cases, no relevant information was found.
20. Furthermore, the Authority submitted that it had asked its "Legal Property" team to carry out searches and it provided the Commissioner with details of those searches. The Authority submitted that the legal team had searched its "Title deed database" for the search terms "Drainage network at Bush St Cyrus", "Bush St Cyrus", "56.7842471, -2.3901435", "water drainage for the old A92", and that it had also searched its "File Manager" records using the search terms "Drainage network at Bush St Cyrus", "Bush St Cyrus", "water drainage for the old A92". In both cases, no relevant information was identified.
21. The Authority explained that it was unable to search its archive when it first received the request, as it was being relocated. However, it submitted that it had since carried out searches of the archives (once they were relocated and re-opened) and its team had not located any further information as a result of those searches.
22. As part of its submissions, the Authority explained that it had consulted its roads engineers, and it had asked if they were aware of any records falling within the scope of the request. The Authority noted that the roads engineers were not aware of any such records, and that no member of staff (from that period) was still employed by the Authority. It noted that one individual had commented that the Authority would not need to hold these records because the road was not the Authority's responsibility to maintain.
23. The Authority explained that trunk roads were (and still are) maintained by the Scottish Government. It noted that Transport Scotland currently have responsibility for trunk roads, but in the past it was the Scottish Office. The Authority also explained that while Transport Scotland have responsibility for trunk roads, the trunk road network is maintained by agents on behalf of Transport Scotland (BEAR, Amey, etc.). It submitted that, in the past, this was a role that was taken on by the relevant Council.
24. The Authority advised that Kincardineshire County Council (up to 1975) and then Grampian Regional Council (up to 1996) may have had some input into the trunk road network at the time in question.

The Authority noted that if that was the case, it was possible there could be physical drawings attached to the committee meetings for Kincardineshire County circa 60 years ago, but it could find no records in its database which suggested this. It submitted that it had searched Grampian Regional Council files in its accessions database for the A92 and only two items were found, neither of which were relevant. It provided the Commissioner with details of these two items.

25. The Authority provided the Commissioner with an image from an Ordnance Survey (OS) map dating from 1972. It commented that the road also appears in a 1960's OS map as a prospective road, and therefore it was reasonable to presume that the road was built somewhere in the late 1960's or early 1970's. It submitted that at this point (1972) the A92 was part of the trunk road network (i.e. it was maintained by the then Scottish Office and not the Authority).
26. The Authority acknowledged that it would be expected to retain information if there was infrastructure that it retained responsibility for. It noted that if it wanted to assert any rights it had in relation to the infrastructure, for example, third party maintenance, it would require documentation to do so. It explained that if it had purchased land to make any alternations to the road, it would have a record of the purchase. However, it noted that searches of its title deeds had returned no results. The Authority also commented that this road is not included on its list of public roads.
27. The Authority submitted that it did not build the road, and that while it was adopted and maintained it could find no evidence that it did not hand back all original documentation, as would likely have been required for the continued maintenance by Transport Scotland, when the road was no longer to be maintained by the Regional Council or Aberdeenshire Council, at the latest in the 2000's but more likely around 1996. It noted that Transport Scotland were believed to have maintained this road since then.
28. In further submissions, the Authority commented that it had spoken with an external colleague who previously worked at Strathclyde Council in the Roads department and were present for the de-trunking of roads in 1996 and 1997. This individual stated that all councils involved were instructed to box up their physical files, place them in filing cabinets, which were then moved to storage containers to be dealt with and digitised by what was then the "Scottish Office", because the roads were no longer the responsibility of the individual councils. The Authority submitted that the recollections of this external source supported its assertions that it would no longer hold these files and that either Transport Scotland, or whoever currently maintained the roads on its behalf, should hold these records.

The Applicant's comments

29. The Applicant explained that he had submitted a FOI request to Transport Scotland for the same information. Transport Scotland notified him that it did not hold the information. It acknowledged that the trunk road in question did once belong to the Scottish Minister's predecessors as part of the A92 trunk road, it also noted that the trunk road in question was bypassed in 1939 and then ceased to be the responsibility of the Scottish Ministers (or their predecessors), and it commented that the remaining A92 was de-trunked in 1978 when it became the responsibility of the local authority. Transport Scotland referred to various Orders, maps and other records to support its view that it did not hold the information.
30. In his requirement for review, the Applicant indicated that he was dissatisfied with the Authority's response that it did not hold the information, because he considered that information about key road infrastructure should be held.

31. The Applicant subsequently provided the Authority with further reasons for believing that the information must be held. He commented that when the “new” A92 was constructed, it was a major infrastructure project that required compliance with applicable rules, regulations, and design acceptance criteria. He submitted that the project also mandated as-built records, including formal acceptance and sign-off.
32. The Applicant noted that the transfer of rights and wayleaves between the “old” A92 and “new” A92 generated legal records and required associated filing and archiving procedures. He implied that this information should be held.
33. The Applicant also referred to local knowledge and reports which indicated that significant drainage modifications were carried out during construction of the “new” A92. He argued that a contractor would have completed this work, which would have required associated work orders, instructions, drawings, and legal documentation including land consents, ownership records, rights, and wayleaves. Again, he implied that this information must be held.
34. The Applicant commented that in its initial response, the Authority had previously classified the “old” A92 as unadopted, but he argued that this was based on incomplete information. He submitted that the Authority could neither confirm nor deny whether the road was adopted or unadopted, as key documents were missing – principally the transfer records for both the “old” and “new” A92 sections, including details of the recipients of these transfers.
35. The Applicant submitted that the “old” A92 served as a major thoroughfare and was the primary route to Aberdeen prior to the A90's construction. Given this, he argued that comprehensive records must have existed for the road, its associated infrastructure, and related legal conditions (including land acquisitions). He contended that proper documentation should also have accompanied any transfer of ownership when the road was decommissioned.
36. The Applicant argued that if there were no records for the “old” A92 being handed back, then the inference was that it remained under the ownership and responsibility of the original owner. He submitted that, in previous years, the Authority made reference to road design and land agreements in its responses to several incidents – including tree falls, flooding, and drainage ditch maintenance responsibilities. He submitted that these responses were either based on documentation that was requested but not provided, or issued without supporting evidence, rendering them potentially misleading.
37. The Applicant argued that given previous statements and correspondence from the Authority, the documents and details either existed, or the Authority was fabricating certainty from undocumented conjecture, hypothesis and guess work.

The Commissioner's view about the exception10(4)(a) EIRs - Information not held.

38. The Commissioner understands the Applicant's frustration with the Authority's response to his request. The Authority has stated that it does not hold the information, and it has referred him to Transport Scotland, suggesting that it was more likely to hold the information he asked for. However, when the Applicant requested the information from Transport Scotland it stated that it does not hold the information, and it has referred him to the Authority. Both authorities are claiming the information is not held and consider the other to be more likely to hold it: this is frustrating and is not helpful to the Applicant.

39. The Applicant has not made an application to the Commissioner about Transport Scotland's handling of his request, and so the Commissioner must reach his decision in this case based solely on the Authority's submissions. He cannot challenge the veracity of Transport Scotland's comments in this case, although he will refer to them as they were raised by the Applicant and provided to the Authority for comment.
40. In its response to the Applicant's request, Transport Scotland stated that any records held by Scottish Ministers or their predecessors regarding the design, construction, and maintenance of the road were transferred to the responsible party (local authority) at the time of the bypass and/or de-trunking. It claimed that the local authority would hold the records for this section of the A92, since local authorities managed and maintained trunk roads on behalf of Scottish Ministers and their predecessors from the 1930s until the early 2000s.
41. The Commissioner notes that Transport Scotland's review outcome did not clarify whether the road in question fell under its responsibility after the early 2000s. Furthermore, it did not establish whether the relevant documents related to the road were transferred to them after that period.
42. The Commissioner has considered the submissions provided by the Authority and, in particular, the nature of the searches that were carried out, and its reasons for concluding that the information was not held. He accepts that the Authority took adequate and proportionate steps in the circumstances to establish if the information was held and he is satisfied that it does not (and did not, on receipt of the request) hold the information requested by the Applicant.
43. He understands that this will be frustrating and disappointing to the Applicant, who has reasonable grounds to believe that the Authority will hold the information, not least the comments from Transport Scotland, which are referenced above. He also notes the Applicant's dissatisfaction that the Authority seems to lack evidence to support its view that it has not adopted the road, and that it has not identified any documentation to evidence that the road was "unadopted" or that the responsibility for the road (and the records relating to that responsibility) was transferred to Transport Scotland.
44. The Commissioner can only focus on what recorded information is actually held by the Authority (or was at the time of the request). While the Applicant believes and expects the specified information to be held by the Authority, the Commissioner is persuaded that this is not the case.
45. Taken together, the responses from Transport Scotland and the Authority are contradictory and lack clarity, but as noted previously, the Commissioner is not investigating Transport Scotland's handling of the request; he is investigating whether or not the Authority holds the information requested by the Applicant. He is investigating what relevant information the Authority held when asked for it, and for that purpose requires to be satisfied that the Authority carried out reasonable and proportionate searches of its records – and, ultimately, that means reaching conclusions on the balance of probabilities rather than absolute certainty.
46. Whoever is responsible for either the bypassed road or the current one (and the latter does not appear to be a trunk road now, although it does appear to have been one in the past), it does not follow that the Authority (or, for that matter, Transport Scotland) will necessarily still hold records of the kind specified in the Applicant's request.

Particularly in relation to events that happened a relatively long time ago in the life of the relevant public function, even if within the applicant's living memory, there are occasions on which he must acknowledge – on the available evidence, and bearing in mind various changes in responsibility – that expectations the applicant considers reasonable cannot be met by the reality of what is held. (None of which, of course, diminishes the importance of the information to the Applicant.)

47. Having given careful consideration to the submissions and explanations that have been provided, the Commissioner is satisfied, on the balance of probabilities, that the Authority does not hold recorded information which would fulfil the Applicant's request. He therefore must conclude that the Authority was entitled to rely on the exception in regulation 10(4)(a) of the EIRs, on the basis that it did not hold the information requested.

The public interest

48. The exception in regulation 10(4)(a) of the EIRs is subject to the public interest test in regulation 10(1)(b) and so can only apply if, in all the circumstances of the case, the public interest in maintaining the exception outweighs that in making the information available.
49. The question of whether or not a public authority holds information is a factual one, determined on the balance of probabilities. If a public authority does not hold the information, then there is no meaningful public interest test that can be undertaken.
50. In this case, for the reasons set out above, the Commissioner is satisfied that the Authority does not hold any information covered by the request, and did not do so on receipt of the request.
51. Consequently, he accepts that there is no conceivable public interest in requiring the disclosure of such information and finds that the public interest in making information available is outweighed by that in maintaining the exception.

Decision

The Commissioner finds that the Authority complied with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by the Applicant.

Appeal

Should either the Applicant or the Authority 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.

Euan McCulloch
Head of Enforcement

1 September 2025