

Decision Notice



Decision 131/2010 Mr J B Rowlands and Scottish Water

Houses at Cairndow, Argyll

Reference No: 200901677
Decision Date: 21 July 2010

www.itspublicknowledge.info

Kevin Dunion
Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews KY16 9DS
Tel: 01334 464610



Summary

Mr J.B. Rowlands requested from Scottish Water information relating to correspondence between Scottish Water and others relating to houses at Cairndow, Argyll. Scottish Water responded by supplying information relating to the request. Following a review, as a consequence of which Scottish Water provided further information and confirmed that the request had been dealt with under the EIRs, Mr Rowlands remained dissatisfied and applied to the Commissioner for a decision.

Following the investigation, the Commissioner was satisfied that Scottish Water had provided Mr Rowlands with all the relevant information it held.

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) (definition of environmental information); 5(1) and 2(b) (Duty to make environmental information available on request) and 10(1), (2) and (4)(a) (Exceptions from duty to make environmental information available)

Background

1. On 17 June 2009, Mr Rowlands wrote to Scottish Water describing a planning application lodged with Argyll & Bute Council by Stewart Associates for a residential development at Cairndow, Argyll (the development). He asked Scottish Water for:
 - a. all correspondence relating to discussions/meetings, verbal or written, between Scottish Water and/or their agents and Stewart Associates and/or their agents and/or the applicants and/or any third party regarding sewerage provision for the development
 - b. all correspondence/discussions/meetings, verbal or written, between Scottish Water and/or their agents and Argyll & Bute Council and between Scottish Water and/or their agents and ATK Partnership, including the original request for connection from the applicants, their agents or any third party.
2. Scottish Water responded on 16 July 2009, providing what it stated to be all the information its Customer Connections Team held in relation to the application for the development.



3. On 7 August 2009, Mr Rowlands wrote to Scottish Water requesting a review of its decision. He drew Scottish Water's attention to the absence of correspondence (in each direction) between Scottish Water and ATK Partnership.
4. Scottish Water notified Mr Rowlands of the outcome of its review on 9 September 2009, indicating that it had processed Mr Rowlands request under the EIRs and was applying the exemption relating to environmental information contained in section 39(2) of FOISA. It also enclosed copies of documentation it had received from ATK Partnership and advised Mr Rowlands that it did not hold any further information regarding the development.
5. On 24 September 2009 the Commissioner received a letter from Mr Rowlands, in which he stated that he was dissatisfied with the outcome of Scottish Water's review and was 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.
6. The application was validated by establishing that Mr Rowlands 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

7. On 16 November 2009 Scottish Water was notified in writing that an application had been received from Mr Rowlands, was given an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asked to respond to specific questions. In particular, these related to the steps taken by Scottish Water to establish that it held no further information falling within the scope of Mr Rowlands' request.
8. Scottish Water confirmed that it wished to rely on the exemption in section 39(2) of FOISA. It explained its approach to Mr Rowlands' request and described the steps it had taken to locate any relevant information. It confirmed that it held no further information.
9. Given Mr Rowlands' belief that correspondence he had been provided with indicated that further relevant correspondence should be held by Scottish Water, clarification on these points was sought from Scottish Water and further searches were requested. Scottish Water's submissions are considered more fully in the Commissioner's analysis and findings below.



Commissioner's analysis and findings

10. 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 Rowlands and Scottish Water and is satisfied that no matter of relevance has been overlooked.

Section 39(2) of FOISA – environmental information

11. In this case, Scottish Water applied the exemption in section 39(2) of FOISA, on the basis that the information requested by Mr Rowlands was environmental information. For this exemption to apply, any information requested would require to be environmental information as defined in regulation 2(1) of the EIRs (which is reproduced in the Appendix below). The Commissioner has set out his thinking on the relationship between FOISA and the EIRs in some detail in *Decision 218/2007 Professor A D Hawkins and Transport Scotland* and need not repeat it here.
12. Mr Rowlands' request relates to information concerning a planning application for a residential development, in particular the sewerage provision for that development. Given the subject matter of the request, the Commissioner agrees with Scottish Water that any information held in relation to the request would fall within paragraph (c) of the definition of environmental information contained in regulation 2(1) of the EIRs, being information on measures affecting or likely to affect the elements and factors referred to in paragraphs (a) and (b) of the definition. As he is satisfied that Scottish Water was correct to conclude that any information falling within the scope of the request would be environmental information, he is also satisfied that the information would be exempt under section 39(2) of FOISA.
13. This exemption is subject to the public interest test in section 2(1)(b) of FOISA. As there is a separate statutory right of access to environmental information available to the applicant in this case, the Commissioner accepts that the public interest in maintaining this exemption and in dealing with the request in line with the requirements of the EIRs outweighs any public interest in disclosure of the information under FOISA. Consequently, the Commissioner accepts that Scottish Water was correct to withhold the information under section 39(2) of FOISA and deal with the request under the EIRs. He has therefore proceeded to consider this case in what follows solely in terms of the EIRs.
14. In his application to the Commissioner, Mr Rowlands complained that, although Scottish Water had released information to him, it had not included correspondence between Scottish Water and ATK Partnership. He referred to correspondence which led him to believe that further relevant information existed, and also to telephone conversations with Scottish Water which led him to believe that relevant information had been lost or misplaced.
15. Scottish Water continued to assert that all the information held at the time it received Mr Rowlands' request had been disclosed to him and that nothing further was held, in effect relying upon regulation 10(4)(a) of the EIRs.



Regulation 10(4)(a) of the EIRs – information not held

16. 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.
17. In its initial response to Mr Rowlands, Scottish Water stated that it was providing Mr Rowlands with the information he had requested. In its subsequent response to Mr Rowlands' request for review, Scottish Water provided two further documents, but otherwise maintained its position that it had provided him with all the information it held which fell within the scope of his request. In its submissions to the Commissioner, it described the searches it had undertaken with a view to locating the information.
18. The investigating officer further clarified with Mr Rowlands what information he believed had not been supplied. He referred to a letter from Scottish Water to ATK Partnership dated 4 July 2008 (which had been supplied to him and which related to the development). It started with the sentence "Thank you for your recent correspondence regarding the above", which suggested to him that there should be previous relevant correspondence from ATK to Scottish Water. He also pointed out that the two documents released to him on review were simply "transmittal notes", suggesting that there should be related substantive information as described in these notes. Scottish Water was asked to comment on these points.
19. Scottish Water explained that the reference in the letter to "recent correspondence regarding the above" was a standard phrase used in correspondence with a person involved in a pre-application (such as this one). It simply acknowledged that material had been received from that person. The investigating officer sought further clarification from Scottish Water as to what this material might have been.
20. Following a further search, Scottish Water advised that the only record it could trace of material having been received from ATK Partnership prior to 4 July 2008 related to a Development Impact Assessment (DIA), logged as having been received on 3 July 2008. One of the transmittal notes did indeed refer to a DIA sent on 30 June 2008, although (as Mr Rowlands pointed out) the other also referred to the transmission of a DIA, this time on 4 March 2008.
21. From its records, Scottish Water could identify the receipt of only one DIA in respect of the development. It was confirmed that this had not been sent to Mr Rowlands in response to his information request or his request for review. The relevant areas of Scottish Water's systems were searched again, but the document itself could not be traced. Scottish Water therefore confirmed that it was relying upon regulation 10(4)(a) of the EIRs in relation to this DIA, on the basis that the information was not held.
22. Having considered all the submissions made by Scottish Water, the Commissioner is satisfied that it carried out adequate searches to ascertain what relevant information it held and, taking account of the information provided to him, accepts that regulation 10(4)(a) applied in that no further relevant information was held by Scottish Water.



23. The Commissioner would emphasise, however, that in coming to this decision, he appreciates Mr Rowlands' concerns that the DIA submitted in respect of the development does not appear to be traceable by Scottish Water, notwithstanding that on its own admission Scottish Water utilised this information in that document for its own internal purposes in relation to the development. Ultimately, however, the Commissioner can only consider what relevant recorded information *is* held by an authority.

Public Interest Test

24. The exception 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 refuse to make available 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 no information in addition to that already supplied to Mr Rowlands (either in response to his request or his request for review) was actually held by Scottish Water at the time his request was received. Consequently, he does not consider there to be any conceivable public interest in requiring that further information be made available.
25. The Commissioner therefore concludes that, in all the circumstances of this case, 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. Given this conclusion, he is satisfied that the Scottish Water was entitled to refuse Mr McLaren's request under regulation 10(4)(a).

DECISION

The Commissioner finds that Scottish Water complied with Part 1 of the Freedom of Information (Scotland) Act 2002 and with the Environmental Information (Scotland) Regulations 2004 in responding to Mr Rowlands' request for information.



Appeal

Should either Mr Rowlands or Scottish Water 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
21 July 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;
- (d) reports on the implementation of environmental legislation;
- (e) costs benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in paragraph (c); and
- (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in paragraph (a) or, through those elements, by any of the matters referred to in paragraphs (b) and (c);

...



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.

...

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;

...