

Decision Notice

Decision 006/2018: Mr William Dempster and Scottish Water

Correspondence regarding a sewage treatment plant project

Reference No: 201701501

Decision Date: 15 January 2018



Scottish Information
Commissioner

Summary

On 4 July 2017, Mr Dempster asked Scottish Water for correspondence to and from named persons about a new sewage treatment plant project.

Scottish Water disclosed some information and withheld the remainder. During the investigation, Scottish Water disclosed the remaining information falling within scope of the request.

The Commissioner found that Scottish Water had failed to disclose all non-exempt information in response to the request and had failed to respond to the initial request within the required timescale. The Commissioner was satisfied that Scottish Water had subsequently disclosed all relevant information and did not require Scottish Water to take any further action.

Relevant statutory provisions

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

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (parts (a), (b) and (c) of the definition of "environmental information") (Interpretation); 5(1) and (2)(b) (Duty to make available environmental information on request); 11(2) (Personal data)

The full text of each of the statutory provisions cited above is reproduced in Appendix 1 to this decision. The Appendix forms part of this decision.

Background

1. On 4 July 2017, Mr Dempster made a request for information to Scottish Water regarding "data given to the public" about the Clachan Seil Sewage Treatment Plant Project (the project). Mr Dempster asked for any information or queries sent to or received from the named occupiers of a specified property.
2. Scottish Water did not respond to the request. On 7 August 2017, Mr Dempster asked Scottish Water to conduct a review of its failure to respond to his request.
3. Scottish Water notified Mr Dempster of the outcome of its review on 23 August 2017. It apologised for the delay in responding to his request. It disclosed some information and withheld some information under regulation 11(2) of the EIRs and section 38(1)(b) of FOISA (Personal information).
4. On 23 August 2017, Mr Dempster applied 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 specified modifications. Mr Dempster was dissatisfied that Scottish Water had not responded to his initial request and did not consider that any information should be withheld.

Investigation

5. The application was accepted as valid. The Commissioner confirmed that Mr Dempster made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to him for a decision.
6. On 20 September 2017, Scottish Water was notified in writing that Mr Dempster had made a valid application. Scottish Water was asked to send the Commissioner the information withheld from Mr Dempster. Scottish Water provided the information and the case was allocated to an investigating officer.
7. Mr Dempster was asked to clarify the matters he wanted the Commissioner to investigate. He confirmed that he was dissatisfied with Scottish Water's failure to respond to his initial request and also believed that Scottish Water held more correspondence from or to the named individuals about the project.
8. Mr Dempster confirmed that he did not require the investigation to include his request for any other data given to the general public and he did not require the Commissioner to consider whether Scottish Water was correct to withhold the personal data of its employees. Accordingly, the Commissioner did not consider this information as part of his investigation.
9. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. Scottish Water was invited to comment on this application and answer specific questions. These included questions about whether the request should have been considered under FOISA or the EIRs, the searches carried out by Scottish Water, and the reasons why information had been withheld.
10. On 23 and 24 November 2017, Scottish Water provided its submissions. It stated that it would disclose the remaining information it held that fell within scope of Mr Dempster's request, after finding that disclosure of the personal data was permitted under condition 6(1) of Schedule 2 of the Data Protection Act 1998.
11. On 7 December 2017, Scottish Water disclosed further information to Mr Dempster and explained why it had failed to respond to his initial request.
12. On 14 December 2017, Mr Dempster confirmed that he required the Commissioner to issue a decision in relation to his application. He commented that the information disclosed by Scottish Water did not show whether it had received any enquiries from the occupants of the named property.
13. On 18 December 2017, Scottish Water was asked to conduct further searches for the requested information. It did so, and its submissions on these further searches are considered below.

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 him by both Mr Dempster and Scottish Water. He is satisfied that no matter of relevance has been overlooked.

FOISA or EIRs?

15. Scottish Water issued a response to Mr Dempster under both FOISA and the EIRs. During the investigation, the Commissioner asked Scottish Water to consider whether the information Mr Dempster had asked for was, in fact, environmental information.
16. Environmental information is defined in regulation 2(1) of the EIRs (the relevant parts of the definition are reproduced in Appendix 1 to this decision). Where information falls within the scope of this definition, a public authority must make it available under the EIRs, subject to various restrictions and exceptions contained in the EIRs.
17. Scottish Water stated that the information requested fell within the definition of environmental information (regulation 2(1) of the EIRs). It noted that its response to Mr Dempster indicated that the exemption in section 39(2) of FOISA applied, and that his request had been processed under the EIRs. However, it acknowledged that its response went on to cite provisions from FOISA as well as provisions from the EIRs.
18. Mr Dempster's request was for information about a proposed sewage works. The information therefore relates to measures or activities affecting, or likely to affect, the elements of the environment, in particular land and landscape. Consequently, the information falls within the definition of environmental information set out in regulation 2(1) of the EIRs, in particular paragraphs (a), (b) and (c) of that definition.
19. A Scottish public authority must respond to a request for environmental information under the EIRs. As Scottish Water issued a response to part of the environmental information request under FOISA alone, the Commissioner finds that Scottish Water failed to comply with regulation 5(1) of the EIRs.
20. Scottish Water applied the exemption in section 39(2) of FOISA to the information requested by Mr Dempster. The exemption in section 39(2) of FOISA provides, in effect, that environmental information (as defined by regulation 2(1) of the EIRs) is exempt from disclosure under FOISA, thereby allowing any such information to be considered solely in terms of the EIRs. As there is a separate statutory right of access to environmental information available to Mr Dempster in this case, the Commissioner has concluded that the public interest in maintaining this exemption, and responding to the request in line with the EIRs, outweighs the public interest in disclosure under FOISA.
21. Given his conclusion that the withheld information is properly classified as environmental, the Commissioner therefore concludes that Scottish Water is correct to apply section 39(2) of FOISA. The Commissioner will consider the information in what follows solely in terms of the EIRs.

Regulation 5(1) – information falling within scope of the request

22. Regulation 5(1) of the EIRs requires a Scottish public authority which holds environmental information to make it available when requested to do so by any applicant. It is important to bear in mind that this obligation relates to information actually held by an authority when it receives the request, as opposed to information an applicant believes the authority should hold.
23. On receipt of a request for environmental information, the authority must establish what information it holds falling within the scope of the request. Having done so, regulation 5(1) requires the authority to provide that information to the requester, unless a qualification in regulations 6 to 12 applies (see regulation 5(2)(b)).

24. Scottish Water explained in its submissions that its searches had identified a range of information, including template letters and postcards, sent to the residents of the village where the named individuals lived between November 2014 and May 2017. A third party company had been used to deliver the letters and postcards.
25. Scottish Water also identified a series of correspondence with the named individuals, which consisted of a series of notes from its call management system. Its call management system is used by the contact centre and other parts of the business to log customer contacts via phone, email and letter. This system came into use in 2003. Scottish Water provided screen shots (with annotations) of the searches it had conducted on the call management system.
26. Scottish Water explained that the Scottish Water Communities Team was contacted when it was responding to Mr Dempster's request, as any written communications to customers would have been sent from this team. All information provided by the Community Manager for the project was taken from a project folder saved on Scottish Water's corporate drive.
27. Scottish Water stated that further searches had been conducted by other members of the Communities Team who were involved in the project prior to December 2015. The distribution companies (for the posted correspondence) had also been contacted and their files searched.
28. Scottish Water was asked to clarify aspects of the searches it had conducted of its call management system. It responded to the investigating officer's questions and confirmed that no further information falling within the scope of the request had been identified.

The Commissioner's findings

29. The Commissioner understands that the main purpose of Mr Dempster's request and application for a decision is to establish whether the named individuals contacted Scottish Water about the proposed sewage works. After investigating, the Commissioner is satisfied with the searches undertaken by Scottish Water of its call management system, which is used to log its customer correspondence. Scottish Water provided the Commissioner with screen shots (with annotations) of the searches it conducted. The Commissioner accepts that Scottish Water has disclosed all of the correspondence to or from the named individuals.
30. On the balance of probabilities, the Commissioner accepts that Scottish Water does not hold any other relevant correspondence. In reaching this view, he has considered the information published online about the proposed sewage works¹; the information disclosed by Scottish Water; and information in the correspondence disclosed to Mr Dempster. He is satisfied that all posted correspondence to and from the named individuals has been identified and disclosed, and that Scottish Water does not hold any other relevant correspondence in its call management system.
31. Taking into account all of the above, the Commissioner is satisfied that, by the end of the investigation, Scottish Water had identified and disclosed all the information falling within the scope of Mr Dempster's request.
32. The Commissioner finds that by failing to disclose all relevant information when Scottish Water responded to Mr Dempster's request and request for review, Scottish Water failed to comply fully with regulation 5(1) of the EIRs.

¹ <http://www.scottishwater.co.uk/investment-and-communities/your-community/isle-of-seil?start=3>

Regulation 11(2) – personal data

33. Regulation 11(2) of the EIRs is set out in full in Appendix 1. During the investigation, Scottish Water disclosed all the information it held falling within scope of Mr Dempster's request. As Scottish Water is no longer withholding the information it withheld in its review response, and in the light of the acknowledgement by Scottish Water that the information was wrongly withheld, the Commissioner must conclude that the information in question was not excepted from disclosure under regulation 11(2) of the EIRs, and that the exception was wrongly applied.

Failure to comply with timescales

34. Regulation 5(2) of the EIRs allows Scottish public authorities a maximum of 20 working days after receipt of a request to comply with a request for information, subject to certain exceptions which are not applicable in this case. Mr Dempster made his request on 4 July 2017, but did not receive a response.
35. In its review response to Mr Dempster, Scottish Water stated that his email was blocked by its security software. In submissions to the Commissioner, Scottish Water stated that at the time of Mr Dempster's request, it had been "going live" with a new unified web and email security system and was experiencing many emails blocked as spam or for content issues. However, Scottish Water also stated that it had established that Mr Dempster's email was received into the FOI mailbox on 4 July 2017, and was not blocked.
36. Scottish Water submitted that the email sent on 4 July 2017 may have been deleted, but stated that it could not determine by whom or when this would have occurred. It may have been accidental.
37. Scottish Water apologised for any inconvenience to Mr Dempster for providing him with the wrong information about his email.
38. The Commissioner notes the explanation from Scottish Water, but does not find it entirely satisfactory, in establishing what happened to Mr Dempster's email of 4 July 2017. However, in terms of compliance with the EIRs, it is a matter of fact that Scottish Water failed to respond to the request from Mr Dempster within 20 working days, and therefore failed to comply with regulation 5(2) in this respect.
39. The Commissioner has noted this failure but does not require Scottish Water to take any action in relation to this breach in respect of this application.

Decision

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

The Commissioner finds that, by the end of the investigation, Scottish Water had disclosed all the information it held that fell within the scope of Mr Dempster's request. However, Scottish Water:

- i. failed to comply in full with regulation 5(1) of the EIRs, in initially failing to disclose all of the information covered by Mr Dempster's request and by failing to respond to an environmental information request under the EIRs;
- ii. wrongly withheld information under regulation 11(2) of the EIRs, which it later disclosed;
- iii. failed to respond to the initial request within the timescale prescribed in regulation 5(2) of the EIRs.

Given that Scottish Water has disclosed the information which was wrongly withheld, the Commissioner does not require Scottish Water to take any further action in relation to Mr Dempster's application.

Appeal

Should either Mr Dempster or Scottish Water 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

15 January 2018

Appendix 1: Relevant statutory provisions

The Freedom of Information (Scotland) Act 2002

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 –
 - (a) the provision does not confer absolute exemption; and
 - (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

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- (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.
- (2) The duty under paragraph (1)-
 - (a) shall be complied with as soon as possible and in any event no later than 20 working days after the date of receipt of the request; and
 - (b) is subject to regulations 6 to 12.

...

11 Personal data

...

- (2) To the extent that environmental information requested includes personal data of which the applicant is not the data subject and in relation to which either the first or second condition set out in paragraphs (3) and (4) is satisfied, a Scottish public authority shall not make the personal data available.

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