

# Decision Notice 022/2020

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## Water connections

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**Applicant: The Applicant**

**Public authority: Scottish Water**

**Case Ref: 201901785**





## Summary

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Scottish Water was asked for information about specific water connections in Fife. Scottish Water provided some information, advising that other information was not held.

During the investigation, Scottish Water notified the Commissioner that it did hold information falling within part of the Applicant's request, accepting it had incorrectly responded to that part of the request. As a result, the Commissioner found that Scottish Water had partially failed to comply with the EIRs by informing the Applicant that it did not hold the information requested.

The Commissioner required Scottish Water to provide a new review outcome.

## Relevant statutory provisions

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The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (paragraphs (a) and (c) of definition of "environmental information"); 5(1) and (2)(b) (Duty to make available environmental information on request); 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 Appendix 1 to this decision. The Appendix forms part of this decision.

## Background

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1. On 17 December 2018, the Applicant made a request for information to Scottish Water. The information requested was:
  - a) A copy of Scottish Water Policy for the provision of Water Connections from all categories of water mains along with Management Guidelines for Policy Implementation.
  - b) A copy of Scottish Water Management Guidance for the Assessment of Connection Applications and the supporting Connection Application Assessment Documentation.
  - c) Copies of the completed Scottish Water Connection Application Assessment documents for the following water connection quote request, client quotation and PDE response respectively:
    - i. New supply – Michael Woods Leisure Complex
    - ii. New Fire Main – Glenrothes Strollers Football Club
    - iii. New Fire Main & Portable Water Supply – Rosyth Sports Pavilion.
2. Scottish Water responded on 11 January 2019. It advised that it had applied section 39(2) of the Freedom of Information (Scotland) Act 2002 (FOISA), as the request was for environmental information and fell to be considered under the EIRs. In relation to part a) of the request, Scottish Water advised the Applicant that policy information was available online and provided a weblink. It stated it did not hold any information falling within parts b) and c) of the request and applied regulation 10(4)(a) of the EIRs.

3. On 28 February 2019, the Applicant wrote to Scottish Water, requesting a review of its decision. It was not satisfied that the link provided gave an adequate response to part a), or that there was no information held for parts b) and c).
4. Scottish Water notified the Applicant of the outcome of its review on 28 March 2019. It upheld its original response while providing the Applicant with some further related information (with personal data redacted).
5. On 24 September 2019, the Applicant wrote to the Commissioner. The Applicant 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. The Applicant stated it was dissatisfied with the outcome of Scottish Water's review because it disagreed that no information was held (regulation 10(4)(a) of the EIRs).

## **Investigation**

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6. The application was accepted as valid. The Commissioner confirmed that the Applicant 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.
7. On 21 October 2019, Scottish Water was notified in writing that the Applicant had made a valid application. The case was 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. Scottish Water was invited to comment on this application and to answer specific questions, in particular to explain the steps it had taken to identify and locate the information requested.
9. Scottish Water responded, confirming its view that the requests fell to be dealt with in terms of the EIRs and, as a result, applying the exemption in section 39(2) of FOISA. It also provided submissions to support its position that, other than the information it had provided to the Applicant, it did not hold any information falling within the scope of his request.
10. Following further correspondence with the investigating officer, Scottish Water informed the Commissioner that, having conducted further investigation, it did in fact hold information falling within the scope of part c) iii of the Applicant's request. Scottish Water apologised for invoking the exception under regulation 10(4)(a) of the EIRs, stating it would provide the Applicant with a new review, taking account of the information identified.

## **Commissioner's analysis and findings**

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11. 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 the Applicant and Scottish Water. He is satisfied that no matter of relevance has been overlooked.

### **Application of the EIRs**

12. It is clear that any information falling within the scope of the Applicant's requests, which relates to aspects of connections to the water mains, having a clear impact on the elements of the environment, is properly considered to be environmental information, as defined in regulation 2(1) of the EIRs (the relevant provisions are reproduced in Appendix 1 to this decision). The Applicant made no comment on Scottish Water's application of the EIRs in

this case and the Commissioner will consider the requests in what follows solely in terms of the EIRs.

### **Information held by Scottish Water**

13. 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. While this duty is subject to certain qualifications, none of them appear to be relevant in this case. 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 (but which is not in fact held at that time).
14. 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. If no such information is held by the authority, regulation 10(4)(a) of the EIRs permits the authority to give the applicant notice to that effect.
15. Scottish Water provided full submissions on the steps taken to identify and locate the information requested by the Applicant and confirmed the searches and enquiries it undertook to ascertain whether it held any information falling within the scope of the request, detailing the places searched. This included consultation with relevant staff. The conclusion of these searches and enquiries was that no information was held falling within the scope of parts b) and c) i and ii of the Applicant's request. Scottish Water provided evidence to this effect.
16. In relation to part c) iii of the request, Scottish Water explained that further searches had resulted in it locating information falling within the scope of that part. Scottish Water apologised for wrongly responding in terms of regulation 10(4)(a) and advised the Commissioner it would provide the Applicant with a further review, responding otherwise than under regulation 10(4)(a) of the EIRs.
17. Having considered all relevant submissions and the terms of the Applicant's request, the Commissioner accepts that (during the investigation) Scottish Water took adequate, proportionate steps to establish whether it held any information falling within the scope of those parts of the Applicant's request covered by his application to the Commissioner.
18. As mentioned above, the Commissioner can only consider whether information is actually held by Scottish Water, not what information it should hold or what an applicant believes it should hold.
19. In all the circumstances, therefore, the Commissioner is satisfied that Scottish Water does not (and did not, at the time it received the request from the Applicant) hold any information falling within the scope of parts b) and c) i and ii of the request and, as such, Scottish Water was entitled to respond in terms of regulation 10(4)(a) of the EIRs in relation to those parts of the request.
20. 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 be upheld if, in all the circumstances, the public interest in maintaining the exception outweighs the public interest in making the information available. The Commissioner is satisfied that the Council does not (and did not, on receiving the request) hold the information in question. Consequently, he does not consider there to be any conceivable public interest in requiring that the information be made available. The Commissioner therefore concludes, to the extent that he has accepted the information is not

held, 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.

21. As Scottish Water has confirmed it does hold information falling within the scope of part c) iii of the Applicant's request, the Commissioner must find that Scottish Water was not entitled to respond to that part of the request in terms of regulation 10(4)(a) of the EIRs and that, in doing so, it failed to comply with regulation 5(1) of the EIRs.
22. The Commissioner now requires Scottish Water to respond to part c) iii of the Applicant's request on the basis that information is held. In other words, it must provide the Applicant with a new review outcome, in terms of regulation 16 of the EIRs (i.e. substituting a new decision for its original decision) and not relying on regulation 10(4)(a) of the EIRs.

## Decision

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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 the Applicant.

The Commissioner finds that, while Scottish Water was entitled to respond in terms of regulation 10(4)(a) of the EIRs in part, it was incorrect to do so in relation to part c) iii of the request.

The Commissioner therefore requires Scottish Water to provide the Applicant with a new review outcome in terms of regulation 16 of the EIRs, on the basis that the relevant information is held, by **20 March 2020**.

## Appeal

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Should either the Applicant 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.

## Enforcement

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If Scottish Water fails to comply with this decision, the Commissioner has the right to certify to the Court of Session that Scottish Water has failed to comply. The Court has the right to inquire into the matter and may deal with Scottish Water as if it had committed a contempt of court.

**Margaret Keyse**  
**Head of Enforcement**

**4 February 2020**

### 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;

...

(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.

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#### 10 Exceptions from duty to make environmental information available–

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(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;

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