

Decision Notice 067/2021

Clinical waste site

Applicant: The Applicant

Public authority: Scottish Environment Protection Agency

Case Ref: 202000494



Scottish Information
Commissioner

Summary

SEPA was asked for information regarding a clinical waste site in Lanarkshire, formerly operated by HES Limited. SEPA provided some information, stating other information was either not held or excepted from disclosure under regulation 10(5)(b) and (e) of the EIRs.

Following an investigation, during which SEPA released the information previously withheld under regulation 10(5)(e) and some of the information previously withheld under regulation 10(5)(b), the Commissioner found that SEPA had partially breached the EIRs in responding to the request. He was, however, satisfied that SEPA had identified all of the information held and that the remaining information was correctly withheld by SEPA (given the likely prejudice to SEPA's ability to conduct a criminal investigation if it were disclosed).

Relevant statutory provisions

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (paragraphs (b) and (c) of definition of "environmental information") (Interpretation); 5(1) and (2)(b) (Duty to make environmental information available on request); 10(1), (2), (4)(a), (5)(b) and (e) (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

1. On 29 January 2020, the Applicant made a request for information to the Scottish Environment Protection Agency (SEPA). The information requested was:
 - a) all information and correspondence between SEPA and Cliniwaste regarding taking over the former HES (Healthcare Environmental Services) site in Shotts.
 - b) all information, including correspondence, involving the transfer of the license to Cliniwaste, including all parties involved in the negotiations.
 - c) all financial due diligence enquiries done by SEPA on Cliniwaste and its directors.
 - d) all technical due diligence and copies of qualified and technical staff involved with Cliniwaste to satisfy SEPA that Cliniwaste was technically competent.
 - e) copies of all waste records of waste leaving the former HES Hasssockrigg site to any potential off-site location, including dates, packaging method, type of vehicle and copies of waste carrier license.
 - f) all information between SEPA and BDO (liquidators) and any other parties involved in negotiating access to the site by SEPA, including Government institutions.
2. On 30 January 2020, the Applicant confirmed that the timeline for his request was the period 1 June 2019 to 31 January 2020.
3. On 4 March 2020, the Applicant wrote to SEPA, requesting a review on the basis that it had failed to respond to his request.
4. SEPA notified the Applicant of the outcome of its review on 28 April 2020, apologising for the delay in responding to the request. It advised the Applicant that it was dealing with the request under the EIRs, applying section 39(2) of the Freedom of Information (Scotland) Act

2002 (FOISA). SEPA provided some information, with personal data redacted in terms of regulation 11(2) of the EIRs. It explained that it was withholding information under regulation 10(5)(b) and 10(5)(e) of the EIRs.

5. In relation to parts c) and d) of his request, SEPA responded in terms of regulation 10(4)(a) of the EIRs, advising that it held no information.
6. On 29 April 2020, 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. Following further communication, the Applicant confirmed he was dissatisfied with information being withheld in terms of regulation 10(5)(b) and 10(5)(e) of FOISA. He was also dissatisfied with SEPA's application of regulation 10(4)(a) of the EIRs. However, he confirmed that he was content with the redaction of personal data under regulation 11(2).

Investigation

7. 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.
8. On 6 July 2020, SEPA was notified in writing that the Applicant had made a valid application. SEPA was asked to send the Commissioner the information withheld from the Applicant. SEPA provided the information and the case was allocated to an investigating officer.
9. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. SEPA was invited to comment on this application and to answer specific questions, focusing on the steps taken to identify and locate information falling within the scope the Applicant's request and why the information requested was considered excepted from disclosure (with emphasis on the exceptions claimed within the review outcome of 28 April 2020).
10. SEPA responded to the Commissioner, advising that it had reconsidered all of the information previously withheld. It stated that it no longer wished to rely on the exception in regulation 10(5)(e) of the EIRs. It confirmed that this information, and some of the information previously withheld under regulation 10(5)(b) of the EIRs, had now been disclosed to the Applicant.
11. SEPA advised that the further information disclosed to the Applicant had been redacted in terms of regulation 11(2) and 10(5)(b) of the EIRs. It provided specific submissions as to why it considered the information redacted, and further information that remained withheld in full, to be excepted from disclosure in terms of regulation 10(5)(b). It also provided submissions on its searches.
12. The Applicant confirmed that he had received the additional information disclosed by SEPA, confirming he had no objection to the redaction of personal data but not accepting the application of regulation 10(5)(b) of the EIRs.
13. The Applicant provided submissions as to why he considered the information should be disclosed.

Commissioner's analysis and findings

14. In coming to a decision on this matter, the Commissioner considered all of the withheld information and the relevant submissions, or parts of submissions, made to him by both the Applicant and SEPA. He is satisfied that no matter of relevance has been overlooked.

Application of the EIRs

15. Having considered the withheld information (which relates to the disposal of waste), the Commissioner is satisfied that the information sought by the Applicant is properly considered to be environmental information, as defined in regulation 2(1) (in particular, paragraphs (b) and (c)) of the EIRs. The Applicant has not disputed SEPA's decision to handle the request under the EIRs and the Commissioner will consider the information in what follows solely in terms of the EIRs.

Regulation 5(1) of the EIRs

16. Regulation 5(1) of the EIRs (subject to the various qualifications contained in regulations 6 to 12) requires a Scottish public authority which holds environmental information to make it available when requested to do so by any applicant.
17. 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.
18. As mentioned above, in responding to the Applicant's requirement for review, SEPA withheld information under regulation 10(5)(b) and 10(5)(e) of the EIRs. In relation to parts c) and d) of the request, SEPA responded in terms of regulation 10(4)(a) of the EIRs.
19. In its submissions to the Commissioner, SEPA advised that it had reconsidered its position regarding the information withheld from the Applicant. SEPA withdrew its reliance on regulation 10(5)(e) of the EIRs

Regulation 10(5)(e) of the EIRs (confidentiality of commercial or industrial information)

20. As mentioned above, during the investigation, SEPA withdrew its reliance on regulation 10(5)(e) for some of the information withheld from the Applicant. It confirmed this information had been disclosed to the Applicant, subject to redaction in terms of regulation 11(2) and 10(5)(b) of the EIRs. In the absence of submissions from SEPA as to why the information was initially considered excepted from disclosure under this exception, the Commissioner must conclude that the information in question was not properly excepted under regulation 10(5)(e) of the EIRs and therefore was incorrectly withheld by SEPA. In doing so, SEPA breached regulation 5(1) of the EIRs.
21. Given that the information concerned was provided to the Applicant during the investigation, the Commissioner does not require SEPA to take any action in respect of this failure.

Regulation 10(5)(b) of the EIRs (the course of justice, the ability of a person to receive a fair trial or the ability of any public authority to conduct an inquiry of a criminal or disciplinary nature)

22. Regulation 10(5)(b) of the EIRs provides that a Scottish public authority may refuse to make environmental information available to the extent that its disclosure would, or would be likely

to, prejudice substantially the course of justice, the ability of a person to receive a fair trial or the ability of any public authority to conduct an inquiry of a criminal or disciplinary nature. As with all of the exceptions in regulation 10, this one is subject to the public interest test in regulation 10(1)(b).

23. In its response to his requirement for review, SEPA informed the Applicant that it was withholding information in terms of regulation 10(5)(b) of the EIRs..
24. As indicated above, during the investigation, SEPA disclosed some of the information it had previously withheld in terms of regulation 10(5)(b) of the EIRs, subject to redactions in terms of regulation 11(2) (Personal data). It continued to rely on this regulation to withhold four documents in full and also for redactions it had made to the information disclosed.
25. In relation to the information SEPA initially withheld under regulation 10(5)(b) of the EIRs, but then disclosed during the investigation, in the absence of submissions from SEPA as to why the information was initially considered excepted from disclosure under this exception, the Commissioner must conclude that the information in question was not properly excepted under regulation 10(5)(b) of the EIRs and was therefore incorrectly withheld by SEPA. In doing so, SEPA breached regulation 5(1) of the EIRs.
26. As mentioned above, SEPA maintained that this exception applied to the information that remained withheld.
27. In determining whether the withheld information would fall within the scope of this exception, the Commissioner has been mindful of the explanation given in *The Aarhus Convention: An Implementation Guide*¹, where the principles behind the Convention provision on which the exception is based are set out in the following way (page 87):

The course of justice refers to active proceedings within the courts. The term “in the course of” implies that an active judicial procedure capable of being prejudiced must be under way. This exception does not apply to material simply because at one time it was part of a court case. Public authorities can also refuse to release information if it would adversely affect the ability of a person to receive a fair trial. This provision should be interpreted in the context of the law pertaining to the rights of the accused.

The Guide goes on to explain that:

Public authorities also can refuse to release information if it would adversely affect the ability of a public authority to conduct a criminal or disciplinary investigation. In some countries, public prosecutors are not allowed to reveal information to the public pertaining to their cases. The Convention clearly does not include all investigations in this exception, but limits it to criminal or disciplinary ones only. Thus, information about a civil or administrative investigation would not necessarily be covered.

28. In its submissions to the Commissioner, SEPA confirmed that the matter had been referred to the Crown Office and Procurator Fiscal Service and was subject to active judicial proceedings, the integrity of which would be prejudiced should the information be disclosed. SEPA argued that, if certain information within these documents were disclosed under the EIRs, it would prejudice the openness and freedom essential in reporting matters to the

¹ http://www.unece.org/env/pp/implementation_guide.html

Procurator Fiscal. It noted that relevant and material information disclosed to the accused would not be appropriate for disclosure to the public outwith the environment of the trial.

29. SEPA provided further detailed submissions as to why the disclosure of the information in question would be likely to prejudice substantially the course of justice, the ability of a person to receive a fair trial and SEPA's ability to conduct an inquiry of a criminal nature.
30. In this case, the Commissioner is aware that, explaining his reasoning with reference to the more detailed submissions made by SEPA or by the Applicant may disclose details of the withheld information. As the Court of Session recognised in *Scottish Ministers v Scottish Information Commissioner* [2006] CSIH 8 (at [18]):

It is important, in our view ... to bear in mind that the [Commissioner], in giving reasons for his decision, is necessarily restrained by the need to avoid, deliberately or accidentally, disclosing information which ought not to be disclosed.

31. Having considered the withheld information, the submissions made by the Applicant and the submissions made by SEPA, the Commissioner is satisfied that disclosure would seriously undermine an ongoing criminal investigation by SEPA and the ongoing active court proceedings. He is therefore satisfied that disclosure would, or would be likely to, prejudice substantially the ability of SEPA to conduct an inquiry of a criminal nature, and the ability of a person to receive a fair trial. The information is therefore excepted from disclosure under regulation 10(5)(b).

Public interest test

32. The Commissioner must now go on to consider the public interest test in regulation 10(1)(b) of the EIRs. This specifies that a public authority may only withhold 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.
33. SEPA recognised that there was a public interest in disclosure in promoting openness and transparency, and thereby increasing public awareness of the environment. In this case, there was a public interest in the handling and disposal of clinical waste, and their regulation, as matters impacting on public health.
34. On the other hand, SEPA submitted there was a strong public interest in preserving the confidentiality of SEPA's investigatory process. It added that it was not in the public interest to disclose information that could have a detrimental effect on an ongoing court case.
35. SEPA identified a strong public interest in withholding information to limit media reporting and protect the justice system, by ensuring that the Courts did not, even subconsciously, take account of anything other than the evidence and arguments presented in court.
36. On balance, SEPA considered that the public interest in ensuring it was able to conduct its enforcement duties without substantially prejudicing an ongoing case outweighed the public interest in making the information availability.
37. The Applicant provided reasoning as to why he required the information to be disclosed.
38. The Commissioner recognises that there is a strong public interest in transparency and in understanding how SEPA enforces environmental protection matters in Scotland.
39. However, the Commissioner must also bear in mind the relevance of the information to an ongoing investigation and active legal proceedings. There is a clear public interest in SEPA being free to take the most appropriate and effective action in the interests of the public and

the environment, without that action being undermined by the information being disclosed under the EIRs.

40. There is a strong public interest in ensuring that the results of investigations covered by regulation 10(5)(b) of the EIRs can be considered and (where appropriate) prosecuted effectively, subject to the protections afforded to the accused by a fair trial. Public disclosure outwith that context is likely to lead to "trial by media", something which is not generally considered to be in the public interest.
41. While the Commissioner recognises the personal interest the Applicant has in disclosure of the information, he does not consider that this equates to a public interest in disclosure.
42. On balance, the Commissioner finds, in all the circumstances, that the public interest in making the information available is outweighed by that in maintaining the exception in regulation 10(5)(b). As such, the Commissioner finds that SEPA was entitled to withhold the information under consideration here in terms of regulation 10(5)(b) of the EIRs.

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

43. The Applicant was dissatisfied with the SEPA response in terms of regulation 10(4)(a) of the EIRs as it pertained to parts c) and d) of his request.
44. As mentioned above, 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 (but which is not in fact held at that time).
45. 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.
46. In this case, SEPA submitted that, other than the information already considered above, it held no information falling within the scope of the Applicant's request.
47. The standard of proof to determine whether a Scottish public authority holds 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.
48. SEPA confirmed the searches and enquiries it undertook to ascertain what information it held falling within the scope of the Applicant's request, detailing the searches undertaken. These included searches of relevant electronic and paper records, and consultation with relevant staff. SEPA provided supporting evidence confirming the outcomes of its searches.
49. SEPA explained that the conclusion of the searches and enquiries was that no information was held, beyond that considered (and either disclosed or withheld) in responding to the Applicant.
50. Having considered all relevant submissions and the terms of the request, the Commissioner accepts that SEPA interpreted the Applicant's request reasonably and took adequate, proportionate steps with a view to identifying and locating the information falling within the scope of parts c) and d) of the Applicant's request. If SEPA did hold any further relevant information, the Commissioner is satisfied that it would have been found by the searches carried out.

51. As mentioned above, the Commissioner can only consider whether information is actually held by SEPA, not what information it should hold or what an applicant believes it should hold.
52. 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 SEPA 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 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.
53. In all the circumstances, therefore, the Commissioner is satisfied that SEPA does not (and did not, at the time it received the request from the Applicant) hold any information falling within the scope of parts c) and d) of the Applicant's and so was entitled to give notice, in terms of regulation 10(4)(a) of the EIRs, that it did not hold the information requested.

Decision

The Commissioner finds that the Scottish Environment Protection Agency (SEPA) 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 SEPA was entitled to give the Applicant notice, in terms of regulation 10(4)(a) of the EIRs, that it held no information falling within parts a) and c) of his request. He also finds SEPA was entitled to withhold the information that remained withheld at the conclusion of the investigation, as excepted in in terms of regulation 10(5)(b) of the EIRs.

However, the Commissioner finds that SEPA was not entitled to withhold the information it subsequently disclosed during the investigation and that, by doing so, it failed to comply with regulation 5(1) of the EIRs. Given that this information was disclosed during the investigation, the Commissioner does not require SEPA to take any action.

Appeal

Should either the Applicant or SEPA 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

5 May 2021

Appendix 1: 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 –
- ...
- (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)-
- ...
- (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;

...

(5) A Scottish public authority may refuse to make environmental information available to the extent that its disclosure would, or would be likely to, prejudice substantially-

...

(b) the course of justice, the ability of a person to receive a fair trial or the ability of any public authority to conduct an inquiry of a criminal or disciplinary nature;

...

(e) the confidentiality of commercial or industrial information where such confidentiality is provided for by law to protect a legitimate economic interest;

...

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