



# Decision Notice 088/2023

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## Garmouth outfall

**Authority: Scottish Environment Protection Agency**  
**Case Ref: 202200064**

### Summary

The Applicant asked the Authority for a range of information about the outfall at Garmouth. The Authority disclosed some information in response to the request and during the investigation. The Commissioner investigated and was satisfied by the end of the investigation that the Authority had carried out appropriate searches to identify the information falling within the scope of the request.

### Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) section 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” and “the Commissioner” and definitions (a), (b) and (c) of “environmental information”) (Interpretation); 5(1) and (2)(b) (Duty to make environmental information available on request); 10(1) and (4)(a) (Exceptions from duty to make environmental information available); 17(1), (2)(a), (b) and (f) (Enforcement and appeal provisions)

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 15 August 2021, the Applicant made a request for information to the Authority. He asked for “information dated from January 1 2020, concerning the water treatment outlet pipe that empties into the old course of the River Spey adjacent to the fifteenth green at the Kingston and Garmouth Golf Club. Specifically I should like to be informed about any communications between [the Authority] and Scottish Water about this outfall, any information that [the

Authority] has about the present water quality in this area and any assessment that has been made regarding the risk to public health.”

2. The Authority did not respond to the request.
3. On 13 October 2021, the Applicant wrote to the Authority requesting a review of its decision, on the basis that it had not responded to his request.
4. The Authority notified the Applicant of the outcome of its review on 3 December 2021. It:
  - Stated that it was unable to conduct hard copy searches of the information requested, due to COVID-19 office closures (although it would not expect to find hard copy information falling within the scope of the request).
  - Confirmed that it held electronic communications between itself and Scottish Water, but there were limitations on its ability to undertake a comprehensive search of information during the period 1 January 2020 to 24 December 2020 due to the cyber attack of 24 December 2020. The Authority disclosed redacted copies of the information it had identified as falling within scope of the request.
  - Confirmed that it held no further information on the water quality in the area and that routine sampling was not conducted for this location: however, due to the impact of the cyber attack it was unable to categorically confirm whether any *ad hoc* sampling was undertaken during the relevant time period.
  - Confirmed that no assessment has been made regarding the risk to public health. This information was not held as it fell outwith the remit of the Authority, but the local council might hold this information as the responsible public authority.
5. On 16 January 2022, 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 he was dissatisfied with the outcome of the Authority’s review because he considered that:
  - information had been omitted from the Authority’s response;
  - the Authority should hold information about the water quality;
  - the Authority should have been able to enter the offices to check for hard copy information;
  - the Authority was responsible for ensuring that the health and wellbeing of people in Scotland was improving;
  - the Authority was responsible for public health and was required to pay close attention to any potential interaction between environmental pollution and its impact on human health. This should, in the Applicant’s view, require that they record and report any possible risks to the lead agency for public health. He therefore found it surprising that the Authority did not hold information about the risk to public health caused by the broken pipeline that was spilling into stagnant pools which had formed during dry periods along parts of the old course of the River Spey.
  - it was surprising, that the Authority was not aware of these dangers or did not have documentation addressing these potential risks at this site.

He also noted that, in response to an information request to the local council, it stated that it did not hold any information.

## **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 31 January 2022, the Authority was notified in writing that the Applicant had made a valid application. The case was then allocated to an investigating officer.
8. The Applicant was asked for, and provided, an explanation as to why he considered the Authority held further information than disclosed. He noted that a meeting between Scottish Water and the Authority was held on 22 September 2021, following which signage was raised by Scottish Water which included the words:  
  
“... water quality in this area has been affected by the outfall from Garmouth Waste Water Treatment Works following a change in the alignment of the River Spey’s main channel. We are working to identify an interim solution to restore better dilution of the treated effluent as quickly as possible. We would advise walkers to take care and not to allow dogs to enter the water in this area.”
9. It was explained to the Applicant that information post-dating the Authority’s receipt of the request would not fall within the scope of this application.
10. 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 the searches that had been conducted and why it was satisfied that no further information was held.
11. The Authority provided submissions, following which it was asked to provide, and provided, further information to the Applicant in relation to his request.
12. The Applicant continued to express dissatisfaction that SEPA should hold more information than disclosed.

## **Commissioner’s analysis and findings**

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

### ***Information falling in scope***

14. 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 it does not in fact hold).

### ***The Authority’s submissions on searches and information held***

15. The Authority submitted that searches subsequent to that undertaken at the date of the review response had not identified any information detailing the placement of the signs in

September 2021. One internal email chain was identified that discussed the 22 September 2021 meeting (which was disclosed to the Applicant during the investigation) but not the signs specifically.

16. The Authority explained that, at the date of the request, Covid restrictions applied and staff were not able to search hard copy records in offices. The Authority noted it was still recovering from the cyber attack on 24 December 2020<sup>1</sup>, following which many of its electronic records had been [inaccessible]. So, in responding to the request, searches focussed on the electronic information which had been recovered following the cyber attack.
17. The Authority stated that staff had searched Microsoft Outlook emails in certain specified mailboxes, as well as the emails and Microsoft Teams folders for team members in these business areas. Employees had also searched the Laboratory Information Management System for water quality data from Garmouth outfall and the watercourse. The local team where outfall was located advised on relevant and appropriate searches.
18. The Authority provided further details of the individuals who conducted searches and why they were considered relevant.
19. The Authority submitted that further checks had been made, but that no further information within the scope of the original request had been identified.
20. The Authority confirmed that, as the Elgin office had reopened in December 2022, hard copy records had been searched (but no relevant information was identified).
21. In relation to the meeting on 22 September 2021, the Authority noted that one email had already been provided to the Applicant as it related to the setting up of the meeting with Scottish Water on 22 September. A further email chain was held, triggered by notification of an environmental event reported at the outfall. (This email chain goes on to mention the 22 September 2021 meeting and includes a summary of the meeting that day – and was provided to the Applicant during the investigation.)
22. The Authority also confirmed that, subsequent to the original searches conducted at the time of the request, further searches confirmed that no regular or *ad hoc* sampling had been conducted (within the time period covered by the request). The Authority noted that the sewage treatment works was monitored by the operator and this data was held by Scottish Water.
23. Following the criminal cyber attack in December 2020, the Authority explained that there was no single database containing information on complaints. Before the cyber attack, data from a database had been recovered as part of the data recovery, but only up to September 2019.
24. A search of the Contact Centre records and the Environmental Events mailbox for Garmouth, both going back to April 2021, found three relevant reports: two within the scope of the request, one after. Redacted copies of these records were provided to the Applicant.
25. With respect to information from 1 January 2020 to April 2021, the Authority submitted that some historical records remained inaccessible. Both Covid and the December 2020 cyber attack impacted on its ability to take, analyse and report samples. During 2021, the Authority was unable to record data on pollution events in the normal way, due to the consequences of the December 2020 cyber attack. The Authority explained that it has prioritised identifying

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<sup>1</sup> [Cyber-attack | Scottish Environment Protection Agency \(SEPA\)](#)

and ensuring those responsible stopped pollution as quickly as possible, with any necessary mitigation put in place and actions taken to prevent reoccurrence.

26. The Authority confirmed that the document containing the flow estimates (only) for the Black Burn (a nearby water source) was supplied to the Applicant with its review outcome.

#### *The Applicant's submissions about the exception*

27. During the investigation, the Applicant provided detailed commentary as to why he believed further information was held.
28. Specifically, he noted that an emergency meeting was held on 22 September 2021, attended by all the main parties, when concerns about public health were discussed and a decision was taken to erect signage. The Applicant advised that Scottish Water had responded to a request, stating that no minutes were taken at this meeting. He considered it was concerning that this important meeting had not been minuted and incomprehensible that "no risk assessments were made in relation to public health".
29. He believed that a proper written scientific assessment of the risk to public health should have been undertaken prior to the placement of signs, and that a written assessment should have been made, and that not doing so was unprofessional and negligent.
30. The Applicant considered the Authority had a statutory responsibility to issue warning notices to Scottish Water if it considered Scottish Water was contravening regulations regarding water quality.
31. The Applicant explained that the outfall pipe had broken several years ago, and was then extended in 2020, further down the old course of the river. Although the effects of the effluent had less direct impact on the surrounding area, the problem had not been resolved and still posed a health hazard to visitors to the area. His concern, which he believed was shared by others in the local community, was that the Authority had not been explicit about the dangers and risks, or provided sufficient information to the local community about the continuing discharge of effluent.

#### *The Commissioner's findings*

32. The standard proof to determine whether a Scottish public authority holds information is the civil standard of the balance of probabilities. In determining this, the Commissioner considers the scope, quality, thoroughness and results of the searches carried out by the public authority. He also considers, where appropriate, any reason offered by the public authority to explain why the information is not held, and any reason offered by the requester to explain why information is likely to be held.
33. The Commissioner considers that the searches carried out by the Authority, by the conclusion of the investigation, were thorough and encompassed all areas where information of the type covered by the Applicant's request would have been likely to be held. He is also satisfied that those members of staff involved in carrying out the searches were the most appropriate to do so, based on their knowledge of the systems in use and their role within the Authority.
34. The Commissioner is satisfied that the Authority provided the Applicant with the recorded information it held, and fell within the Applicant's request. The Commissioner also acknowledges the challenging circumstances faced by the Authority at the time it dealt with the request and requirement for review. However, as the Authority located and provided further pertinent information (redacted complaints) to the Applicant during the investigation,

he must find that the Authority failed to comply fully with regulation 5(1) of the EIRs when responding to the Applicant's request.

35. In the review outcome provided to the Applicant, the Authority stated that it did not hold any recorded information about the present water quality in the area, and had made no assessment regarding the risk to public health.
36. Having considered the case in detail, in particular the submissions and explanations provided by the Authority, the Commissioner is satisfied that the Authority does not (and did not, at the time the request was received from the Applicant) hold the above recorded information.
37. Consequently, the Authority was entitled to rely on the exception in regulation 10(4)(a) of the EIRs in response to part of the request about water quality and public health assessments, on the basis that it did not hold the information requested.
38. This exception is subject to the public interest test in regulation 10(1)(b) of the EIRs, but the Commissioner can identify no conceivable public interest in requiring disclosure of information which the Authority does not hold: on balance, therefore, the Commissioner is satisfied that the public interest in maintaining the exception should prevail.

## **Decision**

The Commissioner finds that the Authority 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, by disclosing the recorded information it held by the end of the investigation, and informing the Applicant that it did not hold recorded information about water quality or public health assessments, the Authority complied with the EIRs.

However, as the Authority disclosed further information during the investigation, it failed to comply with regulation 5(1) of the EIRs in not identifying and disclosing this earlier.

Given that the Commissioner is satisfied that all relevant recorded information was provided to the Applicant by the end of the investigation, he does not require the Authority to take any action in respect of this failure, in response to the Applicant's application.

## **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.

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

**14 August 2023**

## Appendix 1: Relevant statutory provisions

### Freedom of Information (Scotland) Act 2002

#### 47 Application for decision by Commissioner

- (1) A person who is dissatisfied with -
- (a) a notice under section 21(5) or (9); or
  - (b) the failure of a Scottish public authority to which a requirement for review was made to give such a notice.

may make application to the Commissioner for a decision whether, in any respect specified in that application, the request for information to which the requirement relates has been dealt with in accordance with Part 1 of this Act.

- (2) An application under subsection (1) must -
- (a) be in writing or in another form which, by reason of its having some permanency, is capable of being used for subsequent reference (as, for example, a recording made on audio or video tape);
  - (b) state the name of the applicant and an address for correspondence; and
  - (c) specify –
    - (i) the request for information to which the requirement for review relates;
    - (ii) the matter which was specified under sub-paragraph (ii) of section 20(3)(c); and
    - (iii) the matter which gives rise to the dissatisfaction mentioned in subsection (1).

### The Environmental Information (Scotland) Regulations 2004

#### 2 Interpretation

- (1) In these Regulations –

“the Act” means the Freedom of Information (Scotland) Act 2002;

“applicant” means any person who requests that environmental information be made available;

“the Commissioner” means the Scottish Information Commissioner constituted by section 42 of the Act;

...

“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)-

...

(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.

...

(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;

...

## **17 Enforcement and appeal provisions**

(1) The provisions of Part 4 of the Act (Enforcement) including schedule 3 (powers of entry and inspection), shall apply for the purposes of these Regulations as they apply for the purposes of the Act but with the modifications specified in paragraph (2).

(2) In the application of any provision of the Act by paragraph (1) any reference to -

(a) the Act is deemed to be a reference to these Regulations;

(b) the requirements of Part 1 of the Act is deemed to be a reference to the requirements of these Regulations;

...

(f) a notice under section 21(5) or (9) (review by a Scottish public authority) of the Act is deemed to be a reference to a notice under regulation 16(4); and

...