

Decision Notice



Decision 086/2009 Mr John Rennie and Scottish Water

Flood information

Reference No: 200900715
Decision Date: 27 July 2009

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Scottish Information Commissioner

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Summary

Mr Rennie requested from Scottish Water details relating to flooding in a particular location over a specific time period. Scottish Water responded by providing information to Mr Rennie which it considered addressed his request. Following a review, Mr Rennie remained dissatisfied and applied to the Commissioner for a decision.

Having agreed with Scottish Water that the request was for environmental information and therefore should properly have been dealt with under the EIRs, the Commissioner found (given that it had been wrong at the time of dealing with the request, to conclude that it did not hold any further relevant information) that Scottish Water was not entitled to refuse the request under regulation 10(4)(a) of the EIRs. However, all further relevant information was located and provided to Mr Rennie during the investigation and therefore the Commissioner did not require Scottish Water to take any action.

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) (definitions (a), (b) and (f) of environmental information); 5(1) and 2(b) (Duty to make environmental information available on request) and 10(1) 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 the Appendix to this decision. The Appendix forms part of this decision.

Background

1. Mr Rennie wrote to Scottish Water on 11 November 2008 to request flood details for a specific address from 1983 to 2004.
2. Scottish Water responded on 11 December 2008, providing copies of all the contacts held on its systems for the location in question. It also explained to Mr Rennie that its records only went back to 2001.



3. On 10 March 2009, Mr Rennie wrote to Scottish Water requesting a review of its decision. In particular, Mr Rennie drew Scottish Water's attention to his recollection of a number of instances of flooding at the location concerned during the relevant period.
4. Scottish Water notified Mr Rennie of the outcome of its review on 7 April 2009, explaining that it did not hold information dating back to 1983. It advised that it had checked its records since its formation and confirmed that the relevant information held had been disclosed to Mr Rennie in response to his request.
5. On 8 April 2009, Mr Rennie wrote to the Commissioner, stating that he was dissatisfied with the outcome of Scottish Water's review and 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 also 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 Rennie 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. The investigating officer contacted Scottish Water on 28 April 2009, advising it that an application had been received from Mr Rennie and giving it an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA). In particular, Scottish Water was asked to comment on whether the information requested could be deemed to be environmental information for the purposes of the EIRs. It was also asked to provide information on the steps taken to establish what relevant information it held.
8. A full response was received from Scottish Water. It confirmed that the application should be considered under the EIRs, advising that it wished to rely on the exemption in section 39(2) of FOISA. It also submitted that it had provided Mr Rennie with all of the information it held and which fell within Mr Rennie's request. It explained the steps taken to establish what it held and these are considered below. On the basis that it did not hold any further relevant information, Scottish Water submitted that it was relying on the exception in regulation 10(4)(a) of the EIRs.
9. Further information and clarification was sought from both Mr Rennie and Scottish Water during the course of the investigation. All relevant submissions received from parties are addressed below.



10. During the course of the investigation, further relevant information was located by Scottish Water and disclosed to Mr Rennie, subject to the redaction of personal data. Mr Rennie has confirmed to the Commissioner that he does not want to receive this personal data and therefore it will not be considered further in this decision. He also advised, however, that he remained of the view he had not been provided with all the information Scottish Water held on the flooding, alluding to certain incidents on which he believed information should be held.

Commissioner's analysis and findings

11. In coming to a decision on this matter, the Commissioner has considered the submissions made to him by both Mr Rennie and Scottish Water and is satisfied that no matter of relevance has been overlooked.

Section 39(2) of FOISA

12. 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*. Broadly, the Commissioner's general position on the interaction between the two regimes is as follows:
- The definition of what constitutes environmental information should not be viewed narrowly, but in line with the definition in regulation 2(1) of the EIRs.
 - There are two separate statutory frameworks for access to environmental information and an authority is required to consider any request for environmental information under both FOISA and the EIRs.
 - Any request for environmental information therefore **must** be dealt with under the EIRs.
 - In responding to any request for environmental information under FOISA, an authority may claim the exemption in section 39(2).
 - If the authority does not choose to claim the section 39(2) exemption, it must deal with the request fully under FOISA, by providing the information, withholding it under another exemption in Part 2, or claiming that it is not obliged to comply with the request by virtue of another provision in Part 1 (or a combination of these).
 - The Commissioner is entitled (and indeed obliged), where he considers a request for environmental information has not been dealt with under the EIRs, to consider how it should have been dealt with under that regime.
13. As mentioned above, Scottish Water submitted in the course of the investigation that it would rely on the exemption in section 39(2) of FOISA in relation to the information requested by Mr Rennie. For this exemption to apply, any information requested would require to be environmental information as defined in regulation 2(1) of the EIRs.



14. Given the subject matter of the information requested by Mr Rennie (details of incidences of flooding at a particular location within a specified timescale), the Commissioner has no difficulty in agreeing with the position arrived at by Scottish Water, i.e. that any information caught by this request would be environmental information for the purposes of the EIRs. The request relates to the state of an element of the environment (water – paragraph (a) of the definition), to discharges of that element into the environment in a form (flooding) likely to affect other elements of the environment (paragraph (b)), and potentially to the state of human health and safety as affected by the state of that element (paragraph (f)).
15. The Commissioner is therefore satisfied that the information requested is exempt under section 39(2) of FOISA. This exemption is subject to the public interest test in section 2(1)(b) of FOISA. The Commissioner's view is that in this case, as there is a separate statutory right of access to environmental information available to Mr Rennie, the public interest in maintaining this exemption and dealing with Mr Rennie's request in line with the requirements of the EIRs, outweighs any public interest in disclosure of information under FOISA. Consequently, it would have been correct in this case to apply section 39(2) and thereafter deal with the request under 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 the applicant's request is received. In the EIRs, this exception is subject to the public interest test contained in regulation 10(1)(b).
17. Scottish Water argued that all of the information it did hold and which fell within the scope of Mr Rennie's request had been disclosed to him. It submitted that the request fell into two categories: information from the period since Scottish Water had come into existence in 2002 and information from the period before it came into existence.
18. Scottish Water explained that in looking for the first category of information, it carried out searches of its Promise, Elipse and Business Information databases. It advised that the Promise database recorded details of all customer contacts/complaints, while the Elipse database was used for all work orders instructed and carried out by Scottish Water following visits by its network staff. The Business Information database covered information of the same description as contained in Promise, but had been used prior to Promise going live: Scottish Water advised that it contained information dating back to 2002 and 2003.
19. Scottish Water explained that all three of these databases had been examined following Mr Rennie's request, and any information held which fell within the scope of the request had been disclosed. Scottish Water submitted that these were the three relevant databases which would hold the sort of information Mr Rennie had requested.



20. In respect of the second category of information, Scottish Water advised that it had uncovered further information (following the Commissioner's request for submissions) stored on a database (Empac) used by its predecessor water authority, East of Scotland Water, to which it still had limited access. Scottish Water explained that the new information had not been retrieved earlier as it was no longer using this database.
21. A further database (Business Applications), which had not been searched by Scottish Water when dealing with Mr Rennie's request and request for a review, was also checked in the course of the investigation, on the basis that it also contained information relating to the location identified in Mr Rennie's request. The information retrieved from both the Empac and Business Applications database was provided to Mr Rennie during the course of the investigation, subject to the redaction of personal details (see paragraph 10 above).
22. Scottish Water advised that it also checked whether any of the information in its databases had been archived in the past and ascertained that this was not the case; as such, all relevant information held on the databases used by Scottish Water had been disclosed to Mr Rennie.
23. Mr Rennie remains dissatisfied with the information Scottish Water has located and provided to him, believing that it should hold more that would be of relevance. In particular, he has identified one occasion in 2007 where a particular member of Scottish Water staff attended at the location and carried out an inspection. It is Mr Rennie's view that records should be held regarding this. He also recalls four instances of flooding at the location, which he believes took place between 12 and 18 years ago.
24. In response to a request for further comments on the points raised by Mr Rennie, Scottish Water advised that it had spoken to the individual who had carried out the inspection at the location in 2007. Although the individual recalled the visit, no record had been made of it, and Scottish Water confirmed that the individual was not required to do so. External visits to inspect issues reported by the public were not always recorded on the Promise database, because there was no procedure in place to enter a resolution of an issue brought to Scottish Water's attention. Scottish Water also explained that the visit of the member of staff did not result in any notes being entered into the Elipse database, and no report of the visit was made as there is no requirement for staff to do so.
25. In relation to instances of flooding 12 to 18 years ago, Scottish Water maintained that it did not have records going back this far, at least in relation to customer services/relations matters. The hard copy files inherited from its predecessor authorities related to major projects and the like. Its Records Management department was asked to search the metadata relating to these retained files, but failed to locate any relevant information dating from before Scottish Water's establishment. Only a small number of more recent letters had been located at its Records Management facility and these had been provided to Mr Rennie.



26. From the submissions made by Scottish Water, the Commissioner is satisfied that it took adequate steps, during the investigation at least, to locate any information that would be relevant to Mr Rennie's request. In the circumstances, he would not expect Scottish Water to hold further information on this matter, although it does not necessarily follow that he will always be inclined to accept assertions of this kind in relation to information created by Scottish Water's predecessor authorities. In any event, he is concerned that the requisite steps were not taken earlier in the course of dealing with Mr Rennie's request: the fact that a database is no longer in active use, for example, cannot justify failure to examine it where its contents are likely to be relevant to an information request.
27. The Commissioner is also satisfied that any additional relevant information located by Scottish Water the course of the investigation has now been provided to Mr Rennie. Therefore, while he cannot accept Scottish Water's assertions that it was entitled to notify Mr Rennie in response to his information request and request for review that it did not hold any further information falling within the scope of his request, he is satisfied that it would have been entitled to do so had these additional searches been carried out at that time.
28. Given that Scottish Water had not located and provided all relevant information on completion of its review, the Commissioner cannot uphold Scottish Water's reliance on the exception in regulation 10(4)(a) of the EIRs. He is not, therefore, required to consider the public interest in relation to this exception.
29. The Commissioner does not, however, require Scottish Water to take any action in response to this decision, given that he is satisfied that all relevant information has now been located and provided to Mr Rennie.

DECISION

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

The Commissioner finds in particular that Scottish Water was not entitled to refuse Mr Rennie's request under regulation 10(4)(a) of the EIRs.

Given that he is satisfied that all relevant information has now been located and provided to Mr Rennie, the Commissioner does not require Scottish Water to take any action in response to this particular application in relation to this failure.

Decision 086/2009
Mr John Rennie
and Scottish Water



Appeal

Should either Mr Rennie 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
27 July 2009



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);

...

- (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.

...
- (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;