

Decision Notice



Decision 005/2011 Mr Eric Marwick and Scottish Water

Date of sewer installation

Reference No: 201001993
Decision Date: 7 January 2011

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Kevin Dunion
Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews KY16 9DS
Tel: 01334 464610



Summary

Mr Eric Marwick requested from Scottish Water the date(s) of the installation of sewers located at specified streets in Broughty Ferry. Scottish Water responded by stating it did not hold the information he requested. Following a review, Mr Marwick remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the request was for environmental information and therefore should have been dealt with under the EIRs. As Scottish Water did not share this view, the Commissioner considered this case under both FOISA and the EIRs. He found that Scottish Water held information falling within the scope of the request and, in the absence of any relevant arguments as to why it should be withheld, required its disclosure.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (4) (General entitlement) and 73 (Interpretation) (definition of "information")

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulation 2(1) (Interpretation) (definitions (a) to (c) and (f) of "environmental information") and 5(1) (Duty to make available environmental information on request)

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. On 20 July 2010, Mr Marwick wrote to Scottish Water requesting the following information:
"any and all information, held in any format, regarding the date(s) of the installation of the main sewer that runs along Dalhousie Road between Abercromby and Bridge Street, Barnhill, Broughty Ferry" and
"date(s) when the sewer that runs down Guthrie Terrace, Barnhill, Broughty Ferry was installed".



2. Scottish Water responded on 17 August 2010, stating it did not hold the information requested and that its GIS system (a database which is a map of Scottish Water's infrastructure based on Ordnance Survey mapping data) showed the dates of the sewers specified in Mr Marwick's request as being unknown.
3. On 30 August 2010, Mr Marwick wrote to Scottish Water requesting a review of its decision. He could not accept there was no record of a date of installation, given Scottish Water's statutory functions with regard to sewerage systems. He also provided details of a meeting at which, as he understood it, a Scottish Water engineer had produced relevant records relating to the area specified in Mr Marwick's request.
4. Scottish Water notified Mr Marwick of the outcome of its review on 13 October 2010, which upheld its original decision that it did not hold the information he had requested. The response confirmed that the information was not held on Scottish Water's GIS system and that its Records Department did not hold the original plans.
5. On 18 October 2010, Mr Marwick 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 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 Marwick 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. On 4 November 2010, the investigating officer wrote to Scottish Water, notifying it that an application had been received from Mr Marwick and giving it an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA). Scottish Water was asked specific questions on the steps it had taken to establish what relevant information it held, and also on whether it should have considered Mr Marwick's request under the EIRs.
8. Scottish Water responded on 24 November 2010, confirming that its GIS system did record a date on which the relevant pipes had been laid. However, it questioned whether it could be considered to hold this information, given its provenance and Scottish Water's consequent lack of confidence in its accuracy. It did not consider the information to be environmental. Its submissions are considered more fully in the Commissioner's analysis and findings below.



Commissioner's analysis and findings

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

Did Scottish Water hold any relevant information?

10. Mr Marwick submitted what was in essence a simple and straightforward request for the dates on which certain sewers had been installed. While confirming that a relevant date was held on its GIS system, Scottish Water did not accept that it held any information falling within the scope of the request.
11. It does not appear to be disputed that the date held on the GIS system would fall within any ordinary definition of the word "information". It would also appear to fall within the definition of "information recorded in any form", applicable for most purposes of FOISA (including those of the general entitlement in section 1(1)). Finally, it would appear to have been held at the time Scottish Water received Mr Marwick's request, and therefore to fall within the scope of that request by virtue of section 1(4) of FOISA.
12. The Commissioner considers below whether the information requested by Mr Marwick should properly have been dealt with under the EIRs, as environmental information. While the EIRs are less specific on the points addressed in paragraph 11 above, the Commissioner would consider the same reasoning to apply. Consequently, he would consider the information (if environmental information) to have been held for the purposes of the EIRs on the same basis as he considers it to have been held for the purposes of FOISA.
13. In reaching the above conclusions, the Commissioner has considered fully the submissions provided by Scottish Water. He will not repeat them at length, but in essence they relate to Scottish Water's concerns about the accuracy of the information. These concerns may be well-founded, but it is not the Commissioner's function to consider whether they are. The point has no bearing on whether information is held for the purposes of FOISA or (if it is environmental information) the EIRs.

EIRs or FOISA?

14. The Commissioner considered the relationship between FOISA and EIRs at length in *Decision 218/2007 Professor A D Hawkins and Transport Scotland*. Broadly, in the light of that decision, his general position on the interaction between the two regimes is as follows:
- The definition of what constitutes environmental information should not be viewed narrowly.
 - 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.



- d. In responding to a request for environmental information under FOISA, an authority may claim the exemption in section 39(2).
 - e. 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).
 - f. 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.
15. Mr Marwick's request was for any and all information, held in any format, regarding the date(s) of the installation of certain sewers. As indicated above, the Commissioner has found Scottish Water to have held (and to hold) information falling within the scope of that request.
 16. Given the subject matter of the request, the Commissioner found it appropriate to consider whether the information requested by Mr Marwick should properly be regarded as environmental information and therefore subject to the EIRs. In response to a request for comments on this point, Scottish Water took the view that none of the limbs of the statutory definition of environmental information had been engaged. While accepting that an activity affecting the environment would be likely to trigger the definition, Scottish Water did not agree that the date of such an activity could do so.
 17. The Commissioner takes the view that the information requested (and held) in this case relates to the installation of an element of the public infrastructure for dealing with human waste. Information relating to that infrastructure would appear to fall quite clearly into the definition of environmental information in regulation 2(1) of the EIRs, noting in particular paragraphs (a), (b), (c) and (f) of that definition. Given the need to avoid drawing the definition of what constitutes environmental information too narrowly, it appears to the Commissioner to be wholly artificial to attempt to sever the date of installation from other information relating to the sewerage infrastructure and thus deprive it of its character as environmental information.
 18. Having found that the information requested in this case should properly be considered to be environmental information, the Commissioner must also find that Scottish Water failed to deal with Mr Marwick's request for that information in accordance with regulation 5(1) of the EIRs.
 19. In the circumstances, noting that Scottish Water does not consider the requested information to be environmental information (and consequently does not consider the exemption in section 39(2) of FOISA to be relevant), the Commissioner has found it necessary in this case to consider how Scottish Water should have dealt with Mr Marwick's request under the EIRs, and also how it did deal with it under FOISA.



Application of the EIRs

20. In this case, apart from arguing that it did (and does) not hold the information, Scottish Water has put forward no reason why Mr Marwick should not be provided with any information held. In the circumstances, having found that Scottish Water held (and holds) information falling within the scope of Mr Marwick's request, the Commissioner considers that he has no option but to find that this information should have been identified, located and provided to Mr Marwick in response to his request. In failing to do this, Scottish Water breached the requirements of regulation 5(1) of the EIRs.

Handling of the request under FOISA

21. Section 1(1) of FOISA states that a person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority, while section 1(4) stipulates that the information the authority is required to provide in response to an information request is that held by it at the time the request is received, subject to qualifications which are not relevant in this case.
22. Apart from arguing that it did not hold the information, Scottish Water presented no reason (either to Mr Marwick or to the Commissioner) why any relevant information it did hold should not be provided to Mr Marwick. Having concluded that the information was (and is) indeed held, the Commissioner must conclude in the circumstances that, by failing to identify, locate and provide the information in question to Mr Marwick, Scottish Water failed to deal with the request in accordance with section 1(1) FOISA.

Conclusion

23. Having found that the information requested by Mr Marwick (i.e. the data held on Scottish Water's GIS system) was (and remains) held by Scottish Water, and having been provided with no arguments, under either FOISA or the EIRs, as to why it should not be provided to him, the Commissioner must require the disclosure of that information to Mr Marwick. In doing so, Scottish Water is entirely free to explain its concerns as to the accuracy of the information.



DECISION

The Commissioner finds that Scottish Water failed to comply with either Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA), or with the Environmental Information (Scotland) Regulations 2004 (the EIRs), in dealing with the information request made by Mr Marwick.

In particular, he finds that the request related to environmental information (as defined by regulation 2(1) of the EIRs) and therefore should have been responded to in accordance with regulation 5(1) of the EIRs.

Having found that information falling within the scope of Mr Marwick's request was (and remains) held by Scottish Water, and in the absence of any relevant arguments that it should not be provided to Mr Marwick, the Commissioner also finds that Scottish Water failed to identify, locate and provide the information as required by section 1(1) of FOISA and regulation 5(1) of the EIRs.

The Commissioner therefore requires Scottish Water to release the date of installation held on its GIS system to Mr Marwick, by 22 February 2011.

Appeal

Should either Mr Marwick 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
7 January 2011



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.

...

- (4) The information to be given by the authority is that held by it at the time the request is received, except that, subject to subsection (5), any amendment or deletion which would have been made, regardless of the receipt of the request, between that time and the time it gives the information may be made before the information is given.

...

73 Interpretation

In this Act, unless the context requires a different interpretation –

...

“information” (subject to sections 50(9) and 64(2)) means information recorded in any form;

...



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;
- (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.

...