

Decision Notice



Decision 057/2012 Mr Derek McPherson and Scottish Water

Works at a specified location

Reference No: 201102077
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Summary

Mr McPherson requested from Scottish Water information related to works undertaken at a specified location between particular dates. Scottish Water responded by providing information in response to certain of his requests and advising that it did not hold certain other information. Information was also withheld under section 35(1)(c) of FOISA, which relates to law enforcement. Following a review, as a result of which Scottish Water provided further information and advised that it no longer sought to withhold information, Mr McPherson remained dissatisfied (believing that Scottish Water held further information) and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that Scottish Water had failed to identify, locate and provide all relevant information it held in dealing with Mr McPherson's requests. However, she accepted that Scottish Water had taken adequate steps to do this by the end of the investigation. She also found that Scottish Water had failed to identify certain information as environmental information and deal with it accordingly under the EIRs, and that it had failed to respond to Mr McPherson's requests within the required timescale.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 39(2)(Health, safety and the environment)

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (Interpretation – parts (a), (b) and (f) of the definition of “environmental information”); 5(1) and 2(a) (Duty to make environmental information available 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.

All references in this decision to “the Commissioner” are to Margaret Keyse, who has been appointed by the Scottish Parliamentary Corporate Body to discharge the functions of the Commissioner under section 42(8) of FOISA.



Background

1. On 18 June 2011, Mr McPherson wrote to Scottish Water requesting the following information:
 - a) With reference to an attached plan, how many times during the period from 24 February 2008 until the present have Scottish Water (or contractors acting at its behest) visited the area highlighted?
 - b) Of the above visits, how many were made for the purposes of identifying problems with untreated sewerage leeching into and contaminating grazing land?
 - c) If such problems were identified, when, precisely, were they so identified?
 - d) Has Scottish Water, during the above period, had any communications with the Scottish Environmental Protection Agency (SEPA) and if so, how many and on which dates?
 - e) Did Scottish Water apprise SEPA of any possible biological contamination to grazing lands referred to above, and if it did so, when?
 - f) If any biological contamination was identified, when was the contamination finally overcome?
 - g) In fiscal terms, how much money has Scottish Water spent on the works carried out during the period from 24 February 2008 to present in the area referred to above?
 - h) Using the attached map, please indicate the areas from which soil/water samples were taken. Please provide specific dates for these samples and also nominate any biological pathogens identified in the samples.
2. Scottish Water responded on 3 August 2011, apologising for the delay in responding to Mr McPherson's request and advised him that it considered some of the information sought to be environmental. Therefore, where appropriate, it had processed his request under the terms of the EIRs.
3. In relation to requests a) and c), Scottish Water withheld the information under section 35(1)(c) (Law Enforcement) of FOISA, stating that the area highlighted as described by Mr McPherson was subject to an ongoing claim. Scottish Water also gave notice that it did not hold certain of the requested information, in the case of requests b) and h) under section 17(1) of FOISA and in the case of requests e) and f) under regulation 10(4)(a) of the EIRs. Information was provided in response to requests d) and g).
4. On 8 August 2011, Mr McPherson wrote to Scottish Water, requesting a review of its decision. Mr McPherson was not satisfied with the time taken to respond to his request, or with Scottish Water's response to requests a), b) and c).
5. Scottish Water notified Mr McPherson of the outcome of its review on 8 September 2011. It advised Mr McPherson that it no longer sought to withhold information from him and provided him with information and explanations in response to requests a), b) and c).



6. On 10 September 2011, Mr McPherson wrote again to Scottish Water, advising that he considered its response to be incomplete, in that it did not advise him of any pathogens identified. He also considered the response to be factually incorrect, on the basis that he had evidence of further examples of works undertaken, in addition to those identified by Scottish Water that had not been provided to him.
7. On 27 September 2011, Scottish Water replied to Mr McPherson, advising that it had undertaken further searches at both regional office level and within Scottish Water's corporate information databases, but had been unable to identify any relevant information in addition to that already supplied to him. Scottish Water also advised Mr McPherson that it had not carried out any tests which would identify pathogens within the area he was concerned about: it supplied a copy of the results of the relevant tests conducted by SEPA, which it had been provided with. Scottish Water invited Mr McPherson to supply it with further any details he had of the works conducted, so that it could investigate this matter further.
8. On 2 November 2011, Mr McPherson wrote to the Commissioner's office, 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.
9. The application was validated by establishing that Mr McPherson had made requests 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 those requests. The case was then allocated to an investigating officer.

Investigation

10. On 7 November 2011, Scottish Water was notified in writing that an application had been received from Mr McPherson.
11. The investigating officer contacted Scottish Water on 2 December 2011, giving it an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking it to respond to specific questions. Scottish Water was asked to provide details of the searches it had conducted to identify and locate the information subject to Mr McPherson's request, and to comment on the extent to which it considered the requested information to be environmental. It was also asked to comment on its delay in responding to the requests.
12. On 10 January 2012, Scottish Water confirmed that it considered all of the information requested by Mr McPherson to fall within the definition of environmental information for the purposes of the EIRs. Scottish Water advised that it would seek to rely on regulation 10(4)(a) (information not held) of the EIRs where information requested by Mr McPherson was not held when his request was received.



13. Scottish Water supplied details of the searches it had undertaken to identify and locate information falling within the scope of Mr McPherson's requests. Scottish Water explained that it recorded information on a geographical basis (by postcode) and therefore undertook searches of its databases using a particular postcode which corresponded with the area identified by Mr McPherson.
14. Along with his application to the Commissioner, Mr McPherson supplied copies of invoices for works relating to the geographical area subject to his requests. These invoices indicated that works had been conducted at the site of interest to Mr McPherson in, for example, March and October 2008 and July 2009, details of which had not been provided by Scottish Water.
15. The investigating officer contacted Mr McPherson to ascertain whether the postcode used by Scottish Water to search information was correct and to seek consent to share details of his evidence of additional works to assist Scottish Water in its searches.
16. Mr McPherson agreed to share some further details of the works that he was aware of, and supplied details of another postcode area which he believed fell within the scope of his requests.
17. The relevant submissions received from both Scottish Water and Mr McPherson will be considered fully in the Commissioner's analysis and findings below.

Commissioner's analysis and findings

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

Scope of investigation

19. Mr McPherson was dissatisfied with the time taken for Scottish Water to respond to his initial request, and believed that Scottish Water had not supplied him with all the information which fell within the scope of his request. Mr McPherson's application, and therefore the Commissioner's investigation, is limited to consideration of adherence to statutory timeframes for responding to his request, and whether Scottish Water identified, located and provided him with all the information it held which fell within the scope of his requests a), b) and c).
20. In terms of the latter ground for dissatisfaction, Mr McPherson supplied copies of invoices which suggested that works had been undertaken at the area in question prior to June 2010 (and therefore that the information that Scottish Water had supplied was incomplete).



Handling in terms of the EIRs

21. In its initial response to Mr McPherson, Scottish Water advised that it had processed his request under both the EIRs and FOISA. Within its submissions to the Commissioner, Scottish Water accepted that the requests, in their entirety, fell within the definition of environmental information.
22. The Commissioner agrees with Scottish Water that the information under consideration in this case is environmental information. The information requested by Mr McPherson concerns the functioning of public infrastructure for the handling of waste, actions taken by Scottish Water to address faults or incidents involving that infrastructure and the consequences resulting from these incidents.
23. The Commissioner is satisfied that the information captured by Mr McPherson's request falls quite clearly into the definition of environmental information in regulation 2(1) of the EIRs, noting in particular paragraphs (a), (b) and (f) of that definition.

Section 39(2) of FOISA – environmental information

24. The exemption in section 39(2) of FOISA provides, in effect, that environmental information as defined by regulation 2(1) of the EIRs is exempt from disclosure under FOISA, with a view to any such information being considered solely in terms of the EIRs. In this case, Scottish Water accepted, within its submissions to the Commissioner, that the information requested fell within the definition of environmental information, and sought to rely on section 39(2) of FOISA.
25. Section 39(2) is subject to the public interest test in section 2(1)(b) of FOISA. As there is a separate statutory right of access to environmental information available to Mr McPherson in this case, the Commissioner accepts that the public interest in maintaining the exemption and in dealing with the request in line with the requirements of the EIRs outweighs any public interest in disclosure of the information under FOISA. The Commissioner has consequently proceeded to consider this case in what follows solely in terms of the EIRs.

Whether all relevant information has been provided

26. In response to Mr McPherson's request a), Scottish Water described incidents which were recorded in its systems for the area highlighted in the map provided. Scottish Water advised that the first of these incidents occurred on 30 June 2010, consisting of a site visit. Various other incidents were recorded by Scottish Water, some instigated as a result of a complaint received.



27. Mr McPherson supplied the Commissioner with copies of invoices from an external contractor, suggesting that works (at the behest of Scottish Water), which were not part of those described by Scottish Water, occurred within the specified dates and area described in Mr McPherson's requests. Given the manner in which information is stored and recorded by Scottish Water, the investigating officer provided Scottish Water with an additional postcode (supplied by Mr McPherson) relating to the area in question, to allow it to undertake further searches.
28. Scottish Water provided the Commissioner with documentation demonstrating the extent of the internal searches conducted to identify, locate and retrieve the information subject to Mr McPherson's requests. It indicated who had been involved in the searches, noting that they were based on postcode information, as this was the way information was stored on its systems.
29. Scottish Water stated that it had undertaken searches of its three computer-based systems, Promise, Ellipse and WAMS, to locate the information in question. A search was carried out against a particular postcode. Once information was retrieved from the system, it was passed to the Asset Planer based in Scottish Water's Western Isles Offices (and therefore with the requisite local knowledge) to ascertain whether the findings identified in the postcode search related to the specific area in which Mr McPherson was interested.
30. Scottish Water advised that specific searches were not carried out for invoices sent to Scottish Water by contractors, as the systems interrogated had not disclosed outsourced work other than that reported to Mr McPherson.
31. Scottish Water's Promise system is a computer system which records all contacts made through its Contact Centre. Written correspondence, such as enquiries or complaints, is also recorded on the system. Once details have been logged, the matter is assigned to the relevant team or person to investigate. The system then allows that assigned person to put notes onto Promise, enabling everyone in the organisation to view what happened and the outcome reached (and allowing customers to be updated as required).
32. Scottish Water advised that it had to deal with a substantial number of sewage chokes within its system, which were generally either carried out by an in-house team or are outsourced to external contractors. These were usually carried out in response to a customer complaint, which would be logged in the Promise system. If repeated sewage chokes were ascertained within a defined area, further investigation work would be carried out to ascertain whether there were major blockages within the sewerage network or a collapse in part of the network. A capital investment project might be instigated if this was the case, to carry out material remedial work to the sewage infrastructure and prevent further occurrences.
33. Scottish Water advised that they were not aware of any capital intervention which would have involved the use of external contractors in the area of interest to Mr McPherson. It noted that, until October 2010, the matter had been treated as a routine sewer cleaning operation, which would have been carried out internally, rather than work that required specific use of external contractors or investment as part of a capital investment project.



34. During the course of the investigation, Scottish Water conducted another search under the additional postcode supplied and under 13 job reference numbers supplied by Mr McPherson.
35. A further search under the additional postcode for the period requested by Mr McPherson disclosed a sewer surcharge, referred to in a letter provided to Mr McPherson on 8 September 2011. Scottish Water indicated that no other relevant information had been found.
36. As a result of the 13 job references supplied, all were identified by Scottish Water. Certain of them were identified as falling within the area highlighted on the map supplied with Mr McPherson's information requests, while others were not. Scottish Water apologised that the initial searches had failed to disclose items which had subsequently been identified as falling within the scope of Mr McPherson's requests.
37. By way of explanation, Scottish Water advised that its operational response systems were in place primarily to identify, report and rectify defects within its network and when relevant work had been completed. It advised that it recorded a large volume of data, and the practical way of doing this was by postcode (which could cover wide geographical areas in rural locations). In addition, the data on the Promise system was that supplied by the caller, which might not align directly with the actual location of the problem.
38. Scottish Water also explained that if work was required as a result of a customer issue (initially logged on Promise), it was submitted to a work scheduler, who would create a work order on the Ellipse system and this work (which would be classed as operational) was either done internally or contracted out to an external contractor. The contractor referred to within the invoices supplied by Mr McPherson was a contractor in the Western Isles utilised for sewerage blockage works. The work order would be allocated a number in the Ellipse system and would include a timeframe over which it was to be carried out. The order would be closed off following completion.
39. Scottish Water acknowledged that information relating to works orders should be recorded on its systems (either those described above or its WAMS system, which had also been searched), but accepted that certain relevant information had not been identified in its initial searches. It advised that data could occasionally be logged incorrectly, and interpretation at a later date relied on the recall of individuals: it appeared in this case that these were factors in failing to provide the data requested. Another possible factor, when considering the invoice data, was that the works had been logged and recorded by Scottish Water as a batch of works, rather than recording each individual invoice.
40. Scottish Water stated that it did not deliberately attempt to withhold any information from Mr McPherson. The Commissioner is satisfied, having reviewed the documentation which details the extent of the internal searches conducted by Scottish Water and the internal discussions relating to Mr McPherson's request, that there was no deliberate attempt to withhold information from Mr McPherson.



41. Having considered Scottish Water's submissions, the Commissioner accepts that it has now taken adequate steps to identify and locate the additional works following the provision of further details by Mr McPherson, which altered Scottish Water's search parameters. She is not satisfied, however, that it conducted adequate searches for this information in dealing with Mr McPherson's original information request and his request for review. In failing to do so, it failed to deal with the request in accordance with regulation 5(1) of the EIRs. Taking account of the subsequent steps taken by Scottish Water to identify and locate any relevant information, and given that Mr McPherson already has the additional information located in his possession, the Commissioner does not require Scottish Water to take any action in relation to these failures.
42. As noted previously, Scottish Water initially dealt with parts of the request under FOISA rather than the EIRs. During the investigation, Scottish Water acknowledged that the information was environmental and therefore should have been dealt with, in its entirety, under the EIRs. The Commissioner finds that by failing to identify the requested information as environmental information (as defined in regulation 2(1)) and deal with the requests accordingly under the EIRs, Scottish Water failed to comply with regulation 5(1) of the EIRs.

Failure to comply with timescales under the EIRs

43. Regulation 5(2)(a) of the EIRs gives Scottish public authorities a maximum of 20 working days after receipt of the request to comply with a request for information, subject to certain exceptions which are not relevant in this case.
44. As can be seen from the "Background" paragraphs above, Mr McPherson made his request on 18 June 2011. It was received by Scottish Water on 28 June 2011. Scottish Water replied to this request on 3 August 2011, with the result that it failed to comply with the requirements of regulation 5(2)(a) of the EIRs.



DECISION

The Commissioner finds that Scottish Water failed to comply with regulation 5(1) of the Environmental Information (Scotland) Regulations 2004 (the EIRs), by failing to identify, locate and provide to Mr McPherson all the information it held which fell within the scope of his request, which was environmental information as defined by regulation 2(1) of the EIRs. Scottish Water also failed to respond to Mr McPherson's initial request within the required timescale, as required by regulation 5(2)(a) of the EIRs, and to deal with all of the requested information as environmental information (as required by regulation 5(1)).

Given that the Commissioner is satisfied the Scottish Water carried out adequate searches during the investigation to locate the information, she does not require Scottish Water to take any action in respect of these failures in response to Mr McPherson's application.

Appeal

Should either Mr McPherson 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
Acting Scottish Information Commissioner
2 April 2012



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)-

(a) shall be complied with as soon as possible and in any event no later than 20 working days after the date of receipt of the request; and

...