

Decision Notice

Decision 136/2018: Mr R and Dumfries and Galloway Council

Adoption of drainage system

Reference No: 201800824

Decision Date: 30 August 2018



Scottish Information
Commissioner

Summary

The Council was asked about the adoption of private drainage systems in 1976. The Council considered the request under the EIRs, and responded by explaining that it did not hold the information.

Following an investigation, the Commissioner accepted that the Council did not hold the information sought.

Relevant statutory provisions

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 5(1) and (2)(b) (Duty to make available environmental information on request); 10(1), (2) 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 Appendix 1 to this decision. The Appendix forms part of this decision.

Background

1. On 9 March 2018, Mr R made a request to Dumfries and Galloway Council (the Council) for information relating to all private drainage systems adopted in 1976.
2. The Council responded on 9 April 2018. The Council informed Mr R that it did not hold the information requested, in line with regulation 10(4)(a) of the EIRs. It explained to Mr R that responsibility for sewerage and drainage transferred from local authorities in 1996 and advised that he might wish to make a request to Scottish Water (the current responsible authority) for the information.
3. On 11 April 2018, Mr R wrote to the Council, requesting a review of its decision. He was not satisfied with the Council's response to his request, arguing that Scottish Water had nothing to do with the adoption in 1976.
4. The Council notified Mr R of the outcome of its review on 10 May 2018. The Council confirmed that it did not hold the information referred to in his request as records held relating to the year 1976 exceeded the period for records retention. The Council reiterated that that all pre-1996 adopted drainage information held by the former Dumfries and Galloway Regional Council as water and drainage authority would have transferred at local government reorganisation in 1996 to the new water and drainage authority, which was initially West of Scotland Water and later became Scottish Water.
5. On 15 May 2018, Mr R wrote to the Commissioner. He applied 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 specified modifications. Mr R stated he was dissatisfied with the outcome of the Council's review because he did not accept that the information was not held.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that Mr R 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.
7. On 21 June 2018, the Council was notified in writing that Mr R had made a valid application.
8. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. On 24 July 2018, the Council was invited to comment on this application and answer specific questions, with particular reference to the steps taken to identify and locate the requested information.

Commissioner's analysis and findings

9. In coming to a decision on this matter, the Commissioner considered all of the relevant submissions, or parts of submissions, made to him by both Mr R and the Council. He is satisfied that no matter of relevance has been overlooked.

Whether the information requested by Mr R was held by the Council

10. 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 the information when the applicant's request is received.
11. The exception in regulation 10(4)(a) is subject to the public interest test in relation 10(1)(b) of the EIRs and so can only apply if, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in making the information available.
12. The standard of proof in considering whether a Scottish public authority holds information is the civil standard of the balance of probabilities. In determining this, the Commissioner will consider the scope, quality, thoroughness and results of the searches carried out by the public authority. He will also consider, where appropriate, any reason offered by the public authority to explain why the information is not held.
13. Mr R, in his application to the Commissioner, did not accept that information relating to his request would not continue to be held by the Council.
14. Mr R submitted that all private drainage systems adopted had to have the drainage tested by the Department of Water and Sewerage (of the local Council) to ensure that it was of an adoptable standard, and when the system was adopted the builders were reimbursed for installing it. Consequently, Mr R argued that the Council must hold records of the adoptions and of any payments made to builders.
15. The Council submitted that all pre-1996 adopted drainage information held by the former Dumfries and Galloway Regional Council (as water and drainage authority) would have transferred at local government reorganisation in 1996 to the new water and drainage authority, which initially was West of Scotland Water and which later became Scottish Water. The Council stated that it had informed Mr R of this position on numerous occasions.
16. The Council stated that it made specific enquiries to its Economy, Environment and Infrastructure Directorate, which confirmed that records relating to 1976 would no longer be held as this would exceed the period stipulated for records retention.

17. The Council confirmed that its position remained unchanged from that set out in [Decision 003/2011](#) (where Mr R had also sought information relating to the adoption of drainage systems).

Conclusions

18. Having considered the explanations submitted by the Council and the circumstances of this case, the Commissioner is satisfied there can be no reasonable expectation that the information request by Mr R would be held. The Commissioner accepts that regulation 10(4)(a) applies to Mr R's request.
19. In this case, the Commissioner is satisfied that the information in question is not held by the Council, and was not held at the time it received Mr R's request. Consequently, he does not consider there to be any conceivable public interest in requiring that the information be made available. Given this conclusion, he is satisfied that the Council was entitled to refuse Mr R's request under regulation 10(4)(a).
20. The Commissioner would also observe that Decision 003/2011 addressed very similar questions. As in this case, the Commissioner found in the Council's favour. Statutory responsibility for water and sewerage has not rested with local authorities since 1996 and it is no more likely that a given Council will hold information on the adoption of drainage infrastructure now than it was in 2011. In circumstances, where the Council has confirmed that it does not hold such information and that position has been upheld by the Council, it would appear to the Commissioner that regulation 10(4)(b) of the EIRs may apply to further requests for the same or substantially similar information – pursuit of what is essentially the same question in such circumstances is likely to be manifestly unreasonable.

Decision

The Commissioner finds that Dumfries and Galloway Council complied with the Environmental Information (Scotland) Regulations 2004 in responding to the information request made by Mr R.

Appeal

Should either Mr R or Dumfries and Galloway Council 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

30 August 2018

Appendix 1: Relevant statutory provisions

The Environmental Information (Scotland) Regulations 2004

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;...

Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews, Fife
KY16 9DS

t 01334 464610

f 01334 464611

enquiries@itspublicknowledge.info

www.itspublicknowledge.info