

Decision Notice

Decision 205/2018: Mr E and the Scottish Environment Protection Agency

Flood risk assessment

Reference No: 201801236

Decision Date: 18 December 2018



Summary

SEPA was asked about a flood risk assessment for the Whitesands area of Dumfries. It disclosed information in response to the request. The requester queried whether all relevant information had been provided.

The Commissioner investigated and found that SEPA had complied in full with the request.

Relevant statutory provisions

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (paragraphs (a), and (c) of definition of “environmental information”); (5)(1) (Duty to make available environmental information on request)

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 24 February 2018, Mr E asked the Scottish Environment Protection Agency (SEPA) for information relating to flood protection measures for the Whitesands area of Dumfries which could result in a localised increase in flood levels upstream of the defence area. His request was for:

“...all information and material you hold that underpins and justifies in your letter to Dumfries and Galloway Council dated 13th March 2017 at Paragraph 1.3 the statement “But it should be noted that the maximum increase in water level is +0.06m which would be unlikely to represent a materially significant increase in flood risk relative to the existing situation”.

(The letter from SEPA is accessible from Dumfries and Galloway Council’s planning portal¹, dated 22 June 2017.)
2. SEPA responded on 23 March 2018. It stated that the information and material which it holds is all publicly available and easily accessible online. SEPA provided a weblink² to information published on the website of Dumfries and Galloway Council (the Council).
3. On 26 March 2018, Mr E emailed SEPA and requested a review of its decision. He considered that the weblink it had sent him did not provide information and material to underpin and justify SEPA’s statement within its letter to the Council.
4. SEPA notified Mr E of the outcome of its review on 24 April 2018. It provided Mr E with weblinks to:
 - the Hydraulic Modelling Report (Document 17);

¹ <https://eaccess.dumgal.gov.uk/online-applications/applicationDetails.do?activeTab=documents&keyVal=OKNBGFGB00A00>

² <https://eaccess.dumgal.gov.uk/online-applications/applicationDetails.do?activeTab=documents&keyVal=OKNBGFGB00A00>

- appendices B1 – B4 (Documents 17 b - e);
- environmental statement (Document p); and
- drawings showing cross sections – sheets 1 - 5 (documents k – o)

and copies of the following documents:

- section 7 Options Model of the Hydraulic Modelling Report (pages 44 - 52);
 - 160920 Whitesands Model Review ;
 - 161024 Response to Mouchel Modelling Comments; and
 - 170217 Whitesands FPS (which contains the assessment of flood risk to which Mr E referred in his information request).
5. On 22 July 2018, Mr E applied to the Commissioner for a decision in terms of section 47(1) of the Freedom of Information (Scotland) Act 2002 (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 E stated he was dissatisfied with the outcome of SEPA’s review because he considered that further information was held, and provided examples of the information he expected to be held and disclosed.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that Mr E 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 5 September 2018, SEPA was notified in writing that Mr E had made a valid application.
8. On 10 October 2018, Mr E was invited to explain what he considered to be missing from the information disclosed by SEPA. His comments are considered below.
9. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. SEPA was invited to comment on this application and answer specific questions about the searches it had undertaken and the information it held. SEPA responded on 8 November 2018.

Commissioner’s analysis and findings

10. 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 E and SEPA. He is satisfied that no matter of relevance has been overlooked.

Application of the EIRs

11. The Commissioner is satisfied that the information covered by this request is environmental information, as defined in regulation 2(1) of the EIRs. The information in question concerns a flood prevention scheme and, as such, the Commissioner is satisfied that it would fall within either paragraph (a) or paragraph (c) of the definition of environmental information in regulation 2(1) of the EIRs (reproduced in Appendix 1 to this decision).

12. Mr E has not disputed SEPA's decision to handle the request under the EIRs and the Commissioner will consider the information in what follows solely in terms of the EIRs.

Was all relevant information identified, located and provided by SEPA?

13. 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).
14. During the investigation, Mr E identified a range of information he considered should be held by SEPA, in order to properly offer and underpin the opinion to which he had referred in his request. In order to analyse the effect of the increase in flood risk, he believed that SEPA would have considered factors including whether:
- (i) the effects of this increase will make the difference between whether emergency vehicles will still be able to access the 40 or so houses to the north beyond the junction of Nunholm Road and Nunholm Place or not; and
 - (ii) this increase will be sufficient to cause the electricity substation on Nunholm Road adjacent to the former railway line to be rendered inoperable.
15. Mr E expected that the analysis required to properly provide an opinion would include a site specific risk assessment, such as a Flood Risk Assessment (FRA) or a section of the Environmental Impact Assessment (EIA) that supports the opinion on the flood assessment. He stated that such an assessment should follow a methodology, which would also include such an analysis and assessment.
16. The question for the Commissioner in this case is whether SEPA has provided or published all the recorded information it holds which is covered by the terms of Mr E's request, or whether it had failed to identify information when responding to Mr E's request. The Commissioner cannot decide whether a Scottish public authority *should* hold information.
17. The standard of proof to determine 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 it does not hold the information.

Approach taken by SEPA in assessing flooding

18. SEPA were asked about the process by which a finding would be reached on the flood risk in a flood defence project. SEPA explained that relevant documents include its *Technical Flood Risk Guidance for Stakeholders* as well as its *Flood Modelling Guidance for Responsible Authorities*. These documents set out the types of data and analysis SEPA would expect to see undertaken and that conform to accepted, UK standard methods for both hydrological and hydraulic modelling.
19. SEPA explained that its flood risk hydrologists will assess the results of the modelling and comment on the accuracy and suitability of these outputs. Each modelling study is bespoke to different locations and settings, and the effect and impacts of any proposed measures are assessed in that context. In addition, account is taken of local knowledge and information held by SEPA and its key partners, mainly the Council. In executing their job, staff also inherently make reference to standard UK methods (e.g. the Flood Estimation Handbook and

various pieces of proprietary hydraulic modelling software) that they know well and are trained in using, to assess the suitability of the overall approach and results.

Methodology used:

20. SEPA was asked about the methodology it uses in assessing flooding. It submitted that an EIA of a flood protection scheme is required under the Flood Risk Management (Flood Protection Schemes, Potentially Vulnerable Areas and Local Plan Districts) (Scotland) Regulations 2010.
21. SEPA referred to the *Whitesands Flood Protection Scheme: Environmental Statement*³ which sets out the EIA methodology. It notes that the *Whitesands Flood Protection Scheme (Flood Protection and Public Realm Improvement) Hydraulic Modelling Report*⁴ includes flood maps showing where significantly adverse effects of flooding have occurred (as described in the Jacobs 2006 Flood Risk Appraisal commissioned by the Council).
22. SEPA explained that its duty is to review the Council's model as submitted to it in detail and provide comments and advice to the Council. It noted that the flood study for the Whitesands scheme was currently the most detailed and comprehensive flood study available for the River Nith at Dumfries.

Response to Mr E's comments

23. SEPA responded to the points raised by Mr E, in relation to the information he expected it to hold but had not received.

Effect of flood risk on the specified area

24. SEPA commented that, in the case of the Whitesands scheme, mitigation is proposed that will negate the effects of any perceived rise in upstream water levels, as shown in the model. The model may be behaving slightly conservatively in the upstream reach, where it is over-estimating the effect of the proposed flood embankment. This is due to the fact that the bridges located between Whitesands and Nunholm will act as the control on localised water levels during flood events.

Will emergency vehicles be able to access houses on Nunholm Road / Place?

25. SEPA commented that if the predicted rise of 4-6 cm was a reality, it may or may not impede the ability of emergency vehicle access; this depends on what the existing flood depth locally is. It considered this is a question for the Council as flood prevention authority and emergency planning authority, and also for the blue light responders. SEPA considered that the flood defence proposals (due to mitigation and possible model overestimation) will not result in an actual increase in water levels.

³ https://eaccess.dumgal.gov.uk/online-applications/files/028BD955DA773B805C0E0430CCA57BBA/pdf/17_0001_FPS-p_Whitesands_Flood_Protection_Scheme_Environmental_Statement_Volume_1-632822.pdf (pages 20 - 32)

⁴ https://eaccess.dumgal.gov.uk/online-applications/files/9932F986E6447D1BBBE0DF0972327D8B/pdf/17_0001_FPS-17_Supporting_document_to_the_ES_-_hydraulic_modelling_report__Mouchel_-630194.pdf

Will the electricity sub-station be rendered inoperable?

26. SEPA commented that any actual rise, and the impacts that result, are entirely predicated upon what the flood depth is already in that area, and what the critical depth would be to render infrastructure inoperable. This is information which SEPA does not hold.

Searches

27. SEPA explained that the records it holds relate to its involvement as a statutory planning consultee on flood risk matters. The records are held in SEPA's Casework System and in Flood Risk Hydrology records. SEPA explained why these were the only relevant locations to search for feedback on the outcome of a technical review which led to the finding reported in its consultation response to the Council on 13 March 2017.
28. SEPA provided a list of staff who searched their records and were involved in preparing the advice from the flood risk team. It provided their comments, which support the view that all available information had been identified and disclosed.
29. SEPA confirmed that its searches covered records from 7 June 2010 to the date of Mr E's request, even though his request related to the preparation of the planning consultation response on 13 March 2017. SEPA was satisfied that it did not hold any additional information other than that already identified and provided. The staff consulted in relation to Mr E's request had each had direct involvement in matters relating to SEPA's flood risk and planning response for the Whitesands Flood Protection Scheme.

The Commissioner's conclusions

30. Having read Mr E's correspondence in detail, the Commissioner understands that he believes SEPA should have conducted greater evaluation of the increased flooding risk to the area in question before reaching the conclusion stated in its letter to the Council. The Commissioner cannot comment on any aspect of this matter apart from whether SEPA has provided all information which it holds and which is covered by Mr E's request.
31. Having considered all the relevant submissions, the Commissioner is satisfied that, when responding to Mr E's request for review, SEPA took adequate, proportionate steps to establish whether it held any further information falling within the scope of the request. The Commissioner notes that additional information was identified and provided with the review response. If SEPA did hold any further relevant information, the Commissioner is satisfied that it would have been found by the searches carried out at that stage.
32. Mr E has provided reasons why he believes that further information is held by SEPA. The Commissioner's investigation has addressed these matters. SEPA has consistently confirmed that it does not hold any further information falling within scope of Mr E's request, supporting this statement with evidence of its searches, and an explanation of the limits of its role in the flood defence project.
33. Taking all of the above into consideration, the Commissioner is satisfied, on the balance of probabilities, that SEPA does not hold any information falling within the scope of Mr E's request besides the information already provided.

Decision

The Commissioner finds that the Scottish Environmental Protection Agency complied with the Environmental Information (Scotland) Regulations 2004 in responding to the information request made by Mr E.

Appeal

Should either Mr E or SEPA 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

18 December 2018

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;

...

(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.

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