

Decision Notice 048/2020

Water supply and drainage, routes and locations

The Applicant

Public authority: Scottish Water

Case Ref: 201900923



Scottish Information
Commissioner

Summary

Scottish Water was asked for water supply and drainage routes and locations for specified premises. Scottish Water disclosed some information for adjacent premises, which was out of scope.

Following investigation, the Commissioner was satisfied that Scottish Water had carried out adequate searches, but decided that its advice in its correspondence with the Applicant was misleading.

Relevant statutory provisions

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (paragraphs (a) and (c) of definition of "environmental information") (Interpretation); 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); 14(1) Transfer of a 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. It may be helpful to explain that this case concerns an ongoing complaint between Scottish Water and the Applicant about water and sewerage charges for the Applicant's premises. It centres on Scottish Water's approach to "eligible premises" under section 27 of the Water Services etc. (Scotland) Act 2005 (the 2005 Act) and whether charges were levied in error.
2. On 28 March 2019, the Applicant made a request for information to Scottish Water (received on 1 April 2019). The Applicant stipulated it wanted information held by Scottish Water or any or its subsidiaries [the Commissioner's emphasis] regarding premises at a stated address in Glasgow. The request was for:
 - Part 1 Routes and locations of Scottish Water's water mains, stop valves and water meters which form the supply to the solum of the premises, including references and physical location of the SPID [Supply Point Identifier Number].
 - Part 2 Routes and locations of Scottish Water's main drains, whether it be for storm water, foul water, or combined water into which the solum of the premises drains, including references and physical location of the SPID.
 - Part 3 The Applicable law; that is the law (as opposed to any rules) under which Scottish Water raised a ("probably erroneous") charge.
3. On 4 April 2019, Scottish Water asked the Applicant for more detailed information, specifically on the charges received, and from whom they originated, stating it was unable to continue with the request without this clarification.
4. The Applicant replied to Scottish Water on 10 April 2019, stating that the request adequately described the information which had been requested.

5. Scottish Water issued its response on 19 April 2019 under the EIRs. It disclosed information for parts 1 and 2 but, for part 3, stated it did not hold any recorded information, citing regulation 10(4)(a) of the EIRs.
6. On 24 April 2019, the Applicant wrote to Scottish Water, requesting a review of its decision. The Applicant believed the response was incomplete for the first two parts of the request and gave its reasoning. For the final part, the Applicant explained why it believed regulation 10(4)(a) did not apply, given that Scottish Water's Revenue Protection Department would determine the charges and must have some lawful authority for doing so.
7. Scottish Water notified the Applicant of the outcome of its review on 23 May 2019, explaining it did not hold any further information falling within the scope of the request (including an explanation of why it did not hold information for part 3).
8. On 4 June 2019 the Applicant wrote to the Commissioner. The Applicant 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. The Applicant stated it was dissatisfied with the outcome of Scottish Water's review. It believed the information provided was incomplete and gave reasons why, in its view, the review outcome did not fully address the terms of the request.

Investigation

9. The application was accepted as valid. The Commissioner confirmed that the Applicant 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.
10. On 17 July 2019, Scottish Water was notified in writing that the Applicant had made a valid application and the case was allocated to an investigating officer.
11. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. Scottish Water was invited to comment on this application and to answer specific questions. These related to the extent of searches, including whether information held by subsidiaries of Scottish Water had been included, given the terms of the request.
12. In respect of part 1 of his request, the Applicant stated (in the application) that "It is agreed that no information exists as there is no Water Supply". In light of this statement from the Applicant, the Commissioner need not consider this element of the request further in this Decision Notice. He will now consider parts 2 and 3 of the request below.

Commissioner's analysis and findings

13. 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 the Applicant and the Scottish public authority. He is satisfied that no matter of relevance has been overlooked.

Handling in terms of the EIRs

14. In its correspondence with the Applicant, Scottish Water identified all of the information requested as being environmental information, as defined in regulation 2(1) of the EIRs. Having reached this conclusion, it applied section 39(2) of FOISA.

15. The Commissioner is satisfied that the withheld information, relating to the existence or otherwise of water connections for a built structure (and potentially including sewerage connections), falls within the definition of environmental information in regulation 2(1) of the EIRs, particularly paragraphs (a) and (c) (see Appendix 1 to this decision).
16. The Applicant has not disputed Scottish Water's decision to deal with the request under the EIRs and, in what follows, the Commissioner will consider this case solely in terms of the EIRs.

Part 3 – whether this was a request for information

17. In part 3 of his request, the Applicant asked for the law under which charges had been raised. The Applicant was also unhappy that the web links Scottish Water provided in its review outcome to the websites of Business Stream (the arm's length subsidiary providing retail water and sewerage services to business customers) and The Water Industry Commissioner for Scotland did not answer this component of the request.
18. The Applicant submitted that section 27 of the 2005 Act contained the applicable law. The Applicant noted that a Scottish Water employee had stated in correspondence to him that *"Scottish Water is responsible for deciding whether premises should be classed as 'eligible premises' in terms of s.27(1)(a)&(b) of the Water Services Etc. (Scotland) Act 2005."* In making such decisions, it submitted, Scottish Water must adhere to the law and therefore required to know the applicable law.
19. In the Commissioner's view, having considered all relevant comments from the Applicant and taking a reasonable interpretation of the request, part 3 is inviting comment as to which law Scottish Water believes should apply in the circumstances. In effect, it is seeking a legal opinion rather than recorded information. While it is understandable that the Applicant might wish to know Scottish Water's views on this, it is not the role of the EIRs to elicit such an opinion. The applicable law might well be found in section 27 of the 2005 Act, but that is a matter on which the Applicant should seek legal advice.
20. Consequently, the Commissioner concludes that part 3 was not a request for recorded information. For this reason, he cannot consider it further here. Further discussions during the investigation have led to the disclosure of further information to the Applicant on the assessment of the premises in question as "eligible premises": this does not, however, fall within the scope of any part of the Applicant's request of 28 March 2019 (with the result that the Commissioner cannot consider it further here).

Part 2 – whether any further information was held

21. Regulation 5(1) of the EIRs (subject to the various qualifications contained in regulations 6 to 12) requires a Scottish public authority which holds environmental information to make it available when requested to do so by any applicant. This obligation relates to information held by the authority when it receives a request.
22. In its application, the Applicant submitted that Scottish Water failed to provide the information, specifically in relation to the drainage connection at the premises in question.
23. Scottish Water understood the Applicant to be concerned about information relating to the physical location of the SPID. It explained that SPIDs are reference numbers used for billing purposes and are not mapped onto geographical locations. It also explained that it had already provided a copy of the GIS map it maintained for the purposes of section 11 of the Sewerage (Scotland) Act 1968, showing the location of all relevant drains.

24. In the circumstances, considering the explanations offered by Scottish Water on this point, the Commissioner is satisfied that it could not reasonably be expected to hold further information falling within the scope of part 2 of the request.

Other matters - Regulation 14 of the EIRs

25. Where a Scottish public authority has received a request to make environmental information available and does not hold that information, but believes that another public authority holds the information requested, then it must either-
- (a) transfer the request to the other authority; or
 - (b) supply the applicant with the name and address of that other authority,
- and inform the applicant accordingly with the refusal sent in accordance with regulation 13.
26. As indicated above, during the investigation, Scottish Water was asked to comment on whether it considered regulation 14 of the EIRs was engaged in any way by this request (and, if so, whether Scottish Water considered it had complied with the regulation).
27. Scottish Water stated that it considered regulation 14 had been engaged by the request, and believed it had been dealt with in the review outcome (by supplying a link to relevant pages of the Business Stream website), including information on how to make an information request. It believed this was sufficient to comply with the terms of regulation 14, but accepted that the review outcome was not as clear on this point as it could have been. It apologised for any inconvenience this might have caused the Applicant.
28. Scottish Water also noted that its approach to regulation 14 was affected by a misapprehension as to the nature of the information being sought and whether any of that information was held by Scottish Water. During the investigation, it became clear that Scottish Water would hold information falling within the scope of the request (although this would appear to have been the information referred to in paragraph 20 above, outwith the scope of the request).
29. Having considered the submissions on this point, together with the review outcome referred to above (and leaving aside the question of whether it should have understood Business Stream to hold the requested information), the Commissioner is not satisfied that Scottish Water did consider regulation 14 adequately in dealing with the request or the requirement for review. A weblink was provided, certainly, but without clear instruction as to what use the Applicant might make of it (in terms of relevant information believed to be held elsewhere, and how that might be requested). It should also have been made clear that this was Scottish Water's means of addressing that part of the request relating to Scottish Water's subsidiaries (which are, of course, separate Scottish public authorities).
30. Consequently, the Commissioner is not inclined to accept that Scottish Water complied with regulation 14 at the time of the review. Given the explanations above, he does not require any action by Scottish Water on this point, in response to the application under consideration here.

Decision

The Commissioner finds that, in the respects covered by the Applicant's application, Scottish Water partially failed to comply with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by the Applicant.

The Commissioner finds that Scottish Water was correct to inform the Applicant that it held no further information falling within the scope of part 2 of the request.

However, the Commissioner also finds that Scottish Water failed to comply fully with regulation 14 of the EIRs in dealing with the request. Given explanations provided during the investigation, he does not require any action to be taken on this point, in response to the application.

Appeal

Should either the Applicant or Scottish Water 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

11 March 2020

Appendix 1: Relevant statutory provisions

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;

...

(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.

(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;

...

14 Transfer of a request

- (1) Where a Scottish public authority has received a request to make environmental information available and does not hold that information but believes that another public authority holds the information requested then it shall either-
 - (a) transfer the request to the other authority; or
 - (b) supply the applicant with the name and address of that other authority,and inform the applicant accordingly with the refusal sent in accordance with regulation 13.

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