



Scottish Information
Commissioner
www.foi.scot

Decision Notice 278/2024

Evidence of disuse of pipe

Authority: Scottish Borders Council

Case Ref: 202400610

Summary

The Applicant asked the Authority for information as to how it arrived at the understanding that a specific pipe in a graveyard was not in use. The Authority withheld some information on the basis that disclosure would prejudice the interests of a third party. During the investigation, the Authority changed its position and disclosed the withheld information (subject to some third-party personal data redactions). The Commissioner investigated and found that the Authority had not been entitled to withhold the information it disclosed during the investigation.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2) and (6) (General entitlement); 47(1) and (2) (Application for decision by Commissioner)

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (definition of “the Act”, “applicant” and “the Commissioner” and the definition of “environmental information”) (Interpretation); 5(1) (Duty to make environmental information available on request); 10(1), (2), (5)(f) and (6) (Exceptions from duty to make environmental information available); 17(1), (2)(a),(b) and (f) (Enforcement and appeal provisions)

Background

1. On 5 January 2024, the Applicant made a request for information to the Authority. She asked for all documents and correspondence as to how the Authority arrived at the “understanding” that a specific pipe in a graveyard was “not being used” and for the start and finish dates of the pipe’s “use and disuse”.

2. By way of background, the Commissioner has considered connected issues in several previous decisions, including [Decision 089/2024](#)¹ which outlines the general background to the request in this case.
3. The Authority responded on 22 February 2024, providing some information and withholding other information under the exception in regulation 11(2) of the EIRs.
4. On 27 February, the Applicant wrote to the Authority requesting a review of its decision. She stated that she was dissatisfied with the decision because she did not accept that the information the Authority had identified and provided was relevant, as it related to a newer set of pipes.
5. The Authority notified the Applicant of the outcome of its review on 12 April 2024. The Authority upheld its position but explained that it had identified three further documents (an email containing two attachments) that fell within the scope of the request. The Authority withheld the documents in question under the exceptions in regulations 10(5)(f) and 11(2) of the EIRs.
6. On 12 April 2024, the Applicant wrote to the Commissioner, applying 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. The Applicant stated she was dissatisfied with the outcome of the Authority's review because she considered that the Authority had not justified the harm that would result from disclosure of the documents in question, that the public interest favoured disclosure and that any personal information could be redacted.

Investigation

7. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
8. On 27 March 2024, the Authority was notified in writing that the Applicant had made a valid application. The Authority was asked to send the Commissioner the information withheld from the Applicant. The Authority provided the information.
9. On 12 June 2024, the Authority reassessed its position and disclosed to the Applicant the documents it had withheld under the exception in regulation 10(5)(f) of the EIRs, subject to redactions of personal data under the exception in regulation 11(2) of the EIRs.
10. In her application to the Commissioner, the Applicant confirmed that she was content for personal information to be redacted. The Commissioner will therefore not consider the application of regulation 11(2) of the EIRs further in his decision notice.
11. The case was subsequently allocated to an investigating officer.
12. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Authority was invited to comment on this application and to answer specific questions. These related to the relevance of the information and the searches carried out.

¹ <https://www.foi.scot/decision-0892024>

Commissioner's analysis and findings

13. The Commissioner has considered all of the submissions made to him by the Applicant and the Authority.

Handling in terms of the EIRs

14. The Authority considered the Applicant's request under the EIRs, having concluded that the information requested was environmental information as defined in regulation 2(1) of the EIRs.
15. Where information falls within the scope of this definition, a person has a right to access it (and the public authority has a corresponding obligation to respond) under the EIRs, subject to the various restrictions and exceptions contained in the EIRs.
16. The Applicant has not disputed the Authority's decision to handle their request under the EIRs and the Commissioner is satisfied, in the circumstances, that the information requested by the Applicant falls within the definition of environmental information set out in regulation 2(1). The Commissioner will consider the request in what follows solely in terms of the EIRs.

Regulation 5(1) of the EIRs – Duty to make environmental information available

17. 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. This obligation relates to information that is held by the authority when it receives a request.
18. On receipt of a request for environmental information, therefore, the authority must ascertain what information it holds falling within the scope of the request. Having done so, regulation 5(1) requires the authority to provide that information to the requester, unless a qualification in regulations 6 to 12 applies (regulation 5(2)(b)).

Regulation 10(5)(f) – Third party interests

19. Under the EIRs, a public authority may refuse to make environmental information available if one or more of the exceptions in regulation 10 applies, but only if (in all the circumstances) the public interest in maintaining the exception or exceptions outweighs the public interest in making the information available.
20. Regulation 10(5)(f) of the EIRs provides that a Scottish public authority may refuse to make environmental information available to the extent that its disclosure would, or would be likely to, prejudice substantially the interests of the person who provided that information, where that person –
 - (i) was not under, and could not have been put under, any legal obligation to supply the information;
 - (ii) did not supply it in circumstances such that it could, apart from the EIRs, be made available, and
 - (iii) has not consented to its disclosure.
21. However, information relating to emissions is given special status under the EIRs. Regulation 10(6) states that, to the extent that the environmental information to be made available relates to information on emissions, a Scottish public authority cannot rely on several exceptions in the EIRs, including regulation 10(5)(f).

22. As stated above, during the investigation, the Authority withdrew its reliance on regulation 10(5)(f) of the EIRs and disclosed to the Applicant the documents it had withheld under the exception. The Authority informed the Commissioner that it accepted that the information withheld under that exception related to emissions.
23. Having considered the Authority's submissions regarding its decision to withdraw reliance on regulation 10(5)(f), the Commissioner agrees that the Authority had not been entitled to rely on that exception to withhold the information in question and, by so doing, breached regulation 5(1) of the EIRs. Having reached this conclusion, he is not required to consider the public interest test in regulation 10(1)(b) of the EIRs.

Information disclosed during investigation

24. The Commissioner wrote to the Applicant to confirm whether she had received the documents the Authority said it had disclosed to her during the investigation and whether this information addressed her concerns.
25. The Applicant denied that she had received the documents and again expressed concern that the Authority was providing irrelevant information relating to a different set of pipes. The Applicant explained why she did not consider certain documents disclosed to her to be relevant. In doing so, she described one of the documents (the email) the Authority disclosed to her during the investigation – specifically identifying the name, format and content. The Authority confirmed it had sent the documents to the Applicant and provided the Commissioner with a postal receipt as proof.
26. The Commissioner is therefore satisfied that the Authority has disclosed to the Applicant the documents found to have been wrongly withheld under regulation 10(5)(f) of the EIRs. He does not require the Authority to take any further action in this regard.

The information held by the Authority

27. The standard of proof to determine whether a Scottish public authority holds information is the civil standard of the balance of probabilities. In determining where the balance of probabilities lies, the Commissioner considers the scope, quality, thoroughness and results of the searches carried out by the public authority.
28. The Commissioner also considers, where appropriate, any reason offered by the public authority to explain why it does not hold the information. While it may be relevant as part of this exercise to explore expectations about what information the authority should hold, the Commissioner's role is to determine what relevant recorded information is (or was, at the time the request was received) actually held by the public authority, which falls within the scope of the request under consideration.

The Applicant's submissions

29. The Applicant argued that the documents in question did not satisfy her request because it related to pipework installed after the pipe referred to in her request. She noted that the email in question referred to the "cutting off" of the pipe referred to in her request, but it did not describe whether any other outlets from the same system had been cut off.
30. The Applicant provided a document to the Commissioner that gave rise to her belief that other outlets existed. She also provided a document which referred to the "cutting off" of the older pipe as merely a temporary.

31. The Applicant explained that she therefore did not agree that the information identified by the Authority was sufficient to justify the Authority's conclusion that the pipe referred to in her request was not in use.

The Authority's submissions

32. The Authority agreed that the email in question (and the associated attachments) principally related to later works, but it noted that the email referred to the older pipe. Consequently, the Authority considered that the email fell within the scope of the request.

33. The Authority confirmed that it had searched its Uniform, Idox and Outlook systems for information relating to both the specific property from which the pipe runs, the building warrant for the works in question and the individual who applied for the warrant. The Authority also confirmed that it had contacted relevant staff in its Building Standards team, which had responsibility for the issues raised in the request and had surveyed the site.

The Authority also contacted its Enforcement team which confirmed that, although it was aware of the issue, it was not directly involved.

The Commissioner's view

34. The Commissioner has no locus to comment on whether the information identified by the Authority was sufficient for it to conclude that the pipe in question was not in use, or whether it was justified in reaching that conclusion. Nor does he have any locus to comment on whether more information should have been held by the Authority. The question he must consider in this case is: was all the relevant information held by the Authority located and considered appropriately under the EIRs?
35. The Commissioner has carefully reviewed the email and the attached documents in question. He notes that the email describes the "cutting off" of the pipe referred to in the request and that this description is provided in response to a question from the Authority about whether the outflow from the pipe had been capped.
36. Consequently, the Commissioner accepts that the email in question was part of the process of the Authority reaching the conclusion that the pipe was not in use and that it was therefore correct to consider it in scope of the request.
37. The Commissioner has also carefully considered the submissions from both parties, together with the information identified and the supporting evidence and explanation of searches. Having done so, he is satisfied that the searches carried out by the Authority would have been capable of identifying any relevant information.
38. While the Commissioner notes that the Applicant believes the Authority must hold more information, the Commissioner is satisfied, on balance, that no further in-scope information relating to the Applicant's request is held by the Authority. As stated above, whether a public authority should hold information which it does not hold is not a matter for the Commissioner to decide.
39. The Commissioner therefore concludes, on balance, that the Authority does not (and did not, on receipt of the request) hold further relevant information falling within the scope of the request, beyond that already disclosed to the Applicant.

Decision

The Commissioner finds that the Authority partially complied with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by the Applicant.

In locating all the information it held which fell within the scope of their request, the Authority complied with regulation 5(1) of the EIRs.

However, the Commissioner also finds that the Authority failed to comply with the EIRs by wrongly withholding some information under regulation 10(5)(f) of the EIRs and, in doing so, failed to comply with regulation 5(1).

Given that the Authority has already disclosed to the Applicant the information found to have been wrongly withheld under regulation 10(5)(f) of the EIRs, the Commissioner does not require the Authority to take any action in respect of this failure in response to the Applicant's application

Appeal

Should either the Applicant or the Authority 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.

Euan McCulloch
Head of Enforcement

28 November 2024