

Decision Notice



Decision 003/2011 Mr James Duff and Dumfries and Galloway Council

Date on which responsibility for drainage systems of a named street was taken over by Scottish Water

Reference No: 201001188
Decision Date: 6 January 2011

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Scottish Information Commissioner

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Summary

Mr James Duff (Mr Duff) requested from Dumfries and Galloway Council (the Council) details of the date on which Scottish Water took over responsibility for the drainage systems at a particular street from the Council. The Council responded by giving Mr Duff notice, in terms of section 17(1) of the Freedom of Information (Scotland) Act 2002 (FOISA), that it did not hold the information he was seeking. Following a review, Mr Duff remained dissatisfied and applied to the Commissioner for a decision.

During the investigation, the Commissioner took the view that the information requested (if held) comprised environmental information and asked for the Council's comments as to whether the request should be dealt with under the Environmental Information (Scotland) Regulations 2004 (the EIRs). In response, the Council confirmed that if the Commissioner was satisfied that the information (if held) was environmental then it wished to rely on section 39(2) of FOISA.

Following an investigation, while accepting that the information was not held by the Council, the Commissioner found that the Council had failed to identify the information requested as environmental information and therefore deal with Mr Duff's request in accordance with the EIRs.

Relevant statutory provisions and other sources

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

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (Interpretation – definitions (a) to (c) of environmental information); 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 the Appendix to this decision. The Appendix forms part of this decision.



Background

1. On 29 March 2010, Mr James Duff (Mr Duff) wrote to Dumfries and Galloway Council (the Council) requesting the year in which Scottish Water took over responsibility for the drainage systems of a named street from the Council.
2. The Council responded on 27 April 2010. It advised Mr Duff that all of the information held by the Council in its role as drainage authority was passed on to West of Scotland Water (which was later amalgamated with other water authorities to form Scottish Water) around the time of the reorganisation of local government in April 1996. The Council indicated that records relating to its role as drainage authority had been transferred to West of Scotland Water at that time. The Council gave notice in terms of section 17(1) of FOISA that it did not hold the information Mr Duff was seeking.
3. On 15 June 2010, Mr Duff wrote to the Council requesting a review of its decision. The Council sought clarification of the reasons for Mr Duff's request for review and Mr Duff confirmed the terms of his dissatisfaction in a letter dated 17 June 2010. In this letter, Mr Duff made reference to a map which he believed had been produced by the Council and which purportedly showed that the drainage system of the named street had been adopted by the Council in the 1970s. Mr Duff disputes that the drainage system was ever adopted (he is the developer who installed the drainage systems in that street) and he considered it unacceptable that this map, which formed the basis of Scottish Water's assertions that the drainage system had been adopted, had been passed to West of Scotland Water in 1996 with no copy (or other records) retained by the Council.
4. The Council notified Mr Duff of the outcome of its review on 25 June 2010. In this letter, the Council upheld its initial view that it did not hold the information he was seeking and it advised Mr Duff that a manual check had since confirmed that all paperwork due to transfer to West of Scotland Water in April 1996 had in fact been transferred.
5. On 5 July 2010, Mr Duff wrote to the Commissioner, stating that he was dissatisfied with the outcome of the Council'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.
6. The application was validated by establishing that Mr Duff had made a request 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 that request. The case was then allocated to an investigating officer.



Investigation

7. On 12 August 2010, the Council was notified in writing that an application had been received from Mr Duff, and given an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and was asked to respond to specific questions. In particular, the Council was asked to provide details of the steps it had taken to establish that no relevant information was held.
8. The Council was also advised that it was likely that the Commissioner would consider that Mr Duff's request sought environmental information. In light of this, the Council was asked for its views as to whether the request should be considered in terms of the EIRs.
9. The Council responded on 1 September 2010, submitting that it did hold the requested information and providing an explanation as to why it considered this to be the case. It provided details of the steps taken to verify this, and noted that it did not consider the requested information to constitute environmental information.
10. In further correspondence, the Council later submitted that, if the Commissioner considered the requested information to be environmental, it would apply the exemption contained in section 39(2) of FOISA to the requested information, on the basis that it would then be dealt with solely under the EIRs.
11. The relevant submissions made by both Mr Duff and the Council are summarised and considered (where relevant) in the Commissioner's analysis and findings section below.

Commissioner's analysis and findings

12. In coming to a decision on this matter, the Commissioner has considered all of the submissions made to him by both Mr Duff and the Council and is satisfied that no matter of relevance has been overlooked.
13. Although Mr Duff's comments have focussed on the existence (or non-existence) of a particular map, the Commissioner has noted the specific terms of his request, which sought the year that Scottish Water took over responsibility for the drainage systems of the street from the Council. The Council has questioned the relevance of the matters raised by Mr Duff to the particular terms of his request.
14. The Commissioner has some sympathy with this point. He notes that the relevance of any map or any other type of information in this case is only to the extent that, if held, it would provide evidence of responsibility for it being held at one time by the Council and so transferred to the then West of Scotland Water along with the broader range of responsibilities that were transferred in 1996.



15. While it is clear that the Council's responsibilities for drainage in its area were generally transferred to the West of Scotland Water as part of the local government reorganisation in 1996, Mr Duff's request is focussed on responsibility for a particular street. The provision of the date of transfer in response to this request therefore requires two elements to be confirmed: firstly, whether the drainage in the street named in Mr Duff's request was amongst the responsibilities transferred to the West of Scotland Water; and secondly, the date at which that transfer took place.
16. Mr Duff's concern appears to be whether the Council holds information that would confirm the first element, and whether it has taken adequate steps to establish whether responsibility for the street in question was previously held by the Council and so transferred.
17. Given the above, the Commissioner is satisfied that Mr Duff has raised concerns which are relevant given the terms of his request, and he has proceeded to consider whether the Council did hold relevant information that would confirm that it once held responsibility for the street, and so enabled an accurate response regarding the date of transfer of that particular responsibility.

FOISA or the EIRs

18. The Commissioner has first of all considered whether the information requested in this case constitutes environmental information as defined by the EIRs, and whether Mr Duff's information request should have been dealt with in terms of FOISA or the EIRs.
19. The Commissioner set out his thinking on the relationship between FOISA and the EIRs in some detail in *Decision 218/2007 Professor A D Hawkins and Transport Scotland* and need not repeat it in full here. However, the central point set out therein is that when a person requests information that would fall within the definition of environmental information set out in regulation 2(1) of the EIRs, that request should be considered and responded to in line with the EIRs.
20. As noted above, after being advised that the Commissioner might consider the information under consideration in this case to be environmental information for the purposes of the EIRs, the Council submitted that it would apply the exemption contained in section 39(2) of FOISA to the requested information.
21. Environmental information is defined in regulation 2(1) of the EIRs (parts (a) to (c) of the definition are reproduced in full in the Appendix). Where information falls within the scope of this definition, a person has a right to access it under the EIRs, subject to various restrictions and exceptions contained in the EIRs.
22. The information requested by Mr Duff consists of a date upon which the responsibility for the drainage systems of a named street in Dumfries and Galloway passed from the Council to Scottish Water. As such, it is information on measures (including legislation, activities and programmes) affecting, or likely to affect, the elements of the environment listed in paragraph (a) of the definition of environmental information (particularly, land, soil, landscape and natural sites), and the factors listed in part (b) of the definition (such as waste and discharges).



23. As such, the Commissioner considers that the information requested by Mr Duff is environmental information contained as defined in regulation 2(1)(c) of the EIRs.
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 (thereby allowing any such information to be considered solely in terms of the EIRs). As the Commissioner considers that the information requested by Mr Duff is entirely environmental information, he also therefore considers that it is exempt from disclosure under section 39(2) of FOISA.
25. This exemption is subject to the public interest test in section 2(1)(b) of FOISA. The Commissioner's view is that, in this case, as there is a separate statutory right of access to environmental information available to Mr Duff, the public interest in maintaining this exemption and dealing with the requests in line with the requirements of the EIRs, outweighs any public interest in disclosure of information under FOISA. In what follows, the Commissioner has therefore made his decision solely in terms of the EIRs.

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

26. 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 that information when an applicant's request is received.
27. In this case, the Council has submitted that any records it may have held which contained relevant information would have been provided to West of Scotland Water in 1996 as a result of local government reorganisation. The Council also commented that the Local Government etc. (Scotland) Act 1994 (the 1994 Act) created the new Water Authorities and, as such, all property, rights and liabilities were transferred from Dumfries and Galloway Regional Council (the Council's statutory predecessor) to West of Scotland Water.
28. The Council explained that under the 1994 Act, the Regional Council had to produce an Asset Transfer Scheme for approval by the Secretary of State. The Council submitted that it holds a copy of the letter approving the scheme which is dated 27 March 1996. The Council has argued that, while there is no indication as to when the transfer of records would have taken place, it is to be presumed that it happened in accordance with the 1994 Act on 1 April 1996.
29. The Council submitted that, on receipt of Mr Duff's request, it contacted two of its senior officers who confirmed that if any relevant information was held by the Council, it would be held by its Planning Environmental Services department. In light of this, the Council carried out a manual search of the files at its Planning and Environmental Services department, but found no information relevant to the request. The Council pointed out that the 1994 Act makes it clear that there was a legal duty on the Regional Council to transfer all information to the newly formed Water Authority (West of Scotland Water). Given this, the Council argues that it would have no right to retain any information, and that it does not do so.



30. Having considered the submissions made by the Council, the Commissioner is satisfied that it carried out adequate searches to determine if it held any relevant information and, taking account of the information provided to him, he accepts that regulation 10(4)(a) applies in that no information that would confirm either of the elements mentioned in paragraph 15 above was held by the Council.

Public interest test

31. The exception set out in regulation 10(4)(a) is subject to the public interest test in regulation 10(1)(b) of the EIRs. Therefore, a Scottish public authority may only withhold information to which the exception applies where, in all the circumstances, the public interest in making the information available is outweighed by the public interest in maintaining the exception. In this case, the Commissioner is satisfied that the information in question is not held by the Council, and was not so held at the time it received Mr Duff's request. Consequently, he does not consider there to be any conceivable public interest in requiring that the information be made available.
32. The Commissioner therefore concludes that, in all the circumstances of this case, the public interest in making the requested information available is outweighed by that in maintaining the exception in regulation 10(4)(a) of the EIRs. Given this conclusion, he is satisfied that the Council was entitled to refuse Mr Duff's request under regulation 10(4)(a).

DECISION

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

The Commissioner finds that by failing to identify the requested information as environmental information (as defined in regulation 2(1)) and deal with the request accordingly under the EIRs, Dumfries and Galloway Council failed to comply with regulation 5(1) of the EIRs.

However, the Commissioner finds that Dumfries and Galloway Council was entitled to refuse Mr Duff's request under regulation 10(4)(a) of the EIRs on the basis that it did not hold the information requested.



Appeal

Should either Mr James Duff or Dumfries and Galloway Council 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
Head of Enforcement
6 January 2011



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);
- (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;

...