

Decision Notice



Decision 038/2011 Mr James Duff and Scottish Water

Information relating to the drainage systems of a named street

Reference No: 201001189

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Summary

Mr James Duff (Mr Duff) requested from Scottish Water all paperwork (including a specified map) relating to the drainage systems of a named street. Scottish Water responded by giving Mr Duff notice, in terms of section 17(1) of FOISA, that it did not hold the specified map nor any information relating to the adoption of the drainage system. However, it indicated that it did hold an infrastructure map of the pipes of the named street, which was available for inspection. Following a review, Mr Duff remained dissatisfied with the responses to his requests 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 Scottish Water's comments as to whether the request should be dealt with under the EIRs. In response, Scottish Water confirmed that if the Commissioner was satisfied that the information (if held) was environmental, it wished to rely on section 39(2) of FOISA.

Following an investigation, the Commissioner found that Scottish Water should have dealt with the requests under the EIRs, and that, in failing to do so, it had failed to comply with the EIRs.

However, the Commissioner finds that Scottish Water was entitled to apply regulation 6(1)(b) to the infrastructure map that indicated that the relevant drainage system was adopted by Scottish Water, given that it is publicly available and easily accessible to Mr Duff. The Commissioner finds that Scottish Water was entitled to otherwise refuse Mr Duff's requests under regulation 10(4)(a) of the EIRs on the basis that it did not hold the information requested.

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) and 6(1)(b) (Form and format of information); 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. This case involves two separate but related requests for information submitted by Mr Duff to Scottish Water. These are referred to in this decision as request 1 and request 2 respectively.

Request 1

2. In a request dated 27 January 2010, Mr Duff wrote to Scottish Water, indicating that the drainage system in a particular street has never been adopted and remains private. He requested “*all the relevant paperwork concerning [this] drainage system*”.
3. Scottish Water responded on 24 February 2010, having interpreted Mr Duff’s request as one seeking all relevant paperwork concerning the adoption of the water and waste water infrastructure at the named street. It gave Mr Duff notice, in terms of section 17(1) of the FOISA, that it did not hold the information he had requested.
4. However, Scottish Water advised Mr Duff that it could confirm that the water and waste water infrastructure of the named street was adopted, and that it held an infrastructure map of the waste and water pipes of that street. Scottish Water indicated that, while this was not information on the adoption itself, Mr Duff could inspect the infrastructure map at his local Scottish Water office. Having advised Mr Duff where he could view the map, Scottish Water indicated that this information was exempt from disclosure in terms of section 25(1) of FOISA.
5. On 3 March 2010, Mr Duff wrote to Scottish Water requesting a review of its decision, particularly with respect to its confirmation that the drainage system had indeed been adopted.
6. On 5 March 2010, Scottish Water acknowledged receipt of Mr Duff’s request for review and stated that the infrastructure map showed that the drainage system of the named street had been adopted. In response to questions raised by Mr Duff in other correspondence, Scottish Water explained that the infrastructure map is simply a map of infrastructure that has been adopted and is Scottish Water’s responsibility.
7. Scottish Water notified Mr Duff of the outcome of its review on 1 April 2010. It indicated again that it understood that the crux of Mr Duff’s enquiry was to understand why Scottish Water states that it owns the water and sewerage infrastructure at the specified location. It indicated that everything that could reasonably be done to unearth that information had been done, and had failed to identify relevant information. Scottish Water maintained its initial decision that it did not hold the requested information.



Request 2

8. On 12 May 2010, Mr Duff submitted a second information request to Scottish Water. The background to this request was that Mr Duff had been seeking information on the same matter from Dumfries and Galloway Council. Dumfries and Galloway Council is the successor to Dumfries and Galloway Regional Council, which was previously the water authority for the relevant area. The role of water authority for that area had been transferred to the newly formed West of Scotland Water in 1996 as a part of local government reorganisation. Scottish Water is the successor to West of Scotland Water, following the amalgamation of the regional water authorities that were created in 1996.
9. Mr Duff indicated that Dumfries and Galloway Council had advised him that any information regarding the adoption of the relevant drainage systems would have been passed to West of Scotland Water in 1996. He asked for a copy of a map, that he understood to have been produced by the Council in the 1970's showing (by use of a red line) that the drainage system of the named street had been adopted. In so doing, Mr Duff reiterated that he did not believe that the drainage system had been adopted.
10. Scottish Water responded to this request on 14 May 2010. It gave Mr Duff notice, in terms of section 17(1) of the FOISA, that it did not hold a copy of the map he was seeking. It added that any map it may have inherited from its statutory predecessor would have been destroyed following the digitisation process.
11. On 17 May 2010, Mr Duff wrote to Scottish Water requesting a review of its decision. In particular, Mr Duff questioned its assertion that the map he was seeking had been destroyed. He referred to Scottish Water's letter of 5 March 2010 (in relation to request 1), and the reference therein to an infrastructure map which showed that the drainage system of the named street had been adopted.
12. Scottish Water notified Mr Duff of the outcome of its review on 25 May 2010. It upheld its initial decision that it did not hold a copy of the specific map he was seeking and reiterated its previous advice that any local maps it may have inherited from previous water authorities would have been destroyed following the digitisation process.
13. On 8 June 2010, Mr Duff wrote to the Commissioner, stating that he was dissatisfied with the outcome of Scottish Water's reviews of both his requests 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.
14. The application was validated by establishing that Mr Duff had made his requests for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its responses to those requests. During the validation process, Mr Duff was also asked to clarify points regarding his application. Once this clarification was obtained, the case was allocated to an investigating officer.



Investigation

15. The investigating officer subsequently contacted Scottish Water, giving it an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking it to respond to specific questions. In particular, Scottish Water was asked to justify its reliance on any provisions of FOISA/the EIRs it considered applicable to the information requested. Additionally, Scottish Water was asked to provide details of the steps it had undertaken to establish that it did not hold the information requested by Mr Duff.
16. Scottish Water was also advised that it was likely that the Commissioner would consider that Mr Duff's request sought environmental information. In light of this, Scottish Water was asked for its views as to whether the request should be considered in terms of the EIRs.
17. Scottish Water responded on 4 October 2010. In this response, Scottish Water argued that it did not consider the requested information to comprise environmental information and that subsequently it was not going to rely upon the exemption in section 39(2) of FOISA. Scottish Water maintained that the information request would be most appropriately handled under FOISA. However, it noted that if the Commissioner were to apply the EIRs to the requested information, it would consider it excepted from disclosure in terms of regulation 10(4)(a) on the basis that the requested information was not held.
18. Scottish Water indicated that regulation 6(1)(b) (which applies to information which is already publicly available and easily accessible to the applicant) would apply to the infrastructure map referred to in its response to Mr Duff's first request.
19. In further correspondence, Scottish Water maintained that while it did not believe that the requested information fell readily into any of the categories found in the definition of environmental information, if the Commissioner held to the view that the information did fall under this definition, then it would wish to rely on the exemption contained in section 39(2) of FOISA.
20. The relevant submissions made by both Mr Duff and Scottish Water are summarised and considered (where relevant) in the Commissioner's analysis and findings section below.

Commissioner's analysis and findings

21. In coming to a decision on this matter, the Commissioner has considered all of the submissions made to him by both Mr Duff and Scottish Water and is satisfied that no matter of relevance has been overlooked.



FOISA or the EIRs

22. The Commissioner has first of all considered whether the information requested in this case constitutes environmental information as defined within the EIRs, and whether Mr Duff's information request should have been dealt with in terms of FOISA or the EIRs.
23. The Commissioner has 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 in line with the EIRs.
24. 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, Scottish Water submitted that it would apply the exemption contained in section 39(2) of FOISA to the requested information.
25. Environmental information is defined in regulation 2(1) of the EIRs. 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.
26. The information requested by Mr Duff consists of any paperwork relating to the adoption of the drainage system of a named street, with particular reference to a map showing that the aforementioned drainage system had been adopted by Dumfries and Galloway Council. As such, it would (if held) be information on measures (including 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). Accordingly, the Commissioner considers that the information requested by Mr Duff is entirely environmental information contained as defined in regulation 2(1)(c) of the EIRs.
27. In any case where 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. Therefore, the Commissioner considers that when responding to Mr Duff's information requests solely in terms of FOISA, Scottish Water failed to comply with regulation 5(1) of the EIRs.

Section 39(2) of FOISA

28. As noted above, Scottish Water has stated that it would claim the exemption in section 39(2) of FOISA should the Commissioner find the information to be environmental information as defined in regulation 2(1) of the EIRs.



29. 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.
30. 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.

Request 1

31. In his first request, Mr Duff asked Scottish Water for all relevant paperwork concerning the drainage systems at the named street. In response, Scottish Water indicated that it did not hold the requested information, although it advised Mr Duff that he could view its infrastructure map. Scottish Water noted that this map did not provide information on the adoption itself, but it did indicate that the relevant drainage system was adopted.
32. The Commissioner has first of all noted that this request, although preceded by a reference to Mr Duff's belief that the drainage system at the named street was not adopted, refers simply to all "relevant paperwork" concerning the drainage system. Scottish Water has made clear in its communications with Mr Duff in response to this request that it interpreted the request as seeking information about the adoption of the drainage system.
33. Since Mr Duff has not expressed dissatisfaction with this interpretation of his request in any communication with Scottish Water or the Commissioner, the Commissioner has proceeded in this decision on the basis that Scottish Water's understanding of Mr Duff's request is correct.
34. However, the Commissioner notes that Scottish Water, while focusing on the issue of adoption of the drainage system, has also conducted searches on all information it holds relating to the named street. Consequently, the Commissioner is satisfied that even if Mr Duff intended his request to be interpreted more widely, Scottish Water has conducted searches which are also relevant to a wider interpretation of the request.
35. The Commissioner considers that Scottish Water was correct to identify the infrastructure map as potentially relevant to Mr Duff's information request, since it revealed that Scottish Water considered the relevant drainage system to be adopted, although it contained no information about the process of its adoption.



36. Scottish Water indicated that the provision in regulation 6(1)(b) of the EIRs was applicable to the infrastructure map. Regulation 6(1)(b) states that a Scottish public authority shall comply with a request that environmental information be made available in a particular form or format, unless the information is already publicly available and easily accessible to the applicant in another form or format. This is a two-part test, which must (for the regulation to apply) conclude that the information is both publicly available and easily accessible.
37. The Commissioner notes that Scottish Water advised Mr Duff that the infrastructure map could be viewed at his local Scottish Water office, and that the Water (Scotland) Act 1980 and the Sewerage (Scotland) Act 1968 require that any individual is entitled to inspect a map of Scottish Water's waste and water pipes. Having considered the above, along with the distance between Mr Duff's home and his local Scottish Water office, the Commissioner is satisfied that the map is both publicly available and easily accessible to Mr Duff, and he therefore upholds Scottish Water's application of regulation 6(1)(b).
38. During the investigation, Scottish Water confirmed that its view was that it did not hold any information falling within the terms of Mr Duff's request for information, insofar as it related to the process of adoption of the drainage system. It indicated that it therefore considered regulation 10(4)(a) to be applicable to the requested information.
39. 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.
40. Scottish Water submitted that it had searched through all relevant files and asked relevant personnel and that it did not hold the information requested by Mr Duff. Scottish Water commented that Mr Duff was seeking paperwork relating to the adoption of a drainage system that was installed some 40 years ago and that it currently retains such information for only five years.
41. Scottish Water explained that its records management team had conducted extensive searches of its files and drawings database using key terms relating to the named street and its postcode and that nothing of relevance was found. The records management team also searched for any paper records but, again, nothing was found. In addition, Scottish Water advised that key personnel were questioned (including the customer service team) and asked to provide any information that could assist with the request, but nothing was unearthed. Scottish Water argued that it had carried out all relevant searches and asked all relevant personnel and that no information of relevance had been located.
42. Having considered the submissions made by Scottish Water, the Commissioner is satisfied that Scottish Water has carried out thorough searches of its systems, and that it did not restrict those searches to paperwork, but searched for any information held (in any format) that related to adoption of the drainage system at the named street.



43. Having considered all of the searches undertaken by Scottish Water, the Commissioner is satisfied that it holds no information relating to the adoption of the relevant drainage system. He considers that the searches undertaken were thorough and should have allowed the retrieval of any further information relating to the relevant street that was held by Scottish Water.
44. The Commissioner is therefore satisfied that the exception in regulation 10(4)(a) of the EIRs applied to the information sought by Mr Duff about the adoption of the relevant drainage system.
45. 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 Scottish Water, 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.
46. 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 Scottish Water was entitled to refuse Mr Duff's request under regulation 10(4)(a).

Request 2

47. In his second request, Mr Duff requested a copy of the map produced by Dumfries and Galloway Council in the 1970's which showed that the drainage system of the named street had been adopted.
48. Scottish Water submitted that it did not hold a copy of this map, nor could it confirm if it had ever held a copy of this map. Scottish Water stated that if Dumfries and Galloway Council received such a map in the 1970's, and if this map had been transferred to West of Scotland Water (Scottish Water's predecessor) before being transferred to Scottish Water, then following the digitisation process, the paper map would have been destroyed. Scottish Water explained that it implemented a digitisation process in order to remove the need for paper copies of maps. Scottish Water advised that, during this process, water data was transferred from original paper records held by West of Scotland Water, and that this was done by drawing the lines on the electronic Ordnance Survey mapping data.
49. Scottish Water also noted that its records management department did not recall receiving, en masse, a set of maps for various streets or roads in Scotland. Scottish Water noted that it had conducted extensive searches of its records and had interrogated its personnel and that no record of the map had been found. In light of this, Scottish Water maintained that regulation 10(4)(a) applies to the map, on the basis that it was information that Scottish Water did not hold.



50. The Commissioner has considered all of the submissions regarding this request and he is satisfied that the information requested by Mr Duff in request 2 is not held by Scottish Water and that Scottish Water has correctly applied the exception contained in regulation 10(4)(a) of the EIRs.
51. The Commissioner must again consider the public interest test required by regulation 10(1)(b) of the EIRs. The Commissioner is again satisfied that the information in question is not held by Scottish Water, 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.
52. 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 Scottish Water was entitled to refuse Mr Duff's request under regulation 10(4)(a).

DECISION

The Commissioner finds that Scottish Water partially complied with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information requests 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 requests accordingly under the EIRs, Scottish Water failed to comply with regulation 5(1) of the EIRs.

However, the Commissioner has found that Scottish Water was entitled to apply regulation 6(1) to the infrastructure map, given that it is publicly accessible to Mr Duff, and that it was entitled to otherwise refuse Mr Duff's requests on the basis that the information requested was not held, and so excepted from disclosure under regulation 10(4)(a) of the EIRs.

The Commissioner does not require Scottish Water to take any action in response to this decision.



Appeal

Should either Mr Duff or Scottish Water 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
2 March 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.

6 Form and format of information

(1) Where an applicant requests that environmental information be made available in a particular form or format, a Scottish public authority shall comply with that request unless-

...



- (b) the information is already publicly available and easily accessible to the applicant in another form or format.

...

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;