

**Decision 076/2007 Mr Richard Anderson and
Shetland Islands Council**

Agreements between Council and Scottish Water

**Applicant: Mr Richard Anderson
Authority: Shetland Islands Council
Case No: 200600669
Decision Date: 22 May 2007**

**Kevin Dunion
Scottish Information Commissioner**

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Decision 076/2007 – Mr Richard Anderson and Shetland Islands Council

Information request for copy of all agreements between Shetland Islands Council and Scottish Water relating to the provision of drainage and sewage in the Shetland Islands and all transfers of land between Shetland Islands Council and Scottish Water in East Voe, Shetland.

Relevant Statutory Provisions and other Sources

Freedom of Information (Scotland) Act 2002: sections 1(1) (General entitlement); 15 (Duty to provide advice and assistance); 17(1) (Notice that information is not held); 19 (Content of certain notices); 21(1), (5) and (10) (Review by Scottish public authority)

Water Industry (Scotland) Act 2002: section 22(1) (Transfer of property and liabilities)

Local Government etc (Scotland) Act 1994: section 91(1) (repealed)

The full text of each of these provisions is reproduced in the Appendix to this decision. The Appendix forms part of this decision.

Facts

Mr Anderson made an information request to Shetland Islands Council (the Council) requesting a copy of all agreements between the Council and Scottish Water relating to the provision of drainage and sewage in the Shetland Islands and all transfers of land between the Council and Scottish Water in East Voe, Shetland. The Council stated that it did not hold this information.

The Commissioner found that the Council had complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in stating that in terms of section 17 of FOISA it did not hold the information requested.



However, the Commissioner found that the Council had failed to comply fully with section 15 of FOISA by failing to provide adequate advice and assistance to the applicant. The Commissioner required the Council to contact Mr Anderson to provide further information on the information held.

The Commissioner also found that the Council had breached the technical requirements of sections 19 and 21(10) of FOISA in its responses to Mr Anderson. The Commissioner did not require any steps to be taken in response to these technical breaches.

Background

1. On 10 September 2005, Mr Anderson made an information request to the Council under FOISA. Mr Anderson requested to see:
 - All Agreements between the Council and Scottish Water relating to the provision of drainage and sewage in the Shetland Islands (request 1);
 - All transfers of land between the Council and Scottish Water in the East Voe, Scalloway, Shetland (request 2).
2. The Council replied to this request on 10 October 2005 explaining that, in respect of request 1, there were no agreements between the Council and Scottish Water. The Council explained that all water and sewerage assets formerly held by the Council had been transferred to the North of Scotland Water Authority (NOSWA) and subsequently to Scottish Water. In respect of request 2, the Council stated that there had been no land transfers between the Council and Scottish Water in East Voe, Scalloway.
3. The notice described above therefore appeared to advise Mr Anderson that no relevant information was held, in terms of section 17 of FOISA. However, this notice did not advise Mr Anderson of his right to request a review of this decision, or of his subsequent right of application to me.
4. On 13 October 2005, Mr Anderson wrote to the Council seeking a review of its decision. In particular, in respect of request 2, he questioned the Council on its obligations for water drainage and again asked for sight of any agreement with Scottish Water.



5. The Council replied on 25 October 2005, reiterating that there were no land transfers between itself and Scottish Water (as sought by request 1), but advising Mr Anderson to approach Scottish Water to verify this assertion. The Council stated that there was no agreement between it and Scottish Water in respect of the area described in request 2.
6. Once again, the Council's correspondence failed to advise Mr Anderson of his right to apply for a decision by me should he be dissatisfied with this outcome.
7. By letter of 4 April 2006, Mr Anderson contacted my Office to express his dissatisfaction with the response from the Council, stating that he understood that the obligations now undertaken by Scottish Water, and previously by the Council, must be reflected in an agreement. He believed this agreement was held by the Council.
8. Mr Anderson's application was validated by establishing that he had made a valid information request to a Scottish public authority and had made an application to me only after asking the public authority to review its response to his request. The case was allocated to an investigating officer.

The Investigation

9. The officer formally contacted the Council on 6 April 2006 in terms of section 49(3)(a) of FOISA asking for its comments on the application. The Council was asked to provide a range of background information to support my consideration of this case.
10. The Council responded by letter of 5 May 2006, with submissions and a copy of the Shetland Islands Council "Water and Sewerage Transfer Scheme" (the Scheme), made on 8 August 1995 under section 91(2) of the Local Government etc (Scotland) Act 1994 ("the 1994 Act").
11. Mr Anderson's requests were for:
 - All Agreements between the Council and Scottish Water relating to the provision of drainage and sewage in the Shetland Islands (request 1);
 - All transfers of land between the Council and Scottish Water in the East Voe, Scalloway, Shetland (request 2).



12. The Council had explained to Mr Anderson in its review letter of 25 October 2005 that prior to the enactment of the 1994 Act the provision of water and sewerage services in Shetland was the responsibility of the local authority. After the 1994 Act, those responsibilities were transferred to NOSWA. NOSWA was, at that time, therefore responsible for the provision of wholesome water and sewerage services for domestic and non-domestic consumers.
13. The enactment of the Water Industry (Scotland) Act 2002 ("the 2002 Act") transferred the functions and responsibilities of water and sewerage authorities, such as NOWSA, to a new body – Scottish Water.

Submissions from the Council

14. In respect of request 1, the Council said that it held no agreement or protocols or similar documents with Scottish Water in relation to the transfer of water or sewerage assets. This transfer would have been between NOSWA and Scottish Water, and the Council had nothing to do with this transfer. The transference of responsibility was:
 - from the local authority to NOSWA by virtue of the 1994 Act;
 - from NOSWA to Scottish Water by virtue of the 2002 Act.

The Commissioner's Analysis and Findings

15. I have to decide whether the Council holds any information which falls within Mr Anderson's requests.
16. Mr Anderson provided my Office with an excerpt from an incidental application relating to an action in Lerwick Sheriff Court. Mr Anderson pointed to wording within this incidental application as proof that there had been transfer of heritable property from the Council to Scottish Water, and therefore that the Council must hold a copy of an agreement.
17. However, to my reading the wording within the excerpt from the incidental application reinforces what the Council is claiming. The excerpt states that that "Scottish Water Ltd are the statutory successors to NOSWA" and therefore the current heritable proprietors of the property, to which the action refers. That is, the Council transferred the property to NOSWA, not to Scottish Water.
18. The Council provided to my Office a copy of its "Water and Sewerage Transfer Scheme". This was made under, and required by, section 91(2) of the 1994 Act. This scheme, approved by the Secretary of State, transfers:



“... to the new water and sewerage authority or authorities specified in relation to that council in section 91(4) of the Act [the 1994 Act] of all the property, rights and liabilities to which the council is entitled or subject in the exercise of its functions under any enactment in relation to the water supply, in relation to the provision of sewerage and in relation to dealing with the contents of sewers.” (Preamble (A)).

19. This scheme contains a transfer list, which details the assets that are subject to transfer from the Council to NOSWA. This transfer list is extensive. It includes apparatus, machinery, springs, aqueducts, and the like (all specified the name, description and National Grid Reference (NGR)). It includes all land to which the Council was entitled immediately before the transfer date in the exercise of its designated functions (“designated land”), and corporeal moveable property and existing agreements.
20. I would note that the inventory of writs within Transfer List 4.2.2. of the scheme has for “Scalloway” an entry at Number 2 for the property to which Mr Anderson sent me the excerpt of the Sheriff Court writ.
21. Having considered all the information submitted, I accept that the Council has demonstrated that it does not hold any information that comes within Mr Anderson’s requests.
22. I therefore accept that the Council was correct to advise Mr Anderson that the information he requested was not held, in terms of section 17 of FOISA.

Duty to advise and assist

23. Although I accept the Council’s assertion that it does not hold information revealing agreements and the transfer of assets between itself and Scottish Water, I wish to comment further on this matter.
24. In its response to Mr Anderson’s request for review, and in its correspondence with my Office, the Council has helpfully explained the process by which its responsibilities and assets relating to water and sewerage were transferred to NOSWA, and then transferred from NOSWA to Scottish Water.
25. The Council advised Mr Anderson to make a further freedom of information request to Scottish Water in order to see this further relevant information. However, I am very surprised that the Council never advised Mr Anderson that it also held information that was likely to be relevant to his interests – namely information relating to the transfer of its assets and obligations to NOSWA. The Council has provided to my office a copy of part of the scheme which provides detailed information on this transfer.



26. Had the Council interpreted of Mr Anderson's request more generously (to include within the term "Scottish Water" that organisation's statutory predecessors) then the contents of this document (and related information) might have been identified as relevant to Mr Anderson's request.
27. Even if the Scheme was not judged to fall within the scope of the existing request (as I have accepted), I believe it would have been reasonable for the Council to indicate the existence of documents relating to the transfer of assets to NOSWA, and to advise that a new request for information might be made to the Council for relevant content within these. In failing to provide advice of this type to Mr Anderson, I find that the Council failed to comply fully with the requirements of section 15 of FOISA.
28. In failing to provide such advice and assistance to Mr Anderson, I find that the approach taken by the Council had the potential to create the mistaken impression that no such agreements were entered into by the Council. The information provided by the Council explained the process of transfer of the Council's assets and responsibilities, but failed to explain the significance of this process for the types of information that Mr Anderson was seeking that may or may not be held by the Council.
29. I now require the Council to write to Mr Anderson within 45 days of the receipt of this decision notice providing details of the types of information it holds relating to the transfer of any land or sewerage and water assets to the North of Scotland Water Authority, and advising Mr Anderson on how to make a new requests to access information on this subject, should he wish to do so.

Content of notices

30. I also want to note that the Council failed to comply with the technical requirements of section 19 and 21(10) in its responses to Mr Anderson's information request.
31. Section 19 states that when a notice is issued under section 17 of FOISA (stating that information is not held), that notice should contain particulars of
 - a) The procedure provided by the authority for dealing with complaints about the handling by it of requests for information; and
 - b) About the right to request a review of the authority's handling of the request, and subsequently to make an application to the Commissioner.
32. Section 21(10) states that when notifying a person of the outcome of an internal review, the authority must provide particulars of the right of application to the Commissioner, and of the appeal to the Court of Session in respect of the Commissioner's decision.



33. The Council failed to comply with the requirements of section 19 in its initial response to Mr Anderson and it failed to comply with section 21(10) in its subsequent notice of the outcome of its review.
34. I do not require any steps to be taken in response to these technical breaches.

Decision

I find that the Shetland Islands Council (the Council) dealt with Mr Anderson's request partly in accordance with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA). I have found that the Council was correct to state that the information requested was not held in terms of section 17 of FOISA.

However, I have found that the Council failed wholly to comply with the requirements of section 15 in that it failed to provide reasonable advice and assistance to Mr Anderson.

I require the Council to write to Mr Anderson within 45 days of the receipt of this decision notice providing details of the types of information it holds relating to the transfer of any land or sewerage and water assets to the North of Scotland Water Authority, and advising Mr Anderson on how to make a new requests to access information on this subject, should he wish to do so.

I have found that the Council failed to comply with the technical requirements of sections 19 and 21(10) by failing to provide particulars of the applicant's right to seek a review, of application to the Commissioner, and of appeal to the Court of Session in its correspondence with Mr Anderson. As noted above, I do not require any steps to be taken in response to these technical breaches.



Appeal

Should either the Council or Mr Anderson 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 of receipt of this notice.

Kevin Dunion
Scottish Information Commissioner
22 May 2007



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.

15 Duty to provide advice and assistance

- (1) A Scottish public authority must, so far as it is reasonable to expect it to do so, provide advice and assistance to a person who proposes to make, or has made, a request for information to it.
- (2) A Scottish public authority which, in relation to the provision of advice or assistance in any case, conforms with the code of practice issued under section 60 is, as respects that case, to be taken to comply with the duty imposed by subsection (1).

17 Notice that information is not held

- (1) Where-
 - (a) a Scottish public authority receives a request which would require it either-
 - (i) to comply with section 1(1); or
 - (ii) to determine any question arising by virtue of paragraph (a) or (b) of section 2(1),if it held the information to which the request relates; but
 - (b) the authority does not hold that information,it must, within the time allowed by or by virtue of section 10 for complying with the request, give the applicant notice in writing that it does not hold it.

19 Content of certain notices

A notice under section 9(1) or 16(1), (4) or (5) (including a refusal notice given by virtue of section 18(1)) or 17(1) must contain particulars-

- (a) of the procedure provided by the authority for dealing with complaints about the handling by it of requests for information; and



- (b) about the rights of application to the authority and the Commissioner conferred by sections 20(1) and 47(1).

21 Review by Scottish public authority

- (1) Subject to subsection (2), a Scottish public authority receiving a requirement for review must (unless that requirement is withdrawn or is as mentioned in subsection (8)) comply promptly; and in any event by not later than the twentieth working day after receipt by it of the requirement.

[...]

- (5) Within the time allowed by subsection (1) for complying with the requirement for review, the authority must give the applicant notice in writing of what it has done under subsection (4) and a statement of its reasons for so doing.

[...]

- (10) A notice under subsection (5) or (9) must contain particulars about the rights of application to the Commissioner and of appeal conferred by sections 47(1) and 56.

Water Industry (Scotland) Act 2002

22 Transfer of property and liabilities

- (1) The property and liabilities to which the new water and sewerage authorities are entitled or subject are transferred to Scottish Water.

Local Government etc (Scotland) Act 1994 (repealed)

91 Transfer of property, rights and liabilities to new authorities

- (1) Subject to subsections (8) and (9) below, and to section 95 of this Act, on 1st April 1996 (in this Part of this Act referred to as "the transfer date") all property, rights and liabilities to which—

- (b) the regional and islands councils, in the exercise of their functions under any enactment in relation to water supply, to the provision of sewerage and to their dealing with the contents of sewers, are so entitled or subject (in this section referred to as their "relevant" property, rights and liabilities),



shall, by virtue of this subsection, transfer to and vest in the new water and sewerage authorities and be allocated as between those authorities in accordance with such schemes as are mentioned in subsection (2) below.

- (2) Subject to subsections (5) and (7) below, on or before such date as the Secretary of State may direct (in this section referred to as the "scheme submission date"), the Board and each of the regional and islands councils shall make and submit to him a scheme for the transfer under subsection (1) above of—

(a) the Board's; or

(b) as the case may be, the council's relevant,

property, rights and liabilities (any such scheme so made, or made by the Secretary of State under subsection (8) below, being in the following provisions of this Part of this Act referred to as a "transfer scheme").