

Decision Notice



Decision 163/2008 Mrs Mary Turner and the Scottish Environment Protection Agency

Campbeltown Sewerage System

Reference No: 200800990, 200800837
Decision Date: 19 December 2008

www.itspublicknowledge.info

Kevin Dunion

Scottish Information Commissioner

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Summary

Mrs Turner requested from the Scottish Environment Protection Agency (SEPA) information relating to licence applications in respect of the Campbeltown sewerage system. SEPA responded by providing some of the information but identified other information falling within the scope of one of her requests which it considered excepted under regulation 10(5)(d) of the EIRs (which relates to the confidentiality of proceedings of a public authority and in this case was applied to legal advice). Following a review, Mrs Turner remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that SEPA had partially failed to deal with Mrs Turner's requests for information in accordance with the EIRs, by failing to identify all the information which fell within the scope of those requests. He also found that SEPA had complied with the EIRs in withholding certain information under regulation 10(5)(d). He required SEPA to carry out further searches for the information requested and review its systems for dealing with requests of this kind.

Relevant statutory provisions and other sources

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 5(1) and (2)(b) (Duty to make available environmental information on request); 10(1), (2) and (5)(d) (Exceptions from duty to make environmental information available – confidentiality of proceedings).

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 14 January 2008, Mrs Turner wrote to SEPA requesting the following information:

“...copies of ... all letters or emails between SEPA and Scottish Water regarding the progress of the application and in particular the request and agreements for the extensions to the determination period.”

This request related to applications submitted to SEPA by Scottish Water for licences under the Water Environment (Controlled Activities) (Scotland) Regulations 2005 (CAR), which were associated with the sewerage provision in Campbeltown **[request one]**.



2. On 13 February 2008, Mrs Turner made another request to SEPA requesting copies of all correspondence, records and monitoring information relating to the Campbeltown sewerage system, Slaty Farlan sewage treatment works, Kinloch Park pumping station, sludge and sludge handling and any other information which she had not already received between 1 August 2007 and 13 February 2008 [**request two**].
3. SEPA responded to the first and second requests on 17 January 2008 and 12 March 2008, respectively. On 17 January 2008, SEPA informed Mrs Turner that she had been provided with the information that formed the basis of her request as a result of recent correspondence with another employee within SEPA, confirming that it had been sent to her the previous day. SEPA also informed her that it had confirmed that it held no other information in addition to that already supplied.
4. In its letter of 12 March 2008, SEPA identified and released to Mrs Turner 43 emails and 5 attachments which it understood to fall within the scope of request two. SEPA identified one email which it withheld under regulation 10(4)(e) of the EIRs, along with eight emails and two attachments withheld under regulation 10(5)(d) of the EIRs. SEPA also informed Mrs Turner that it had requested third party consent with respect to other information which it did not release at that stage.
5. On 22 January 2008 and 18 March 2008 respectively, Mrs Turner wrote to SEPA requesting reviews of its decisions in respect of requests one and two. In her email of 22 January 2008, Mrs Turner detailed why she was not satisfied that she had been provided with all the information that fell within the scope of request one, drawing SEPA's attention to correspondence which alluded to a particular letter she had not been provided with but which she felt ought to have been supplied.
6. In her letter of 18 March 2008, Mrs Turner indicated that she was not satisfied SEPA was correct in its application of regulations 10(4)(e) and 10(5)(d) of the EIRs in withholding certain information in response to request two.
7. SEPA notified Mrs Turner of the outcome of its reviews, on 15 February 2008 in respect of request one and on 17 April 2008 in respect of request two. In its response of 15 February 2008, SEPA explained to Mrs Turner that the reference to the letter she had identified was erroneous and should have been a reference to an email of the same date, which had been supplied. SEPA clarified that it did not hold a letter of the date specified by Mrs Turner and therefore claimed the exception in regulation 10(4)(a) of the EIRs.
8. In its letter of 17 April 2008, SEPA withdrew its reliance on regulation 10(4)(e) and released the information withheld under this exception. In respect of the information withheld under regulation 10(5)(d), SEPA withdrew its reliance on this exception in relation to a letter and a Ministerial Direction but upheld its reliance on it for the remainder of the information.



9. On 6 June 2008, Mrs Turner wrote to the Commissioner's Office, stating that she was dissatisfied with the outcomes of SEPA's reviews 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.
10. The applications were validated by establishing that Mrs Turner 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.

Investigation

11. On 7 July 2008, SEPA was notified in writing that an application had been received from Mrs Turner in respect of request two and asked to provide the Commissioner with any information withheld from the applicant. SEPA responded with the information requested and the case (in respect of both requests) was then allocated to an investigating officer.
12. The investigating officer subsequently contacted SEPA, giving it an opportunity to provide comments on the applications (as required by section 49(3)(a) of FOISA) and asking it to respond to specific questions. In particular, SEPA was asked to justify its reliance on any provisions of the EIRs it considered applicable to the information requested.
13. Given the connection between the two applications it was decided to investigate both of them together and issue a single decision notice.
14. During the course of the investigation SEPA released further information to Mrs Turner, originally withheld under regulation 10(5)(d).

Commissioner's analysis and findings

15. In coming to a decision on this matter, the Commissioner has considered all of the withheld information and the submissions made to him by both Mrs Turner and SEPA and is satisfied that no matter of relevance has been overlooked.



16. In her application, Mrs Turner explained why she believed SEPA had failed to provide her with all the information which fell within the scope of her requests. She considered it clear that her request was seeking all letters between SEPA and Scottish Water in relation to Scottish Water's CAR applications. In particular, she believed she should have been provided with a particular letter dated 22 October 2007 from SEPA to Scottish Water, or at least that the letter should have been identified at some point in the course of the handling of her requests. Further, during the course of the investigation Mrs Turner indicated that she had received information from Scottish Water which she felt evidenced that she had not been provided with all the information from SEPA which fell within the scope of her second request. SEPA's apparent failures to identify relevant information led her to conclude that the information was being deliberately concealed from her: she also suggested that her requests were being interpreted so as to avoid the provision of information.
17. In relation to request one, the Commissioner will consider whether or not further information is (or was at the time of Mrs Turner's request) held by SEPA that should have been provided to Mrs Turner in response to her request.
18. With regard to request two, SEPA released further information to Mrs Turner during the course of the investigation. Therefore the Commissioner will consider SEPA's application of regulation 10(5)(d) to the remainder of the information withheld and whether further information is (or was at the time of the request) held that falls within the scope of her request.

Background to Mrs Turner's requests

19. Between 31 August 2006 and May 2007, SEPA was carrying out the formal determination of two licences relating to two separate applications submitted by Scottish Water. The licences were handled under the terms of CAR and were associated with sewerage provision in Campbeltown. SEPA submitted that the requests under consideration here were part of a sequence of inter-related requests from Mrs Turner and others, relating to the determination process, over an extended period. The original application for a new combined storm water overflow at the Campbeltown sewage treatment works was received by SEPA on 8 November 2006. SEPA explained that if it was unable to determine an application of this type within four months, excluding any time for the applicant to provide it with additional information, then it could request the applicant's (in this case Scottish Water's) agreement to extend the determination period. The application in question was considered and determined by SEPA between November 2006 and August 2007.



20. SEPA explained that some of those who were dissatisfied with SEPA's eventual proposal to grant a licence, subject to conditions, exercised their right to ask the Scottish Ministers to call in the application for determination. While that process was underway, Scottish Water successfully argued that the application had been deemed to be refused under the CAR legislation, the relevant timescales having been inadvertently exceeded. Scottish Water appealed that refusal and the Scottish Ministers decided that the appeal would be heard by way of a public local inquiry, the prehearing for which was scheduled to take place on 21 August 2008. Scottish Water withdrew its appeal immediately prior to the prehearing meeting. The withdrawal of the appeal meant that the deemed refusal (which in fact rendered the Ministers' call-in invalid) continued to have effect. Mrs Turner's requests related to these ongoing matters. To assist in dealing with related requests for information, SEPA created a single electronic "mailbox" as repository for all correspondence relating to the Campbeltown sewerage system.

Request one

21. In response to request one, SEPA informed Mrs Turner that she had been provided with the information she had requested as a result of a parallel request for information. However, Mrs Turner remained dissatisfied as she believed she had not been provided with all the information which fell within the scope of her request. In her application to the Commissioner, she raised particular concerns about a letter dated 22 October 2007 (of which she had eventually received a copy).
22. SEPA submitted that the handling of Mrs Turner's request, in this instance, was materially affected by the receipt of a parallel request sent by her directly to another employee of SEPA. It went on to explain the process followed. Request one was received on 14 January 2008. It was passed to the Access to Information team, in accordance with SEPA procedures. The request was logged on SEPA's Supportworks system, given a unique ID and acknowledged. Details of the request were sent to the contact point for scoping enquiries in the North area. Details were then also forwarded to a Senior Environmental Protection Officer (SEPO) in the Lochgilphead Office, which dealt with matters relating to Campbeltown.
23. The SEPO in the Lochgilphead Office responded to the scoping request on 16 January 2008, stating that the request had already been answered as the information had been separately supplied to Mrs Turner by an officer on 16 January 2008. Further confirmation was received from the SEPO that there was no further information within the scope of the enquiry, other than that which had been supplied.
24. Within her application to the Commissioner, Mrs Turner listed the various places where she thought the letter of 22 October 2007 could have been located in SEPA's systems.
25. In response, SEPA stated that its Corporate Licensing Administration System (CLAS), identified by Mrs Turner as a possible location, was an electronic database holding key characteristics of environmental licence applications, including important dates in the determination process. It did not have a facility to hold copies of correspondence.



26. SEPA explained that the formal record of the letter was filed as a signed photocopy in the Site Record File (Working File) for the applications in question held in SEPA's Lochgilphead Office. An electronic copy (unsigned Word document) was also stored in the electronic folder for the applications in question on the server in the Lochgilphead Office. SEPA stated that these sources were not specifically searched during the scoping phase for Mrs Turner's request, as the Access to Information Team had received confirmation from colleagues that all relevant information had been passed to the Campbeltown Correspondence mailbox. The letter had been retrieved from the Site Record File later, in response to a specific request for it.
27. SEPA submitted that when the SEPO was asked whether any additional information fell within the scope of the request, the following judgement had been made regarding the content of the letter of 22 October 2007. The letter was considered by SEPA to be an explanation of the conditions of the draft licence rather than "progress with the application", which was considered by SEPA to mean progress with the legal determination of the application in accordance with the relevant Regulations. This interpretation was underpinned, in SEPA's view, by "the emphasis in the inquiry for information on the request and agreements for extensions to the determination period".
28. The existence or otherwise of the letter of 22 October 2007 was therefore not addressed by the Access to Information Team during the handling of the initial request.
29. Having reviewed the content of this letter, which was supplied to Mrs Turner in response to a specific request made in May 2008, the Commissioner considers it to fall within the scope of Mrs Turner's request. He is not satisfied that SEPA correctly interpreted the phrase "progress with the application" to mean that her request was limited to the *legal and procedural aspects* of progress of the application. The Commissioner is of the view that the content of this letter reflects factors that fed into and were taken into consideration in the course of the determination.
30. The content of this letter thus quite clearly relates to the progress of the Campbeltown CAR licence application and should (given its release when located and no apparent reason for it being withheld at the time) have been provided to Mrs Turner as a result of request one. The letter should also have fallen within the scope of Mrs Turner's second request (see below).



31. Within its submissions, SEPA accepted that there was non-conformance [with the EIRs] in the process of locating and identifying the letter in question during the handling of Mrs Turner's request, caused by a failure to lodge a copy of the letter in the Campbeltown Correspondence mailbox after issuing it to Scottish Water. This, it was submitted, was largely due to staff absence. SEPA accepted that there was a failure to locate this document during the handling of the request. A wider search was not carried out at any point to determine whether any additional information was held which fell within the scope of the request, as SEPA did not consider Mrs Turner's request for review to imply that there was additional information to be located. SEPA explained that Mrs Turner submitted a request on 7 May 2008, which led to the 22 October 2007 letter being specifically identified and located. An apology was given in the response to the later request that the information had not been located earlier. SEPA emphasised that there was no deliberate intent by any member of SEPA staff to prevent the information from being located by the Access to Information team or considered during the handling of Mrs Turner's requests.
32. SEPA submitted that Mrs Turner had made a substantial number of information requests regarding Campbeltown sewerage provision since 2005. On occasion, the information requests had been embedded in correspondence and SEPA maintained that it had striven to ensure that these have been identified and dealt with by the most appropriate means. The Campbeltown Sewerage Task Force (a local pressure group) had also made inter-related requests on issues relating to sewerage provision in Campbeltown.
33. SEPA submitted that between November 2006 and August 2007, the period during which the CAR applications were being determined by SEPA, Mrs Turner submitted 19 information requests which were formally handled under the EIRs. In addition, between September 2007 and August 2008, Mrs Turner submitted 21 information requests which were formally handled under the EIRs.
34. The Commissioner considers that the letter of 22 October 2007 should have been identified and provided to Mrs Turner as a result of request one. Given the terms of Mrs Turner's request for review, he cannot accept that SEPA was justified in not carrying out further searches for the information at that point: clearly, she was not satisfied that all relevant information had been located. He considers that in not locating and providing the letter SEPA failed to comply with regulation 5(1) of the EIRs. The Commissioner notes that SEPA has placed a great deal of reliance on the information in question being held within the Campbeltown Correspondence mailbox. Given the outcome in this particular request, however, it is clear that the systems employed by SEPA failed to identify all the information that fell within the scope of Mrs Turner's requests. The Commissioner is aware that SEPA has since provided Mrs Turner with a copy of the letter in question, in response to a specific request for it.
35. The Commissioner will give further consideration to the issues arising from SEPA's failures to locate information following consideration of SEPA's handling of Mrs Turner's request two.



Request two

36. With respect to her second request for information, Mrs Turner stated that she was not satisfied that she had been provided with all the information which fell within its scope. During the course of the investigation, Mrs Turner stated that she had been provided with further information from Scottish Water, which she considered fell within the scope of her second request, but to date this had not been provided by SEPA. Mrs Turner was also not satisfied that SEPA had applied the exception contained in regulation 10(5)(d) correctly to the information withheld: the application of this exception will be considered in the first instance.

Regulation 10(5)(d)

37. During SEPA's review of this request, consideration was given to the status of the information, which had been withheld under the terms of regulation 10(5)(d) of the EIRs. It was agreed that the Ministerial Direction and the covering letter that accompanied it should be released. The application of regulation 10(5)(d) to the remainder of the information was upheld. The status of the information that had been withheld was also reappraised as part of the preparation of SEPA's submission to the Commissioner's office. During this process, consideration was also given to the current status of the regulatory process that underpinned the information in question.
38. It was determined during that process that some emails, withheld at review, could now be released. It was also determined that a number of emails could be released in part, with sections still withheld under regulation 10(5)(d). Mrs Turner confirmed during the course of the investigation that this information had been provided to her. This information will therefore not be considered further in this decision.
39. SEPA maintained that sections of two emails continued to be legitimately withheld under the terms of regulation 10(5)(d) of the EIRs. This exception entitles an authority to refuse to make environmental information available to the extent that disclosure would, or would be likely to prejudice substantially the confidentiality of the proceedings of any public authority where such confidentiality is provided for by law.
40. SEPA argued that the information being withheld consisted of communications between a legal adviser acting in a professional capacity and their client, SEPA, clearly within the context of a professional relationship.
41. SEPA considered that the disclosure of the retained information would prejudice substantially the confidentiality of SEPA's proceedings covered by law. SEPA accepted that the test for substantial prejudice was a high one, but argued that the test was satisfied given the content of the information in the present case, namely complex advice on the interpretation of legislation having a significant influence on SEPA's decision making and its approach to the appeals process in particular, and its continuing privileged nature. SEPA highlighted the importance of being able to communicate with its legal advisers freely and frankly in confidence, in order to obtain comprehensive legal advice about proposed actions and to defend its position adequately as required.



42. In the present case, SEPA argued that the withheld information related to complex advice on the interpretation of legislation having a significant influence on its decision making. This information argues, SEPA argued, needed to be kept confidential to allow it to think in private about its approach to the specific matter to which the advice related and to continue to think in private on an ongoing basis about its approach to analogous circumstances as they arose at that time and in the future. SEPA submitted that the time for thinking in private in this respect had not ended.
43. SEPA referred to some of the Commissioner's earlier analogous decisions and argued that the public interest in withholding legal advice was high, and that only in particularly compelling cases should release be considered. SEPA stated that the dangers associated with the disclosure of legal advice included unreasonably exposing legal positions to challenge and thereby diminishing the range and quality of that advice, which would in turn damage the quality of its decision-making.
44. SEPA explained that there was a statutory provision for challenging the decisions made by SEPA, directly or indirectly, and such statutory provision applied in this case, but that it would not be fair, reasonable or appropriate to disclose the legal advice provided to SEPA in this case, to challenge outside the statutory basis provided by the relevant legislation.
45. Arguing that it was in the public interest for a public authority to receive the most comprehensive legal advice on its proposed actions, SEPA suggested that an awareness that the advice would be released might have affected its range and quality. While recognising that it might sometimes be in the public interest to disclose where it would make a significant contribution to debate on a matter of public interest, SEPA argued that this did not apply in the present case.
46. In relation to the timing of the advice and the request for its release, SEPA argued that the public interest in keeping that legal advice confidential had not been diminished significantly by the passage of time since the advice it was provided. In this case, SEPA submitted that the information remained relevant and important in relation to the application to analogous circumstances as they arose in the future. Therefore, SEPA submitted that the advice would remain relevant on an ongoing basis.
47. As indicated above, regulation 10(5)(d) 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 confidentiality of the proceedings of any public authority where such confidentiality is provided for by law. In most cases where this exception will apply, there will be a specific statutory provision prohibiting the release of the information. However, the Commissioner also considers that there may also be cases where the common law of confidence will protect the confidentiality of the proceedings.



48. Having considered the content of the information in question and the context of this request, the Commissioner is satisfied that SEPA was correct in its application of regulation 10(5)(d) to the information withheld. The information withheld is a communication between legal advisor and client, in this case within SEPA. It was written by one of SEPA's solicitors acting in their capacity as such and provides legal advice in relation to SEPA's powers under CAR and options for dealing with a particular situation.
49. The Commissioner is therefore satisfied that the information comprises information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings in that it is a communication between a professional legal advisor (a solicitor) acting as such and their client within the context of a professional relationship. He is also satisfied that the confidentiality has not been waived and that no other exception to a claim of confidentiality applies. The Commissioner must now consider whether disclosure of the information would substantially prejudice that confidentiality.
50. The Commissioner has made clear in previous decisions that the test of substantial prejudice is a high one, requiring a real risk of actual, significant harm. That said, given the content of the information and its privileged nature, the Commissioner accepts that disclosure would cause substantial prejudice to the confidentiality of the authority's proceedings and therefore that the exception in regulation 10(5)(d) applies. He must, however, go on to consider whether the public interest in making the information available is outweighed by the public interest in maintaining the exception.
51. The Commissioner has always acknowledged that the Courts have long recognised the strong public interest in maintaining the right to confidentiality of communications between legal adviser and client on administration of justice grounds and there are many judicial comments on the fundamental nature of this confidentiality in our legal system. Many of the arguments in favour of maintaining confidentiality of such communications were discussed in *Three Rivers District Council and Others v Governor and Company of the Bank of England (2004) UK HL 48*.
52. In *Decision 069/2008 Robin Thompson and the Scottish Environment Protection Agency* the Commissioner concluded that there will always be a strong public interest in maintaining the right to confidentiality of communications between legal adviser and client and therefore, while he will consider each case on an individual basis, he is likely to order the release of such communications in highly compelling cases only. He has reiterated this in a number of subsequent decisions.
53. The Commissioner accepts the public interest arguments put forward by SEPA in support of the information being withheld. It is in the public interest that an authority can communicate with its legal advisers freely and frankly in confidence, in order that it can obtain the most comprehensive legal advice about its proposed actions and defend its position adequately as required. On the other hand, the Commissioner can identify no public interest arguments of substance in support of this particular information being disclosed. In all the circumstances, therefore, the Commissioner concludes that the strong public interest in maintaining the exception outweighs such public interest as exists in making the information available, and therefore is satisfied that the information was properly withheld under regulation 10(5)(d).



Further information covered by the request

54. Within her submissions Mrs Turner identified further information she felt should have been provided to her as a result of request two. Mrs Turner identified a spreadsheet containing the November 2007 flows monitoring information. She was particularly dissatisfied that she had not been provided with the second page of this spreadsheet as a result of her request.
55. When asked to comment on this, SEPA stated that it had provided Mrs Turner with a copy of the first page of this spreadsheet on 3 December 2007. SEPA explained that this was handled as a service request and was not logged as a formal Access to Information request. SEPA explained that the second sheet of the November 2007 flows spreadsheet formed the basis of a customer service complaint submitted on 4 July 2008, which was handled under SEPA's formal procedures. SEPA supplied this office with copies of the Stage 1 and Stage 2 complaint outcomes. SEPA advised that the full version of the spreadsheet was released to Mrs Turner on 18 September 2008, as an enclosure to the Stage 2 customer service complaint response (as appears to have been the case).
56. Within its submissions to this office SEPA acknowledged that the second sheet of the November 2007 flows spreadsheet fell within the scope of Mrs Turner's request of 13 February 2008. SEPA explained that the Access to Information team was not involved in the initial release of the information in December 2007, and when the request was scoped it was considered that the information had already been released. SEPA apologised for this mistake.
57. In this instance, the investigating officer requested from SEPA an explanation of a statement made in correspondence supplied to Mrs Turner which related to the handling of request two, particularly the second page of the spreadsheet described above. SEPA was unable to provide an explanation of the meaning of the statement as intended by the author of the email (not a SEPA employee), although it confirmed that the statement had been queried with the organisation concerned. SEPA also submitted that the release of the information had been carried out in an expeditious manner, providing the information requested in accordance with the format which had always previously been used to supply similar information relating to the flows data for previous months.
58. The Commissioner is satisfied that the whole of the November 2007 flows spreadsheet falls within the scope of request two. It is also clear that SEPA failed to provide Mrs Turner with a copy of this information as a result of her request and thus failed to comply with regulation 5(1) of the EIRs. However, the Commissioner also notes that the first page of the spreadsheet had in fact been provided in response to an earlier request and accepts in the circumstances that there was a failure to appreciate that the whole spreadsheet had not been provided at that time. He is aware that Mrs Turner has now been provided with a full copy of the information in question, in the course of SEPA's handling of her customer service complaint.
59. As indicated above in relation to request one, the scope of request two was such that if the letter of 22 October 2007 was not located in response to request one (as clearly it was not) it should have been caught by searches carried out in response to request two. That it was not is of some concern.



Conclusions from SEPA's handling of both requests

60. Having carefully considered the submissions made by both SEPA and Mrs Turner, together with the context of Mrs Turner's requests, the Commissioner must conclude that there have been shortcomings in the manner in which these requests were dealt with. While acknowledging that a good deal of potential for confusion will have arisen as a consequence of Mrs Turner and others submitting a substantial number of general and more specific requests for information relating to the Campbeltown sewerage issues, via a number of different routes, ultimately it falls to the public authority to manage multiple requests of this kind effectively, using the relevant provisions of the EIRs or (where relevant) the Freedom of Information (Scotland) Act 2002 to do so. As indicated above, in this case the Commissioner is not satisfied that the mechanisms SEPA has put in place to manage Campbeltown-related requests have proved adequate when tested: in particular, the Campbeltown Correspondence mailbox does not appear to have proved effective as a means of marshalling all relevant information.
61. As indicated above, there were clear failures to comply with regulation 5(1) of the EIRs in dealing with both of Mr Turner's requests. In the circumstances, given consistent failures to identify relevant documents, the Commissioner is not confident as to the adequacy of the searches carried out to locate the information in question and therefore requires SEPA to carry out a further search of all systems where such information might be located and to notify Mrs Turner of the outcome by one of the means provided for in the EIRs (that is, by making any further information located available in accordance with regulation 5(1) or by refusing to do so in accordance with regulation 10).
62. As the Commissioner also concludes from the failures to comply with regulation 5(1) identified in this case that the underlying systems are inadequate, he requires SEPA to review the systems it has in place for dealing with requests relating to Campbeltown sewerage provision, and to report back to him on its conclusions and any remedial action taken.
63. Although the Commissioner has concluded that there have been lapses in SEPA's records management which have contributed to its failures to identify relevant documents earlier, he finds no evidence to substantiate Mrs Turner's allegations of concealment. These allegations appear to derive to a large extent from perceptions of collusion between SEPA and Scottish Water in relation to enforcement of the relevant regulatory requirements, which do not appear to be borne out by any of the information the Commissioner has considered in the course of his investigation, or by a reasonable interpretation of SEPA's dealings with either the applicant in this case or Scottish Water. In all the circumstances, the Commissioner cannot conclude that SEPA's failures to comply with the EIRs were to any degree intentional.



DECISION

The Commissioner finds that the Scottish Environment Protection Agency (SEPA) partially complied with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information requests made by Mrs Turner.

The Commissioner finds that by withholding extracts from two emails under regulation 10(5)(d) of the EIRs, SEPA complied with the EIRs.

However, in failing to adequately identify (and where required provide Mrs Turner with) all of the information which fell within the scope of Mrs Turner's requests, SEPA failed to comply with regulation 5(1) of the EIRs.

The Commissioner requires SEPA:

- (i) To carry out a further search of all systems where information falling within the scope of Mrs Turner's requests might be located and to notify Mrs Turner of the outcome by one of the means provided for in the EIRs (that is by making any further information located available in accordance with regulation 5(1) or by refusing to do so in accordance with regulation 10), all within 45 days after the date of intimation of this decision notice;
- (ii) To review the systems it has in place for dealing with information requests relating to Campbeltown sewerage provision and to report back to the Commissioner on the conclusions of that review and any remedial action taken in response, all within 6 months after the date of intimation of this decision notice.

Appeal

Should either Mrs Turner or SEPA 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.

Kevin Dunion
Scottish Information Commissioner
19 December 2008



Appendix

Relevant statutory provisions

The Environmental Information (Scotland) Regulations 2004

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.

...

(5) 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-

...

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- (d) the confidentiality of the proceedings of any public authority where such confidentiality is provided for by law;

...