



Scottish Information
Commissioner
www.itspublicknowledge.info

Decision Notice 089/2024

Correspondence and documentation relating to sewage dispute

Authority: Scottish Borders Council
Case Ref: 202200565

Summary

The Applicant asked the Authority for correspondence and documentation relating to a dispute over the discharge of sewage at a specified property. The Authority provided some information and stated that no further information was held. Following an investigation, the Commissioner was satisfied that the Authority did not hold further information, but found that it had failed to respond within the statutory timescales.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2) and (6) (General entitlement); 39(2) (Health, safety and the environment); 47(1) and (2) (Application for decision by Commissioner)

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (paragraphs (a), (b), (c) and (f) of definition of “the Act”, “applicant” and “the Commissioner”) (Interpretation); 5(1) and (2)(a) (Duty to make environmental information available on request); 7(1), (2), (3)(a) and (b) (Extension of time); 17(1), (2)(a) and (b) (Enforcement and appeal provisions)

The full text of each of the statutory provisions cited above is reproduced in Appendix 1 to this decision. The Appendix forms part of this decision.

Background

1. In 2013, the Authority issued a writ against the Applicant in connection with them capping a sewage pipe which discharged into a septic tank on their property. The Authority conjoined

its legal action with that of a neighbouring property, but after the neighbouring property withdrew its action (subsequent to mediation), the Authority brought its own proceedings to an end.

2. On 15 December 2021, the Applicant made the following two-part request for information to the Authority:
 - (i) “Could you please supply me with all documentation in whatever format, letters, telephone notes, emails etc., between our neighbours at [specified property] and/or their Agents/contractors and [the Authority], that both discussed and convinced [the Authority] that they had a right, prescriptive or otherwise, to discharge their sewage across the [specified location] and into our septic tank, which would have been sufficiently credible for [the Authority] to raise action against us.
 - (ii) Could [the Authority], please also specify if [the Authority] worked from any Title Deed documentation that would have supported all of the above.”
3. The Authority responded on 18 January 2022, advising the Applicant that it would require an additional 20 working days to respond, as permitted by regulation 7(1) of the EIRs, as it would be complex to access the information as this it was held in paper format and an officer would need to travel to Authority premises.
4. On 10 February 2022, the Authority informed the Applicant that it would be unable to respond to their request within the extended time limit, but did not confirm when it would provide a response. On 9 March 2022, the Authority advised the Applicant that this position remained unchanged, and apologised for the delay.
5. The Applicant wrote to the Authority again on 23 March 2022 seeking an update on its response, which they noted was significantly overdue.
6. On 30 March 2022, the Authority issued its substantive response to the Applicant – 31 working days beyond the extended time permitted by regulation 7(1) of the EIRs. The Authority provided 37 pages of information in its response. The information included:
 - a copy of a writ the Authority had previously raised against the Applicant
 - a copy of the Applicant’s title deeds
 - title deeds relating to a neighbouring property, and a nearby area of land.
7. On 4 April 2022, the Applicant wrote to the Authority requesting a review of its decision. The Applicant stated that they were dissatisfied with the decision for the following reasons:
 - they considered that the Authority had grossly misunderstood their request
 - the Authority had duplicated some information it had already provided to them previously outwith the EIRs/FOISA
 - they believed that the Authority must hold information justifying its original 2013 legal position (and action), and separately named officials they believed had corresponded with their neighbours
 - the Authority had issued its response to the wrong address.
8. The Authority notified the Applicant of the outcome of its review on 7 April 2022, fully upholding its original position. The Authority apologised if the information was not what the

Applicant had expected and explained that it had provided all of the information identified as falling within the scope of the request and information that it otherwise considered helpful.

9. On 13 May 2022, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. By virtue of regulation 17 of the EIRs, Part 4 of FOISA applies to the enforcement of the EIRs as it applies to the enforcement of FOISA, subject to specified modifications. The Applicant stated that they were dissatisfied with the outcome of the Authority's review for the reasons set out in their review request and because:
 - the Authority had raised court action against the Applicant "on the belief" a neighbouring property had a right to discharge sewage into the Applicant's septic tank
 - given the Authority's legal action, it was not credible that it held no correspondence, or other documentary evidence, supporting the neighbouring property's "prescriptive" right to discharge into the Applicant's septic tank
 - they were dissatisfied with the time taken by the Authority to respond to their initial request.

Investigation

10. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
11. On 7 June 2022, the Authority was notified in writing that the Applicant had made a valid application and the case was subsequently allocated to an investigating officer.
12. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Authority was invited to comment on this application and to answer specific questions. These primarily related to how the Authority established what information it held, and the time taken to respond to the Applicant's request.

Commissioner's analysis and findings

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

Handling in terms of the EIRs

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

Section 39(2) of FOISA – Environmental information

17. 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. In this case, the Commissioner accepts that the Authority was entitled to apply this exemption to the information withheld under FOISA, given his conclusion that it is properly classified as environmental information.
18. As there is a statutory right of access to environmental information available to the Applicant in this case, the Commissioner accepts, in all the circumstances, that the public interest in maintaining this exemption (and responding to the request under the EIRs) outweighs any public interest in disclosing the information under FOISA. Both regimes are intended to promote public access to information and there would appear to be no reason why (in this particular case) disclosure of the information should be more likely under FOISA than under the EIRs.
19. The Commissioner therefore concludes that the Authority was correct to apply section 39(2) of FOISA and to consider the Applicant's information request under the EIRs.

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

20. Regulation 5(1) of the EIRs (subject to the various qualifications contained in regulations 6 to 12) requires a Scottish public authority which holds environmental information to make it available when requested to do so by any applicant. It is important to bear in mind that this obligation relates to information actually held by an authority when it receives the request, as opposed to information an applicant believes the authority should hold, but which is not in fact held.
21. The standard of proof to determine whether a Scottish public authority holds information is the civil standard of the balance of probabilities. In determining where the balance lies, the Commissioner considers the scope, quality, thoroughness and results of the searches carried out by the public authority.
22. The Commissioner also considers, where appropriate, any reason offered by the public authority to explain why it does not hold the information. While it may be relevant as part of this exercise to explore expectations as to what information the authority should hold, ultimately the Commissioner's role is to determine what relevant information is actually held by the public authority (or was, at the time it received the request).

The Applicant's submissions

23. The Applicant considered that the Authority had interpreted their request too narrowly.
24. The Applicant submitted that their request sought the documentation or evidence (including any title deeds) that "convinced" the Authority – to the extent that it would bring legal action "using public funds" – that their neighbours had a prescriptive right to discharge waste into the Applicant's septic tank.
25. The Applicant argued that to have initiated legal action the Authority must hold "overwhelming evidence", not being able to initiate action on hearsay alone.
26. In summary, and having provided the Commissioner with further explanation of the history of this case and the properties concerned (as this related to sewage and title deed matters), the

Applicant believed that the Authority failed to provide them with all of the information falling within the scope of their request.

The Authority's submissions

27. The Authority explained that, while there was a long-standing history of voluminous correspondence with the Applicant on similar, related matters, it had interpreted the request as specifically seeking information relating to its 2013 legal action.
28. The Authority explained that the Applicant had blocked a pipe, which had caused sewage discharge into a nearby cemetery. The Authority confirmed that:
 - its resulting legal action had sought to remove the blockage causing the sewage discharge
 - its legal action had been conjoined with the neighbours' action only as they dealt with some matters of common concern (noting these actions were immediately sited to allow mediation to take place)
 - it did not participate in the mediation and was not "working in tandem" with the Applicant's neighbours
 - it had lodged initiating documentation and productions, but no further material was ever prepared or presented
 - as the Applicant and their neighbours had apparently reached resolution (leading to the withdrawal of the neighbours' legal action), the Authority abandoned its own action
 - there was therefore never any substantive hearing on evidence, nor any time when such a hearing was being prepared for.
29. The Authority also stated that prescriptive rights do not generally appear in documentation, which it had explained to the Applicant on a number of previous occasions.
30. The Authority noted that the matters described in the Applicant's information request were historic (the pipe was capped in 2010; a seepage took place in 2012; the Authority brought legal action in 2013, which it abandoned in 2014).
31. The Authority explained that its legal services team held a central paper file containing information relating to the 2013 legal action, which included relevant documentation pre-dating that action provided by the relevant service team. The Authority submitted that this file was voluminous and comprehensive, given it was, at one time, an active legal file prepared in anticipation of court proceedings.
32. The Authority noted that its legal filing system at that time was predominantly paper-based, but that relevant electronic documents (including emails) had been printed and added to this file. The Authority explained that an electronic search was therefore not undertaken as it did not retain emails from 2014 or earlier, except those that had been printed off and added to the paper file.
33. The Authority submitted that, being familiar with the history of this matter and previous related requests for information from the Applicant, it was confident that all information falling within the scope of the request would be held in this central file.
34. The Authority explained that its Chief Legal Officer had carried out a comprehensive search of each document in this file for the information requested, and was best placed to do so

given their role and understanding of the request and case. The Authority stated that there was no evidence or suggestion that information was missing from this file, or that information in relation to this matter had ever been (or would ever be) stored elsewhere.

35. The Authority further stated that three of the officials named by the Applicant no longer worked for the Authority, and it could not therefore comment on whether the conversations described by the Applicant had taken place (though it accepted these individuals were involved in related matters over the years). The Authority explained that not it was not standard practice to note all conversations involving officials, and that this had been explained to the Applicant previously.
36. In summary, the Authority concluded that it held no further information falling within the scope of the request.

The Commissioner's view

37. Having closely considered the terms of the request, it is clear to the Commissioner that it seeks information relating to (and within the context of) the Authority's abandoned legal action against the Applicant.
38. In the circumstances, the Commissioner is therefore satisfied that the Authority's interpretation of the request was reasonable.
39. The Commissioner has taken account of the submissions provided by the Applicant, in which they explained why they believed the Authority should hold further information falling within the scope of their request.
40. The Commissioner considers that the searches carried out by the Authority were thorough and encompassed all areas where information of the type covered by the Applicant's request would have been likely to be held. He is also satisfied that those members of staff involved in carrying out the searches were the most appropriate to do so, based on their knowledge of the background to the request, their role within the Authority and the relevant filing arrangements.
41. Having considered the case in detail, in particular the submissions and explanations provided by the Authority, the Commissioner is satisfied that the Authority does not (and did not, at the time the request was received from the Applicant) hold any further recorded information.
42. While the Applicant believed and expected further information to be held by the Authority, the Commissioner is satisfied that this was not the case.
43. Consequently, Commissioner finds that the Authority complied with regulation 5(1) of the EIRs in responding to this part of the Applicant's request.

Timescales

44. Regulation 5(2)(a) of the EIRs gives Scottish public authorities a maximum of 20 working days following the date of receipt of the request to comply with a request for information, subject to exceptions which are not relevant in this case.
45. Regulation 7(1) of the EIRs allows a Scottish public authority to extend the time allowed by regulation 5(2)(a) by a further period of up to 20 working days, if the volume and complexity of the information requested makes it impracticable for the authority to provide an earlier response. In such cases, therefore, the time allowed for a response can be extended to a maximum of 40 working days. Regulations 7(3)(b) and (c) of the EIRs specify the notification

that is required to be given to an applicant, if the time period is to be extended for a further period of 20 working days.

46. As rehearsed earlier, it is a matter of fact that the Authority failed to respond to the Applicant's request within the timescales laid down by the EIRs.
47. The Commissioner notes the Authority's explanation that responding to the request required a key legal officer searching a voluminous paper file at its headquarters and that Covid-19 pandemic restrictions made it difficult to access the building, which hampered its ability to meet the statutory timescales in the case.
48. While the Commissioner accepts that the Authority's explanation provides some mitigation, Scottish public authorities have a statutory obligation to respond to requests for information under FOISA and the EIRs within the prescribed timescales.
49. Consequently, the Commissioner must find that the Authority failed to comply with regulation 5(2)(a) of the EIRs.
50. The Commissioner has recorded this procedural failure in his case management database, which is used to inform and monitor FOI practice by authorities.

Decision

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

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

However, in failing to provide its initial response within the required timescale, the Authority failed to comply with regulation 5(2)(a) of the EIRs.

Given that the Authority issued its subsequent review response within statutory timescales the Commissioner does not require the Authority to take any action in respect of this failure in response to the Applicant's application.

Appeal

Should either the Applicant or the Authority wish to appeal against this decision, they have the right to appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days after the date of intimation of this decision.

David Hamilton
Scottish Information Commissioner
15th May 2024

Appendix 1: 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.
- (2) The person who makes such a request is in this Part and in Parts 2 and 7 referred to as the “applicant.”
- ...
- (6) This section is subject to sections 2, 9, 12 and 14.

...

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.

...

47 Application for decision by Commissioner

- (1) A person who is dissatisfied with -
 - (a) a notice under section 21(5) or (9); or
 - (b) the failure of a Scottish public authority to which a requirement for review was made to give such a notice.

may make application to the Commissioner for a decision whether, in any respect specified in that application, the request for information to which the requirement relates has been dealt with in accordance with Part 1 of this Act.
- (2) An application under subsection (1) must -
 - (a) be in writing or in another form which, by reason of its having some permanency, is capable of being used for subsequent reference (as, for example, a recording made on audio or video tape);
 - (b) state the name of the applicant and an address for correspondence; and
 - (c) specify –
 - (i) the request for information to which the requirement for review relates;
 - (ii) the matter which was specified under sub-paragraph (ii) of section 20(3)(c);

and

(iii) the matter which gives rise to the dissatisfaction mentioned in subsection (1).

...

The Environmental Information (Scotland) Regulations 2004

2 Interpretation

(1) In these Regulations –

“the Act” means the Freedom of Information (Scotland) Act 2002;

“applicant” means any person who requests that environmental information be made available;

“the Commissioner” means the Scottish Information Commissioner constituted by section 42 of the Act;

...

“the Directive” means Directive 2003/4/EC of the European Parliament and of the Council on public access to environmental information and repealing Council Directive 90/313/EEC;

“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;

...

- (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in paragraph (a) or, through those elements, by any of the matters referred to in paragraphs (b) and (c);

...

...

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)-
 - (a) shall be complied with as soon as possible and in any event no later than 20 working days after the date of receipt of the request; and
 - (b) is subject to regulations 6 to 12.

...

...

7 Extension of time

- (1) The period of 20 working days referred to in-
 - (a) regulation 5(2)(a);
 - (b) regulation 6(2)(a); and
 - (c) regulation 13(a),may be extended by a Scottish public authority by a further period of up to 20 working days if the volume and complexity of the information requested makes it impracticable for the authority either to comply with the request within the earlier period or to make a decision to refuse to do so.
- (2) Where paragraph (1) applies the Scottish public authority shall notify the applicant accordingly as soon as possible and in any event no later than 20 working days after the date of receipt of the request for the information.
- (3) Notification under paragraph (2) shall-
 - (b) give the authority's reasons for considering the information to be voluminous and complex; and
 - (c) inform the applicant of the review provisions under regulation 16 and of the enforcement and appeal provisions available in accordance with regulation 17.

...

...

17 Enforcement and appeal provisions

- (1) The provisions of Part 4 of the Act (Enforcement) including schedule 3 (powers of entry and inspection), shall apply for the purposes of these Regulations as they apply for the purposes of the Act but with the modifications specified in paragraph (2).
- (2) In the application of any provision of the Act by paragraph (1) any reference to -
 - (a) the Act is deemed to be a reference to these Regulations;

(b) the requirements of Part 1 of the Act is deemed to be a reference to the requirements of these Regulations;

...

(f) a notice under section 21(5) or (9) (review by a Scottish public authority) of the Act is deemed to be a reference to a notice under regulation 16(4); and

...