



Scottish Information
Commissioner
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Decision Notice 098/2024

Crown Consent and the Heat Networks (Scotland) Bill

Authority: Scottish Ministers

Case Ref: 202100948

Summary

The Applicant asked the Authority for information about the use of Crown Consent in relation to the Heat Networks (Scotland) Bill. The Authority considered the request under FOISA. It disclosed some information but withheld other information under FOISA. The Commissioner investigated and found that the Authority had considered the request under the wrong legislation. The requested information was environmental information and the Authority should have considered the request under the EIRs. The Commissioner required the Authority to respond to the request under the EIRs.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 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) (definition of “the Act”, “applicant” and “the Commissioner”) (Interpretation); 5(1) (Duty to make environmental information available on request); 16 (Review by Scottish public authority); 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. On 21 March 2021, the Applicant made a request for information to the Authority. She asked for:

Copies of the correspondence received, the response sent (including any further follow up correspondence) and any discussions surrounding this (including internal discussions) between the Scottish Government and representatives of the Crown regarding Queen's Consent and the Heat Networks Bill.

Please also include copies of minutes of meetings held relating to the obtaining of Queen's consent to Acts of the Scottish Parliament, in line with Rule 9.11 of the Standing Orders in relation to the same Bill.
2. The Authority responded on 27 April 2021. It disclosed some information but withheld other information under sections 30(b), 25(1), 36(1), 38(1)(b) and 41(a) of FOISA. The Authority explained that it did not hold any minutes of meetings regarding the obtaining of Crown Consent for the Heat Networks (Scotland) Bill, as no meetings were held. It gave the Applicant formal notice, under section 17(1) of FOISA, that it did not hold this information.
3. On 25 May 2021, the Applicant wrote to the Authority requesting a review of its decision. The Applicant challenged the Authority's decision to withhold information under section 30(b), 36(1) and 41(a) of FOISA, and she expressed dissatisfaction with the Authority's application of the public interest test.
4. The Authority notified the Applicant of the outcome of its review on 23 June 2021. It clarified that it was relying on sub-clause (ii) of section 30(b) for some of the information it withheld and it upheld its original response in terms of applying section 36(1) and section 41(a) of FOISA to the remaining withheld information.
5. On 3 August 2021 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 she was dissatisfied with the outcome of the Authority's review because information was still being withheld. She explained that, in her view, the public interest lay in disclosure.

Investigation

6. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
7. On 31 August 2021, the Authority was notified in writing that the Applicant had made a valid application. The Authority was asked to send the Commissioner the information withheld from the Applicant. The Authority provided the information and the case was allocated to an investigating officer.
8. 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 related to its reasons for withholding information from the Applicant.

Commissioner's analysis and findings

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

FOISA or EIRs?

10. During the investigation, the Authority acknowledged that the request was seeking environmental information and that it should have processed the request under the EIRs and not under FOISA.
11. When advised of this change of regime the Applicant disagreed that the EIRs was the correct regime and she challenged the re-categorisation of her request, as one seeking environmental information. The Applicant argued that she had made a request under FOISA and that the Authority had handled it under FOISA for two years. The Applicant further argued that the Authority had accepted the request as one falling under the scope of FOISA, and it was reasonable for her to ask the Commissioner to continue considering the request under FOISA, and not the EIRs.
12. The relationship between FOISA and the EIRs was considered at length in [Decision 218/2007](#)¹. Broadly, in the light of that decision, the Commissioner's general position is as follows:
- (i) The definition of what constitutes environmental information should not be viewed narrowly.
 - (ii) There are two separate statutory frameworks for access to environmental information and an authority is required to consider any request for environmental information under both FOISA and the EIRs.
 - (iii) Any request for environmental information therefore must be handled under the EIRs.
 - (iv) In responding to a request for environmental information under FOISA, an authority may claim the exemption in section 39(2).
 - (v) If the authority does not choose to claim the section 39(2) exemption, it must respond to the request fully under FOISA: by providing the information; withholding it under another exemption in Part 2; or claiming that it is not obliged to comply with the request by virtue of another provision in Part 1 (or a combination of these).
 - (vi) Where the Commissioner considers a request for environmental information has not been handled under the EIRs, he is entitled (and indeed obliged) to consider how it should have been handled under that regime.
13. The Commissioner observed that the Authority originally handled the request and the review under FOISA.
14. During the investigation, the Commissioner considered the subject matter of the request. The information concerns the Heat Networks (Scotland) Bill, a legislative process to put in place rules and administrative measures regarding heat networks with the aim of reducing emissions from homes and other buildings. In the overview of the Bill, as stated on The Scottish Parliament website, it says;

The aim of the Bill is to encourage greater use of heat networks in Scotland. Heat networks are made up of insulated pipes and heat generation systems which make heat. This can be

¹ <https://www.itspublicknowledge.info/decision-2182007>

in the form of hot water or steam. This will help reduce emissions from homes and other buildings.

15. Given that the Bill relates to the generation of heat (being a form of energy) with the aim of reducing emissions, the Commissioner takes the view that the information is environmental information, as defined in regulation 2(1) of the EIRs (paragraphs (b) and (c)), in that it relates to factors such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment and measures affecting, or likely to affect, those factors.
16. As noted above, when questioned by the Commissioner, the Authority agreed that the request sought environmental information and that it should have been responded to under the EIRs.
17. The Applicant challenged the Commissioner's decision to re-categorise her request as an environmental information request.
18. She argued that the focus of her request was the nature, scope and substance of correspondence between the Authority and the Crown regarding the operation of Crown Consent. She stated that her request did not seek information that was environmental, specifically, and she commented that:

“...The value of the information withheld is to understand the operation of Crown Consent, and to identify whether this process operates with regard to its constitutional parameters. The connection to environmental information came later, and is subordinate in the context of the request.”
19. The Applicant further argued that the burden of designating legislation is on the Authority, yet the Authority proceeded for two years considering the request solely in terms of FOISA, not the EIRs. The Applicant submitted that there were multiple opportunities, during those two years, for the Authority to advise her that the request should be processed under the EIRs, but it did not.
20. The Applicant referred to the Authority's argument that there was no public interest in handling the request under two regimes, and that its decision to process the request under FOISA was a “technical point” which had “no material effect”. The Applicant contended that if there was “no material effect” in processing the request under the EIRs, then there was no reason why it could not be processed under FOISA.

The Commissioner's view

21. The Commissioner has considered the arguments put forward by the Applicant, and he acknowledges that the request was originally dealt with under FOISA rather than EIRs. However, in its response and review outcome, the Authority did not provide any indication that it had properly considered whether the subject matter of the request was, or was not, environmental information. That is to say, the Commissioner takes the view that the Authority overlooked the EIRs rather than having applied due consideration to the matter at that time.
22. The Applicant has suggested that it is for the Authority to decide whether information is environmental or not, and what information regime should be used to process a request.

The Commissioner refers the Applicant to [Decision 218/2007](#)², which established that if information falls within the definition of environmental information, authorities have an obligation to deal with the request under the EIRs. It is the Commissioner's view that any information that is environmental **must** be handled under the EIRs, regardless of whether the Authority also processes it under FOISA. On receipt of an application, the Commissioner will determine whether the information requested is environmental, and if it is, he will require the request to be handled under the EIRs, irrespective of whether the Applicant or Authority considers it should be processed under FOISA.

23. The Commissioner notes the Applicant's comments on the Authority's view that the change of regime (from FOISA to the EIRs) had no "material effect" on its processing of her request, but he disagrees. Section 41 of FOISA provides that information is exempt from disclosure if it relates to communications with the monarch, or other members of the royal family or the royal household; there is no equivalent exception in the EIRs. It is clear to the Commissioner that, in this case, taking into account the scope of the Applicant's information request and the provisions of section 41 of FOISA, there would be a "material difference" if the request was handled under the EIRs rather than under FOISA.

24. The Commissioner notes that the Authority has recognised that the information requested is environmental and it has acknowledged that it should have been processed under the EIRs.

25. Paragraph 6 of the Commissioner's briefing entitled "[What is environmental information?](#)"³ states:

"No types of information are excluded from the potential ambit of environmental information. Environmental information may be found in or extend beyond what is not specifically an environmental topic. Court cases have confirmed that environmental information, and the scope of the Directive, should be interpreted broadly."

26. In reaching his view on whether the information was environmental or not, the Commissioner referred to the Implementation Guide to the Aarhus Convention⁴ (The Guide). The Convention states in Article 2 (Definitions) at paragraph 3(b) that the following is considered to be "environmental information";

Factors, such as substances, energy, noise and radiation, and activities or measures, including administrative measures, environmental agreements, policies, legislation, plans and programmes, affecting or likely to affect the elements of the environment within the scope of subparagraph (a) above, and cost-benefit and other economic analyses and assumptions used in environmental decision-making...

27. The Guide further explains that this definition certainly includes decisions on specific activities, such as permits, licences, permissions. The request sought correspondence between the Authority and the Crown, records of discussions and copies of minutes regarding the same in relation to the application of Crown Consent to the Heat Networks (Scotland) Bill. The Applicant submitted that she sought to establish to what extent (if any) the operation of Crown Consent affected the progress or ultimate form of the Bill.

28. The Guide explains that the test is whether the activities or measures may have an effect on the environment. The Commissioner's view is that the process in developing this legislation

² <https://www.itspublicknowledge.info/decision-2182007>

³ <https://www.itspublicknowledge.info/sites/default/files/2022-03/EIRBriefingsDefinition.pdf>

⁴ https://unece.org/DAM/env/pp/Publications/Aarhus_Implementation_Guide_interactive_eng.pdf

(i.e. the Bill, and subsequent Act⁵) is covered by this definition as it is the process of creating administrative measures likely to affect the elements of the environment, and must therefore be considered “environmental information”.

29. Given that the information requested is environmental information, the Authority had a duty to consider it in terms of regulation 5(1) of the EIRs. In failing to do so, it failed to comply with regulation 5(1).

Section 39(2) of FOISA - environmental information

30. 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.
31. During the investigation, as stated above, the Authority agreed with the Commissioner that the request fell to be considered under the EIRs. It subsequently provided the Applicant with its reasons for withholding the information under various exceptions, and it explained that it considered the information exempt from disclosure under section 39(2) of FOISA.
32. The Commissioner finds that the Authority would have been entitled to apply this exemption to the request, given his conclusion that the information requested was properly classified as environmental information. As there is a separate statutory right of access to environmental information available to the Applicant, the Commissioner also accepts that, in this case, the public interest in maintaining this exemption and in handling the request in line with the requirements of the EIRs outweighs any public interest in disclosing the information under FOISA.

Handling of the request

33. Regulation 5(2) of the EIRs gives Scottish public authorities a maximum of 20 working days following the date of receipt of a request, or receipt of clarification of a request, for information. This is subject to qualifications which are not relevant in this case.

It is a matter of fact that the Authority did not provide a response to the Applicant’s 21 March 2021 request for information within 20 working days, so the Commissioner finds that it failed to comply with the timescale laid down by regulation 5(2)(a) of the EIRs.

34. Regulation 16(4) of the EIRs gives Scottish public authorities a maximum of 20 working days following the date of receipt of the requirement to comply with a requirement for review.

Whilst the Authority provided a response to the Applicant within 20 working days, this response did not (in not dealing with the requirement for review under the EIRs) fulfil the requirements in regulation 16 of the EIRs. The Commissioner finds that it failed to comply with regulation 16.

35. The remainder of regulation 16 sets out the process for carrying out a review. The Commissioner must require the Authority to conduct a review now, meeting the requirements of regulation 16.

⁵ <https://www.legislation.gov.uk/asp/2021/9/2021-03-31>

Decision

The Commissioner finds that the Authority failed to comply with the requirements of regulations 5(1), 5(2) and 16 of the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request and requirement for review made by the Applicant.

The Commissioner therefore requires the Authority to provide a response to the Applicant's requirement for review, in terms of regulation 16 of EIRs by **6 July 2024**.

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.

Enforcement

If the Authority fails to comply with this decision, the Commissioner has the right to certify to the Court of Session that the Authority has failed to comply. The Court has the right to inquire into the matter and may deal with the Authority as if it had committed a contempt of court.

David Hamilton
Scottish Information Commissioner

22 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.

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.
- ...

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;

...

“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

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...

(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)-

(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.

...

16 Review by Scottish public authority

(1) Subject to paragraph (2), an applicant may make representations to a Scottish public authority if it appears to the applicant that the authority has not complied with any requirement of these Regulations in relation to the applicant's request.

(2) Representations under paragraph (1) shall be made in writing to the Scottish public authority no later than 40 working days after either the date that the applicant receives any decision or notification which the applicant believes does not comply with these

Regulations or the date by which such a decision or notification should have been made, or any other action should have been taken, by the authority but was not made or taken.

- (3) The Scottish public authority shall on receipt of such representations-
 - (a) consider them and any supporting evidence produced by the applicant; and
 - (b) review the matter and decide whether it has complied with these Regulations.
- (4) The Scottish public authority shall as soon as possible and no later than 20 working days after the date of receipt of the representations notify the applicant of its decision.
- (5) Where the Scottish public authority decides that it has not complied with its duty under these Regulations, it shall immediately take steps to remedy the breach of duty.

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
 - ...