



Decision Notice 174/2024

Change of bathing water designation

Authority: Scottish Ministers

Case Ref: 202400141

Summary

The Applicant asked the Authority for various information relating to the change of bathing water designation criteria. The Authority provided the Applicant with some information encompassing most of the request and stated that it did not hold information for the remainder of the request. The Commissioner investigated and was satisfied that the Authority's response complied with 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", "the Commissioner" and paragraphs (a), (b) and (c) of the definition of "environmental information") (Interpretation); 5(1) (Duty to make environmental information available on request); 10(1), (2) and (4)(a) (Exceptions from duty to make environmental information available); 17(1), (2)(a), (b) and (f) (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 18 December 2023, the Applicant made a request for information to the Authority. She asked for information relating to the change of bathing water designation criteria. The request was in five parts:

- a) General information relating to the change of designation criteria and the changed application form, which were published in early 2023.
 - b) Notes of any meetings relating to change of designation criteria and the changed application form.
 - c) Copies of all correspondence relating to the change of designation criteria and the changed application form.
 - d) Copies of all documents relating to the change of designation criteria and the changed application form
 - e) Information which explains why the new criteria and application form were introduced.
2. The Authority responded on 9 January 2024 in terms of the EIRs as it considered the information requested was environmental information. The Authority provided two documents, but withheld some information in those documents under the exception in regulation 11(2) (personal information) of the EIRs. The Authority also stated that it was unable to provide some of the information requested because it did not hold it.
 3. On 11 January 2024, the Applicant wrote to the Authority requesting a review of its decision. The Applicant stated that she was dissatisfied with the decision because the Authority had not responded to her request by not providing her with all of the information she had requested relating to the change of the designation criteria and the changed application form.
 4. The Authority notified the Applicant of the outcome of its review on 25 January 2024, confirming its original decision with some modifications. The Authority explained that:
 - the information it provided as part of its initial response was relevant to parts a), c) and d) of the request
 - it held no information relevant to part b) of the request and it was refusing that part of the request under regulation 10(4)(a) (information not held) of the EIRs
 - it held information relevant to part e) of the request that it should have disclosed in its initial response, which it was now disclosing
 5. On 2 February 2024, 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 she was not satisfied that the Authority had disclosed all of the information she had requested.

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 23 February 2024, the Authority was notified in writing that the Applicant had made a valid application. The case was subsequently 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.

Commissioner's analysis and findings

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

EIRs or FOISA?

10. 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.
11. The information requested appears to fall clearly within the scope of the definition of environmental information contained in regulation 2(1) of the EIRs.
12. 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) - Environmental information

13. 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.
14. In this case, therefore, the Commissioner accepts that the Authority was entitled to apply the exemption in section 39(2) of FOISA, given his conclusion that the information requested is properly considered to be environmental information.
15. 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.
16. 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.
17. 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) – Duty to make environmental information available

18. Regulation 5(1) of the EIRs requires a Scottish public authority which holds the information to make it available when requested to do so by any applicant. This obligation relates to information that is held by the authority when it receives a request, as opposed to information an applicant believes the authority should hold, but which is not in fact held.
19. 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.

20. The Commissioner's consideration here relates to parts a), c), d) and e) of the Applicant's request where the Authority provided information relating to those parts of the request, but the Applicant believed that further relevant information was held.

The Applicant's submissions

21. The Applicant believes that it can be inferred from the information provided in response to her request that a process was undertaken by the Authority and SEPA to review and update bathing waters application form and guidance. The Applicant queried how the Authority could state that a document was finalised without there being prior drafts.
22. The Applicant also questioned why no meetings were held where notes were taken during the review and update process. The Applicant did not accept that the information provided to her was the only information falling within the scope of her request given that there appeared to be a "review process" which was carried out over a period of time.

The Authority's submissions

23. The Authority noted that there are a number of processes relevant to bathing water designation policy in Scotland. For example, there is an annual process to designate specific areas as bathing waters and a current pre-investigation in its final stages into the bathing water designation process by Environmental Standards Scotland which has prompted further changes to the bathing water designation processes since the changes made in early 2023.
24. The Authority explained that it had interpreted the request as relating to the changes made in early 2023 to the bathing water designation application form and related development work.
25. Given the specific reference to the timeframe in the Applicant's request and the consistent language of "the changed application form" and "change of designation", the Authority stated that it focused the timeframe of its searches around September 2022 to March 2023 as, after discussion with the policy team leading this work, it was deemed this would cover any information potentially relevant to the request.
26. The Authority explained that the Policy Lead and relevant Team Leader had been consulted as part of the response to the request, who confirmed that the work undertaken was aimed at making routine, minor and non-substantive changes to improve the clarity of documents.
27. The Policy Lead and relevant Team Leader also confirmed that the work was not part of any wider project, meaning there was a limited range of relevant people to ask to conduct searches. As a result, there were a narrow range of people to ask to conduct email inbox searches and the searches conducted yielded no returns.
28. The Authority stated that the following searches were carried out:
 - searches of relevant records (including inboxes) using the term "Bathing Water Designation Application" using the date parameters September 2022 to March 2023
 - focused searches of a folder titled "Bathing Waters Directive: Implementation: 2020-2025" using the data parameters September 2022 to March 2023 the following terms: "bathing water", "application" and "criteria". using the data parameters September 2022 to March 2023.

29. The Authority explained it considered these searches would locate all information relevant to the request and that it had focused its searches on the folder above. This was because there is a significant volume of information relating to historic documentation on bathing waters and the folder above would contain all relevant information relating to the work undertake to change the designation for 2023.
30. The Authority noted that the searches were conducted with members of the Water Environment Team who were involved in the work that is the subject of the request. The Authority confirmed searches for relevant information held locally (e.g. on notepads, laptops or instant messaging applications) had been carried out by members of the Water Environment Team, with no relevant results returned. The Authority explained that any relevant information would, if held, be found in inboxes or the specific “Bathing Waters Directive” folder referred to above.
31. After sifting the respective results of its searches, the Authority confirmed that it located two documents in scope and that it had, by review stage, disclosed that information to the Applicant.
32. The investigating officer asked the Authority to respond to the following specific points raised by the Applicant:
- referring to one of the disclosed documents, the Applicant stated that the content meant it was reasonable to assume there was prior email correspondence that had been exchanged. It was not plausible that the document disclosed was the sole correspondence and a document cannot be said to be finalised without there having existed prior drafts or, presumably, some information relating to those drafts. It was also not plausible that no meetings were held without there being notes of those meetings or there being no discussions between the Authority and SEPA
 - referring to the review outcome, the Applicant noted that it said “the change of bathing water designation guidance and application form published in early 2023 was made as a result of ongoing work to regularly review the designation rather than a wider standalone project”. The Applicant explained that her request asked for all documents and correspondence “relating to the change of designation criteria and the changed application form” and that the reference to “ongoing work” made it even less plausible that no further relevant information was held by the Authority.
33. Regarding the first point, the Authority noted that further information relevant to the request may have existed during the course of completing the work (i.e. routine exchanges with SEPA) on the changes to the application form. However, the Authority explained that such information was not retained as part of routine data management with only the salient documents (those disclosed to the Applicant) requiring retention. The Authority confirmed that no notes of relevant discussions with SEPA colleagues had been located.
34. Regarding the second point, the Authority explained that it had intended to explain that the revisions were part of routine work and not a specific or wide-ranging review process that might have involved a wider range of stakeholders (e.g. public consultation or Ministerial involvement). The Authority noted that, if that had been the case, a larger amount of information might have been generated and retained on its corporate record.
35. In respect of the work carried out that was subject to the request, the Authority explained that this was conducted by one official from the Authority and staff from SEPA. The Authority noted that its review response directed the Applicant to SEPA as SEPA may have retained

further information falling within the scope of the request. The Authority confirmed that no notes of relevant discussions with colleagues within SEPA were found during the searches conducted.

36. The Authority reiterated that the revisions were part of routine work and as such, not something that would involve public consultation or Ministerial involvement.

The Commissioner's view

37. The Commissioner has taken account of the submissions provided by the Applicant, in which she explained why she believed that the Authority holds further information falling within the scope of her request.
38. Having closely considered the terms of the request and the submissions provided by the Authority, the Commissioner is satisfied that the Authority's interpretation of the request was reasonable.
39. Given the explanations and submissions provided, the Commissioner accepts that the Authority took adequate and proportionate steps to establish if the information was held and he is satisfied, on balance, that it does not (and did not, on receipt of the request) hold any further relevant information. The Commissioner considers that the Authority's searches were reasonable in the sense of those tasked to carry them out, the search terms used, the timeframe covered and the locations searched.
40. While the Applicant believed and expected further information to be held by the Authority, the Commissioner is satisfied that this was not the case.
41. The Commissioner notes the Authority's explanation that it may have previously held further information relevant to the request, but this information was not retained as part of routine document management. Whether a public authority should hold information which it does not hold is not a matter for the Commissioner to decide.
42. The Commissioner therefore concludes, on balance, that the Authority complied with regulation 5(1) of the EIRs in responding to parts a), c), d) and e) of the Applicant's request.

Regulation 10(4)(a) – Information not held

43. On receipt of a request for environmental information, the authority must ascertain what information it holds falling within the scope of the request. Having done so, regulation 5(1) requires the authority to make the information available, unless a qualification in regulation 6 to 12 applies (regulation 5(2)(b)).
44. Under the EIRs, a Scottish public authority may refuse to make environmental information available if one or more of the exceptions in regulation 10 applies.
45. Regulation 10(4)(a) of the EIRs states that a Scottish public authority may refuse to make information available to the extent that it does not hold the information when it received the request.
46. The Commissioner's consideration here relates to part b) of the Applicant's request where the Authority said that it held no information relevant to this part of the request, but the Applicant believed that relevant information was held.
47. The submissions set out above made by the Applicant and the Authority to the Commissioner are also relevant for his consideration of this part of the Applicant's request. He will therefore not reproduce those submissions here.

48. As rehearsed earlier (at paragraph 39), the Commissioner is satisfied that the Authority's searches were reasonable in the sense of those tasked to carry them out, the search terms used, the timeframe covered and the locations searched.
49. While the Applicant believed and expected the information requested in part b) of her request to be held by the Authority, the Commissioner is satisfied that this was not the case.
50. Consequently, the Commissioner is satisfied, on balance, that the Authority does not hold recorded information which would fulfil part b) of the Applicant's request.
51. The Commissioner therefore concludes, on balance, that the Authority was entitled to rely on the exception in regulation 10(4)(a) of the EIRs in relation to part b) of the Applicant's request on the basis that it did not hold the information requested.

The public interest

52. The exception in regulation 10(4)(a) of the EIRs is subject to the public interest test in regulation 10(1)(b) and so can only apply if, in all the circumstances of the case, the public interest in maintaining the exception outweighs that in making the information available.
53. The question of whether or not a public authority holds information is a factual one, determined on the balance of probabilities. If a public authority does not hold the information, then there is no meaningful public interest test that can be undertaken.
54. In this case, for the reasons set out above, the Commissioner is satisfied that the Authority does not hold any information covered by the request, and did not do so, on receipt of the request. Consequently, he accepts that there is no conceivable public interest in requiring the disclosure of such information and finds that the public interest in making information available is outweighed by that in maintaining the exception.

Decision

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

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

21 August 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

-

(a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;

(b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in paragraph (a);

(c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in paragraphs (a) and (b) as well as measures or activities designed to protect those elements;

...

5 Duty to make available environmental information on request

(1) Subject to paragraph (2), a Scottish public authority that holds environmental information shall make it available when requested to do so by any applicant.

(2) The duty under paragraph (1)-

...

(b) is subject to regulations 6 to 12.

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.

...

(4) A Scottish public authority may refuse to make environmental information available to the extent that

(a) it does not hold that information when an applicant's request is received;

...

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

...