



Decision Notice 179/2024

Written statement by specified individual regarding the capping of a disused pipe

Authority: Scottish Borders Council
Case Ref: 202400589

Summary

The Applicant asked the Authority for a statement made by a named individual surrounding the capping of a disused pipe. The Authority informed the Applicant that it did not hold the statement and provided some other information which it considered relevant. During the investigation, the Authority identified the statement requested. The Commissioner found that request ought to have been properly considered under the EIRs and that the Authority had not been entitled to inform the Applicant that it did not hold the information requested.

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 (f) of “environmental information”) (Interpretation); 5(1) and (2) (Duty to make environmental information available on request); 16(4) (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 5 January 2024, the Applicant made a request for information to the Authority. Referring to point 9 of a letter dated 22 November 2023 from the Authority's Chief Executive in which he stated that a named individual made a "*statement*" to the Authority surrounding the capping of a disused pipe, she asked to see a copy of that statement, commenting that any personal data could be redacted.
2. The Authority responded on 22 February 2024. It apologised for the delay in responding and considered the Applicant's request under FOISA. The Authority provided the Applicant with a copy of the letter to which it was referring, with personal data redacted under section 38(1)(b) (Personal information) of FOISA. [For information, the letter disclosed was a letter from the named individual's solicitors to the owners of the property who owned the pipe.]
3. On 27 February 2024, the Applicant wrote to the Authority requesting a review of its decision. The Applicant stated that she was dissatisfied with the decision because, according to the Chief Executive, he had confirmed that the Authority had "*...received a written statement from [the named individual]...*" and "*...indeed a letter from her lawyers...*", the latter of which the Authority had disclosed. She asked the Authority to provide the statement she had initially requested. She also raised dissatisfaction with the Authority's failure to respond to her request within 20 working days.
4. The Authority notified the Applicant of the outcome of its review on 12 April 2024. It gave notice under section 17 of FOISA (Notice that information is not held) that no recorded information was held. The Authority explained that the delay in issuing its initial response had been due to resources. It again apologised for the delay and for any inconvenience caused.
5. On 25 April 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 that she was dissatisfied with the outcome of the Authority's review because the Chief Executive's letter of 22 November 2023 cited a statement written by the named individual which, it was now claiming, was not held. The Applicant also expressed dissatisfaction with the failure of the Authority to respond to her request and requirement for review within the statutory timescales.

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 22 May 2024, the Authority was notified in writing that the Applicant had made a valid application, and 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. These focussed on the searches undertaken by the Authority to establish whether it held the statement requested, and on its compliance with statutory timescales for responding to both the Applicant's request and

requirement for review. The Authority was also asked to consider whether the request ought to have properly been considered under the EIRs.

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 the EIRs?

10. In [Decision 218/2007](#)¹, the Commissioner confirmed (at paragraph 51) that, where environmental information is concerned, there are two separate statutory frameworks for access to that information and, in terms of the legislation, an authority is required to consider the request under both FOISA and EIRs.
11. As stated above, the Authority was asked whether it believed the request ought to have properly been considered under the EIRs, given the nature of the information requested.
12. In its submissions to the Commissioner, having considered the request and the Commissioner's guidance on [What is Environmental Information?](#)², the Authority conceded that the request should have been more appropriately dealt with under the EIRs.
13. The Authority confirmed that it now wished to rely on the exemption in section 39(2) of FOISA, where the public interest lay in favour of applying the exemption. It considered that the public interest in disclosing any relevant information under FOISA was outweighed by that in considering a request for environmental information in accordance with the EIRs.
14. For this exemption to apply, any information requested would require to be environmental information as defined in regulation 2(1) of the EIRs. The Authority agreed that the overall subject matter of the information requested by the Applicant related to environmental information.
15. Having considered the terms of the request and the Authority's submissions on this point, it is clear that any information falling within the scope of the request would be environmental information, as defined in regulation 2(1) of the EIRs. The information in question relates to waste and emissions which impact soil and land, and which may affect the state of human health. As such, the Commissioner is satisfied that it would fall within paragraphs (a), (b) and (f) of the definition of environmental information in regulation 2(1) of the EIRs (reproduced in Appendix 1 to this decision).
16. 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. This exemption is subject to the public interest test in section 2(1)(b) of FOISA.
17. As there is a separate statutory right of access to environmental information available to the Applicant in this case, the Commissioner accepts that the public interest in maintaining this exemption and dealing with the request in line with the requirements of the EIRs outweighs

¹ <https://www.foi.scot/decision-2182007>

² <https://www.foi.scot/sites/default/files/2022-03/EIRBriefingsDefinition.pdf>

any public interest in disclosure of the information under FOISA. In the circumstances, he will consider this case, in what follows, solely in terms of the EIRs.

18. The Commissioner recognises that, in this case, the outcome would have been the same regardless of whether the request was dealt with under FOISA or the EIRs. However, as the Authority failed to recognise and respond to the request as a request for environmental information, the Commissioner must find that it failed, in this respect, to respond in accordance with regulation 5(1) of the EIRs.

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

19. Regulation 5(1) of the EIRs requires a Scottish public authority which holds environmental 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.
20. On receipt of a request for environmental information, therefore, 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 provide that information to the requester, unless a qualification in regulations 6 to 12 applies (regulation 5(2)(b)).

Whether the Authority held the information requested

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 of probabilities lies, the Commissioner considers the scope, quality, thoroughness and results of the searches carried out by the public authority. He 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 about what information the authority should hold, ultimately the Commissioner's role is to determine what relevant recorded information is (or was, at the time the request was received) actually held by the public authority.

The Applicant's submissions on the information held

22. The Commissioner has taken account of the arguments in both the Applicant's application and her further submissions to the Commissioner, in which she provides reasons as to why she considers the Authority might hold the information requested.
23. In her application to the Commissioner, the Applicant contended that the Chief Executive's letter of 22 November 2023 cited a statement written by a named individual which, it was now claiming, was not held. In the Applicant's view, the Chief Executive's letter cited two documents – a statement written by the named individual and a letter from that individual's solicitors, the latter of which the Authority had disclosed. As the Authority was now claiming that the statement was not held, the Applicant believe that the Chief Executive's letter had been either mis-narrated or had been quoted to serve some other purpose. If any misdirection had taken place, the Applicant sought an apology and full explanation.
24. In support of her view, when providing submissions to the Commissioner, the Applicant provided a copy of the Chief Executive's letter of 22 November 2023 which contained the reference to the Authority having received a statement from the named individual. She commented that it would have been irresponsible for the Chief Executive to have made such a claim given his letter was now in the public domain.

The Authority's submissions on the information held

25. In its submissions to the Commissioner, the Authority explained that, as a result of further searches, the statement referred to in the Chief Executive's letter had now been located. It informed the Commissioner that it considered that the statement could be disclosed, subject to the redaction of any personal data.
26. The Authority explained the searches and enquiries carried out at both review stage and during the investigation.
27. The Authority submitted that the over-arching issue was a long-standing matter. It explained that, through officer knowledge, it was known that the Authority had received written confirmation of this however, during review, staff involved had been unable to locate the information in question. Through widened searches, the information had now been located. The Authority apologised for this oversight.

The Commissioner's conclusions on the information held

28. The Commissioner has considered all relevant submissions and the terms of the request, including the Authority's explanation of the searches undertaken to establish whether it held the information requested. Having done so, he is satisfied that, by the end of the investigation, the Authority had taken adequate, proportionate steps to identify the information held that that was relevant to the request.
29. As the statement requested by the Applicant was located as a consequence of further searches carried out during the course of the investigation, the Commissioner finds that the Authority failed to carry out adequate, proportionate searches and failed to identify the relevant recorded information held at the time it responded to the Applicant's requirement for review.
30. It is evident to the Commissioner that the information requested, now identified by the Authority, should clearly have been located by the close of the Authority's review (i.e. its response of 12 April 2024) at the latest. In failing to do so, the Commissioner finds that the Authority failed to deal with the Applicant's request fully in accordance with regulation 5(1) of the EIRs. The Commissioner notes that not only was this a breach of the EIRs, but it resulted in avoidable delay for the Applicant.
31. The Commissioner notes that the Authority has stated it is willing to disclose the information now identified to the Applicant, with some personal data redacted. As, at the date of this Decision Notice, the Authority has not yet done so, the Commissioner therefore requires the Authority to provide the Applicant with a revised review outcome under the EIRs, otherwise than in terms of regulation 10(4)(a) (Information not held) of the EIRs.

Handling of the request – failures to comply with statutory timescales

32. As set out in section 9 of the Scottish Ministers' Code of Practice on the Discharge of Functions by Scottish Public Authorities under FOISA and the EIRs (the "[Section 60 Code](https://www.gov.scot/publications/foi-eir-section-60-code-of-practice/)"³), sections 10(1) (Time for compliance) and 21(1) (Review by Scottish public authority) of FOISA (the equivalent regulations in the EIRs being regulations 5(2)(a) and 16(4) respectively) require all public authorities to respond to a request or a requirement for review within a statutory 20 working day timescale.

³ <https://www.gov.scot/publications/foi-eir-section-60-code-of-practice/>

33. 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. This is subject to qualifications which are not relevant in this case.
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. Again, this is subject to qualifications which are not relevant in this case.
35. As noted earlier in this Decision Notice, the Authority was invited to provide submissions on its handling of the Applicant's request and requirement for review.
36. In response, the Authority submitted that it endeavoured to respond to requests for information as soon as possible and within the legislative timescales. It recognised, however, its failures to respond to the request and the requirement for review within these timescales. It explained that resources played their part in the Authority responding on time.
37. The Authority considered it was important to note that the Applicant had submitted several information requests within a short period of time, all of which required a review with some going on to appeal stage. In addition, the sheer volume of correspondence Authority staff had entered into with several applicants had created significant difficulties for colleagues in ensuring the Authority comprehensively met any obligations it had. These difficulties, the Authority explained, no doubt also contributed to some of its mistakes in this process and the time taken to respond.
38. Notwithstanding this, it is a matter of fact that the Authority did not respond to the Applicant's request or her requirement for review within 20 working days. Indeed, the Authority acknowledged this in both its initial response and in its review outcome, where it apologised for the delays in responding.
39. The Commissioner therefore finds that the Authority did not respond to the Applicant's initial request within the statutory timescale. As such, he finds that the Authority failed to comply with regulation 5(2)(a) of the EIRs.
40. The Commissioner also finds that the Authority did not respond to the Applicant's requirement for review within the statutory timescale. As such, he finds that the Authority failed to comply with regulation 16(4) of the EIRs.
41. The Commissioner has recorded these procedural failures in his case management database, which is used to inform and monitor FOI practice by authorities.

Decision

The Commissioner finds that the Authority failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) and with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by the Applicant.

He finds that, by failing to recognise and respond to the request as a request for environmental information, the Authority failed to comply with regulation 5(1) of the EIRs.

He also finds that, by the end of his investigation, the Authority failed to comply with the EIRs by:

- failing to identify the information falling within the scope of the request at review stage and, in doing so, failed to comply with regulation 5(1) of the EIRs, and

- failing to comply with regulations 5(2)(a) and 16(4) of the EIRs respectively, by failing to respond to the Applicant's request and requirement for review within statutory timescales.

The Commissioner therefore requires the Authority to carry out a fresh review and provide the Applicant with a revised review outcome, otherwise than in terms of regulation 10(4)(a) of the EIRs, by **14 October 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.

Jill Walker
Deputy Head of Enforcement

29 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);

...

- (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.

...

16 Review by Scottish public authority

...

- (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.

...

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

...