

Decision Notice

Decision 003/2015: Mr John Flynn and Perth and Kinross Council

Private water supply

Reference No: 201401892

Decision Date: 8 January 2015



Scottish Information
Commissioner

Summary

On 14 May 2014, Mr John Flynn asked Perth and Kinross Council (the Council) for information regarding his private water supply.

The Council responded to Mr Flynn (late) with explanations and answers to the questions he had raised, and telling him that it did not hold the recorded information he had requested. Following a review, Mr Flynn remained dissatisfied and applied to the Commissioner for a decision.

The Commissioner found that not all of Mr Flynn's requests were valid. Where they were, the Commissioner agreed that the Council had correctly told Mr Flynn that it did not hold the information he requested. However, the Council failed to respond to him in a way that complied fully with the EIRs.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (3) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 39(2) (Health, safety and the environment)

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (definitions (a), (b) and (c) of environmental information) (Interpretation); 5(1) and (2)(b) (Duty to make environmental information available on request); 9(1) and (2) (Duty to provide advice and assistance); 10(1), (2) and (4)(a) (Exceptions from duty to make environmental information available); 13(a), (b) and (e) (Refusal to make information available)

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.

Investigation

1. On 15 April 2014, the Council's Environmental Service notified Mr Flynn that it had assessed the water quality of his private water supply and it had failed bacteriological examination.
2. On 14 May 2014, Mr Flynn made a request for information to Perth and Kinross Council (the Council). The information requested was as follows (some personal details have been removed):

"Please advise as to the law in regard to maintaining the water supply to our property given the water supply is via a galvanised tank that is very old and has dirt and silt at the bottom, due to this dirt and silt there is no way of telling if rust exists on the floor of the tank.

The tank and filter system is supposed to be maintained by CHA, as the tank house is sited on CHA property at [...].

We are informed the Tank should receive urgent attention if not replaced by a plastic tank and the water pipe to our property should be cleaned to kill all bacteria, are you intent on an inspection of the tank, have you the legal powers to force CHA to maintain our water supply or do we have to consult solicitors against them [...].

[...] therefore is it your duty to inspect the water supply every year or a time frame to ensure health and safety is maintained by CHA if this is your duty under the law please supply me with all of your inspection dates for the past five years you may treat this request as a freedom of information request, if the Council has failed in its duty under the provisions of the Health and Safety Act I may have redress against the Council as well as CHA.

[...] we have on many occasions told the Council of the problems with the water all have been ignored in the main.

Therefore if you have made proper inspections of our water supply and made recommendations to the Council and to CHA did you do any follow up to see if your recommendations were carried out by the Council and CHA.

With regard to your letter of 15/4/14 have you sent this notification to CHA and what time was given to them to rectify this matter, [...] did you inform the Area Housing Officer if so please supply me with the date of this, if not please advise why not.

Please advise what the duties of the Area Housing Officer are when notified by yourselves of contaminated water supply to their tenants in relation to health and safety in other words what are their obligations to their tenants under the Health and Safety Act.

Please advise when you believe the water supply will be safe. We look forward to hearing from you regarding the above.”

3. Mr Flynn did not receive a response from the Council so on 7 July 2014 he wrote to the Council requesting a review.
4. The Council provided a late response to Mr Flynn’s request on 8 July 2014. In its response, the Council made no reference to FOISA or the EIRs but commented on the points raised in his letter. The Council also indicated that it did not hold any relevant recorded information.
5. The Council responded to Mr Flynn’s request for review on 16 July 2014. It maintained that it did not hold the information requested by Mr Flynn and cited section 17(1) of FOISA. The Council apologised that this was not made clear in its initial response.
6. On 22 July 2014, Mr Flynn applied to the Commissioner for a decision in terms of section 47(1) of FOISA. By virtue of regulation 17 of the EIRs, Part 4 of FOISA applies to the enforcement of the EIRs as it applies to the enforcement of FOISA, subject to specified modifications. Mr Flynn stated he was dissatisfied with the outcome of the Council’s review because he did not accept that the Council did not hold the requested information.
7. The application was accepted as valid. The Commissioner confirmed that Mr Flynn made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to her for a decision.
8. On 19 August 2014, the Council was notified in writing that Mr Flynn had made a valid application. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Council was invited to comment on Mr Flynn’s application and to answer specific questions, including justifying its reliance on any provisions of FOISA or the EIRs it considered applicable to the information requested.

Commissioner’s analysis and findings

9. In coming to a decision on this matter, the Commissioner considered all of the withheld information and the relevant submissions, or parts of submissions, made to her by both Mr Flynn and the Council. She is satisfied that no matter of relevance has been overlooked.

FOISA or the EIRs?

10. "Environmental information" is defined in regulation 2(1) of the EIRs (paragraphs (a), (b) and (c) of the definition are reproduced in full in the Appendix to this decision). Where information falls within the scope of this definition, a person has a right to access it under the EIRs, subject to various qualifications and exceptions contained in the EIRs.
11. The Council failed to handle Mr Flynn's initial request under either FOISA or the EIRs. In response to Mr Flynn's request for review, the Council provided him with a review outcome that complied with section 21 of FOISA. In his submissions to the Commissioner, Mr Flynn argued that the Council should have processed his request under the EIRs and not FOISA.
12. During the investigation, the Council acknowledged that the requested information was environmental information and so applied the exemption contained in section 39(2) of FOISA. Section 39(2) 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.
13. The Commissioner has considered the information requested by Mr Flynn and the Council's belated application of section 39(2). She is satisfied that the information, if held, would fall within paragraph (a) of the definition contained in regulation 2(1) of the EIRs (as information on the state of the elements of the environment) and also paragraphs (b) and (c) of that definition (as factors such as substances or discharges that affect or are likely to affect those elements, or measures or activities designed to protect those elements).
14. The exemption in section 39(2) is subject to the public interest test in section 2(1)(b) of FOISA. As there is a separate statutory right of access to environmental information available to Mr Flynn in this case, the Commissioner has concluded that the public interest in maintaining this exemption, and dealing with the request in line with the EIRs, outweighs the public interest in disclosure under FOISA.

Handling of the request

15. Regulation 13 of the EIRs provides that, subject to regulations 10(8) and 11(6) (neither of which are relevant here), if a request to make environmental information available is refused by a Scottish public authority in accordance with regulation 10, the refusal shall:
- be given in writing, not later than 20 working days after the date of receipt of the request (regulation 13(a));
 - specify the reasons for the refusal, including any exception under regulation 10(4) or (5) (or, where relevant, any provision of regulation 11) and how the public authority reached its decision with respect to the public interest under regulation 10(1)(b) (regulation 13(b));
 - inform the applicant of the review provisions under regulation 16 and the enforcement and appeal provisions available in accordance with regulation 17 (regulation 13(e)).
16. In this case, Mr Flynn submitted his request on 14 May 2014 and the Council did not provide him with a response until 8 July 2014. The Council submitted that it did not consider that

Mr Flynn had made any valid requests for information in his letter of 14 May 2014 and therefore it had not handled his request in line with the requirements of FOISA or the EIRs, but instead had dealt with it on a “business as usual” basis.

17. The Commissioner notes that Mr Flynn’s initial request stated “*you may treat this request as a freedom of information request.*” Given this explicit statement, the Commissioner is at a loss to understand how the Council could have failed to have identified Mr Flynn’s request as a request made under FOISA/the EIRs. It is the Commissioner’s view that not only should the Council have identified Mr Flynn’s request as being a request for recorded information, but (given the subject matter of his letter) it should have been clear to the Council that he was seeking environmental information so his request should have been handled under the EIRs.
18. The Council has argued that Mr Flynn was seeking answers to questions rather than recorded information, and therefore it had tried to provide Mr Flynn with advice and explanations rather than simply giving him notification that it held no recorded information.
19. Having considered Mr Flynn’s letter of 14 May 2014 in full, the Commissioner cannot accept that Mr Flynn was simply seeking answers to questions rather than seeking recorded information. The Commissioner accepts that two parts of the request are not valid requests for the purposes of the FOISA/EIRs because they ask for advice rather than recorded information (the request asking for legal advice and the request “if not, why not?”), but the letter clearly contains requests for recorded information and should have been treated as such.
20. The Commissioner acknowledges that the Council’s response to Mr Flynn attempted to address the key points he raised in his request and she notes that the tone of the response issued by the Council was very friendly and open. However, although the Council’s response was attempting to help Mr Flynn, its advice and assistance was not given in the explicit context of the EIRs as it should have been so it still failed to comply with the requirements of regulation 9 of the EIRs.
21. Regulation 9(1) of the EIRs provides that “A Scottish public authority shall provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to applicants and prospective applicants.” Additionally, Regulation 9(2) of the EIRs requires that “Where a request has been formulated in too general a manner, the authority shall (a) ask the applicant as soon as possible, and in any event no later than 20 working days after the date of receipt of request, to provide more particulars in relation of the request; and (b) assist the applicant in providing those particulars.”
22. The Commissioner notes that parts of Mr Flynn’s request were ambiguous, but in such circumstances she considers that it was the Council’s duty to have contacted Mr Flynn and sought clarification of his request (rather than providing him with an approximate response). By failing to obtain clarification of his request, the Commissioner finds that the Council failed to comply with regulation 9(1) and (2) of the EIRs.
23. The Commissioner also finds that the Council did not issue a response within 20 working days, the response it provided did not cite the specific regulation it was relying upon (10(4)(a) of the EIRs) and it did not contain details of the review and appeal provisions in the EIRs. In light of this, the Commissioner must find that the Council breached the requirements contained in regulation 13(a), (b) and (e) of the EIRs.

24. In terms of the information requested, the Commissioner accepts that the Council does not hold any recorded information falling within the scope of Mr Flynn's request. She has come to this conclusion following a detailed consideration of every part of the request and having considered the submissions from the Council.

Decision

The Commissioner finds that Perth and Kinross Council (the Council) failed to comply with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by Mr Flynn.

The Commissioner finds that, in relation to the requests which were valid under the EIRs, the Council was correct to advise Mr Flynn that it did not hold the information he had requested. However, it failed to provide Mr Flynn with a response meeting the requirements of regulation 13 of the EIRs.

She does not require the Council to take any action in respect of these failures.

Appeal

Should either Mr Flynn or Perth and Kinross Council 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.

Rosemary Agnew
Scottish Information Commissioner

8 January 2015

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.

...

- (3) If the authority –

- (a) requires further information in order to identify and locate the requested information; and
- (b) has told the applicant so (specifying what the requirement for further information is),

then provided that the requirement is reasonable, the authority is not obliged to give the requested information until it has the further information.

...

- (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.

The Environmental Information (Scotland) Regulations 2004

2 Interpretation

(1) In these Regulations –

...

"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.

9 Duty to provide advice and assistance

(1) A Scottish public authority shall provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to applicants and prospective applicants.

(2) Where a request has been formulated in too general a manner, the authority shall-

(a) ask the applicant as soon as possible, and in any event no later than 20 working days after the date of receipt of request, to provide more particulars in relation to the request; and

(b) assist the applicant in providing those particulars.

...

- (4) In any case to which paragraph (2) applies, the date on which the further particulars are received by the authority shall be treated as the date of the request for the purposes of regulations 5(2)(a), 6(2)(a) and 13(a) and any period within which the authority is required to respond to that request by these Regulations shall begin on the day following that date.

10 Exceptions from duty to make environmental information available–

- (1) A Scottish public authority may refuse a request to make environmental information available if-
- (a) there is an exception to disclosure under paragraphs (4) or (5); and
 - (b) in all the circumstances, the public interest in making the information available is outweighed by that in maintaining the exception.
- (2) In considering the application of the exceptions referred to in paragraphs (4) and (5), a Scottish public authority shall-
- (a) interpret those paragraphs in a restrictive way; and
 - (b) apply a presumption in favour of disclosure.

...

- (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;

...

13 Refusal to make information available

Subject to regulations 10(8) and 11(6), if a request to make environmental information available is refused by a Scottish public authority in accordance with regulation 10, the refusal shall-

- (a) be given in writing 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;
- (b) specify the reasons for the refusal including, as appropriate, any exception under regulation 10(4) or (5) or provision of regulation 11 and how the Scottish public authority has reached its decision with respect to the public interest under regulation 10(1)(b);

...

- (e) inform the applicant of the review provisions under regulation 16 and of the enforcement and appeal provisions available in accordance with regulation 17

...

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