

# Decision Notice

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## **Decision 049/2015: Mr Alexander Adamson and the Scottish Environment Protection Agency**

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### **Drainage and sewerage at two properties**

Reference No: 201402884

Decision Date: 13 April 2015



Scottish Information  
Commissioner

## Summary

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On 11 September 2014, Mr Adamson asked the Scottish Environment Protection Agency (SEPA) for information held for two specified properties where there had been a prolonged incidence of pollution. SEPA provided information to Mr Adamson, with the exception of some personal data. Following a review, Mr Adamson remained dissatisfied, believing that SEPA held other information, and applied to the Commissioner for a decision.

The Commissioner investigated and accepted that SEPA did not hold any further information that fell within the terms of Mr Adamson's request. The Commissioner found that SEPA identified and provided all information covered by Mr Adamson's request.

## Relevant statutory provisions

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) 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 definition of "environmental information"); 5(1) (Duty to make environmental information available on request); 10(1), (2) and (4)(a) (Exceptions from duty to make environmental 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.

## Background

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1. On 11 September 2014, Mr Adamson made a request for information to SEPA. He requested all information that SEPA held for two specified properties in order to clarify the background to a prolonged incidence of pollution.
2. SEPA responded on 30 September 2014. In terms of the EIRs, SEPA provided Mr Adamson with information which it considered to be all relevant records, after redacting some personal data under regulation 11(2) of the EIRs. SEPA indicated that no document had been withheld in full.
3. On 18 November 2014, Mr Adamson wrote to SEPA requesting a review of its decision, as he thought information about an inspection of the sewage disposal system conducted by SEPA on a certain date had not been provided to him. Mr Adamson also provided SEPA with another name by which one of the properties was known, and asked SEPA to carry out another, more detailed, search.
4. SEPA notified Mr Adamson of the outcome of its review on 17 December 2014. SEPA explained the additional searches it had carried out, which had located more information falling within Mr Adamson's request. SEPA disclosed this information after redacting personal data in terms of regulation 11(2) of the EIRs. SEPA also stated, in terms of regulation 10(4)(a) of the EIRs, that it did not hold any information under the alternative name of one of the properties, as suggested in Mr Adamson's request for review.

5. On 20 December 2014, Mr Adamson wrote to the Commissioner. Mr Adamson 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.
6. In his application, Mr Adamson explained that he was dissatisfied with the outcome of SEPA's review as he believed information on the disposal of sewage from both properties adjacent to his was being withheld by SEPA. He stated that this belief was based on a telephone conversation with SEPA in 2007, when he had been told that that the sewage disposal system for these properties had been inspected, yet no record of this inspection was provided. Mr Adamson also argued that SEPA was not entitled to withhold information under regulation 10(4)(a) of the EIRs.

## **Investigation**

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7. The application was accepted as valid. The Commissioner confirmed that Mr Adamson 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. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. SEPA was invited to comment on this application and answer specific questions, including justifying its reliance on any provisions of FOISA or the EIRs it considered applicable to the information requested.
9. On 13 March 2015, SEPA disclosed additional documents to Mr Adamson. SEPA had identified this information in responding to Mr Adamson's request and review, but regarded the information as outwith the scope of the request. Nonetheless, to assist Mr Adamson, SEPA agreed to disclose this information to him during the Commissioner's investigation, but with some personal data redacted in terms of regulation 11(2) of the EIRs.
10. Mr Adamson's application did not express dissatisfaction with the redaction of personal data by SEPA, and accordingly the Commissioner will not consider whether SEPA complied with the EIRs or Part 1 of FOISA in withholding personal data.

## **Commissioner's analysis and findings**

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

### **FOISA or the EIRs?**

12. "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 the information under the EIRs, subject to qualifications and exceptions in the EIRs.
13. SEPA submitted that the focus of the request on sewerage and the sewerage arrangements pertaining to the specified addresses suggested the information fell within the definition of environmental information in paragraphs (a), (b) and (c) of regulation 2(1) of the EIRs.

14. The Commissioner has considered the information requested by Mr Adamson. She is satisfied that the information falls 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). The information relates to the state of elements of the environment (water and land), factors such as waste or other discharges that affect these elements, and measures (administrative measures and legislation) and activities likely to affect these elements and factors.
15. SEPA submitted that the requested information was environmental information and, accordingly, it had applied the exemption contained in section 39(2) of FOISA. Section 39(2) provides, in effect, that environmental information is exempt from disclosure under FOISA, thereby allowing any such information to be considered solely in terms of the EIRs.
16. 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 Adamson 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. Therefore, the Commissioner will consider the information in what follows solely in terms of the EIRs.

**Was all relevant information identified, located and provided by SEPA?**

17. 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 the information held by an authority when it receives a request.
18. Mr Adamson thought it likely that SEPA held more information than it had identified and disclosed to him. SEPA submitted that it had provided all the information it held that fell within the terms of Mr Adamson's request. SEPA provided the Commissioner with the information it had extracted and disclosed to Mr Adamson and submitted that the remaining information was outwith the scope of the request.

*Scope of the request*

19. Mr Adamson's request was for "all information" held on the specified properties. He explained that this would help clarify the background to a prolonged incidence of pollution at the properties, and would make information available for review at a proposed meeting relating to the problem.
20. In its submission to the Commissioner, SEPA explained that, during its review, it had identified and provided Mr Adamson with five documents, but took the view that the information in these documents did not fall within the terms of request as the focus of the substantive content of the information did not relate to the named property, but to an adjoining property. SEPA gave detailed reasons, in relation to the information in each document.
21. The Commissioner accepts that the information in the five documents is not covered by the terms of Mr Adamson's request, although it relates to the subject matter of that request. The Commissioner notes that SEPA disclosed the information in the five documents during the course of the investigation, regardless of whether the information was covered by the terms of the request, and commends SEPA for assisting Mr Adamson in this way.

### *Searches carried out by SEPA*

22. Mr Adamson believed that SEPA held more information than it had located or identified. The investigating officer therefore asked SEPA how it had ensured that it had located all the information that fell within Mr Adamson's request.
23. SEPA explained how it had searched for information covered by Mr Adamson's request. This included searches of the following files and systems:
  - SEPA's Corporate Licence Administration System (CLAS);
  - SEPA's environmental events database;
  - SEPA's emails;
  - SEPA's hard copy files (WAT01) dating from 1990 to 2014 relating to the Ale Water.
24. The paper files maintained by SEPA's Galashiels office were also searched. SEPA explained that the Operations Team maintained a series of files originally created by the predecessor body, the Tweed River Purification Board. Each file related to a watercourse in the area. The file reference WAT01 referred to the Ale Water which was the watercourse closest to the specified properties and adjoining properties. The files contain both correspondence between SEPA and external bodies and internal file notes on matters relating to properties in the vicinity of the Ale Water. The files are kept in date order. SEPA searched all extant WAT01 files between 1990 and 2014. During the search, some documents were retrieved and subsequently disclosed to Mr Adamson in response to his request for a review.
25. In his application to the Commissioner, Mr Adamson referred to a SEPA inspection which he understood to have been carried out on the specified property when the current occupants took possession. He stated that he had been told about this inspection during a conversation with SEPA in 2007. Mr Adamson had no information on when the inspection took place, but estimated this to be around 1995.
26. SEPA was asked whether it was confident that its searches would have located any relevant information on such an inspection, were it to have taken place around 1995. SEPA confirmed that its searches would have retrieved such information and provided the Commissioner with a copy of an internal SEPA email evidencing the recall of certain files it had searched.
27. SEPA submitted that it did not hold information about the inspection, and that regulation 10(4)(a) applied to such information.
28. SEPA was asked if it was legally required to hold certain recorded information relating to the subject matter of Mr Adamson's request.
29. SEPA replied that, in relation to discharges of sewage effluent to the water environment, it was required to maintain a public register by virtue of regulation 37 of the Water Environment (Controlled Activities) (Scotland) Regulations 2011. Schedule 8 to these Regulations stipulates the information required to be held<sup>1</sup>. SEPA explained that with respect to the specific authorisation for the named properties, the original consent was granted in 1968 under the Rivers (Prevention of Pollution) (Scotland) Act 1965. Consents under that Act became consents under the Control of Pollution Act 1974, which then became authorisations

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<sup>1</sup> <http://www.legislation.gov.uk/ssi/2011/209/made>

in terms of the 2011 Regulations. SEPA said that the consent issued in 1968 was supplied to Mr Adamson (as Document A3) and was still valid and considered as though it were an authorisation granted under the 2011 Regulations. SEPA said that any member of the public wishing to access such information should contact its Registry department.

30. The Commissioner must decide whether SEPA complied with regulation 5(1) in responding to Mr Adamson's request, by providing the environmental information it held which was covered by his request. The standard of proof to determine whether a Scottish public authority holds information is the civil standard of the balance of probabilities. In determining this, the Commissioner will consider the scope, quality, thoroughness and results of the searches carried out by the public authority. She will also consider, where appropriate, any reason offered by the public authority to explain why the information is not held.
31. The Commissioner notes that SEPA has searched its systems and hard copy files for information relating to the properties, under both names supplied by Mr Adamson. SEPA's submission to the Commissioner confirmed that it had interpreted the initial request to mean any information relating to the specified property, not just information relating to an inspection.
32. Having considered all the relevant submissions, the Commissioner accepts that SEPA has taken adequate and proportionate steps to establish the information it held which fell within the scope of Mr Adamson's request. In reaching this conclusion, the Commissioner has taken into account the following:
  - the SEPA officials involved in searching for the information had experience and knowledge of the subject matter of the request and there was less likelihood of error and misunderstanding in locating the information requested;
  - the searches detailed by SEPA appear reasonable, proportionate and thorough and used search terms (e.g. the property name provided by Mr Adamson; postcodes) which would identify any information held;
  - SEPA has provided evidence of its searches to the Commissioner;
  - SEPA has explained why it does not hold any further information, in relation to its legal duties;
  - SEPA identified information initially and at review, indicating that its searches were capable of locating the appropriate information.
33. The Commissioner is satisfied, on the balance of probabilities, that Mr Adamson has received all the information held by SEPA that falls within the scope of his request. She therefore finds that SEPA complied with regulation 5(1) of the EIRs in responding to his request.
34. As stated in many previous decisions, the Commissioner's remit here extends only to the consideration of whether a Scottish public authority actually holds the requested information and whether it has complied with Part 1 of FOISA or the EIRs in responding to a request. The Commissioner cannot comment on whether a public authority should have recorded any, or more, information about a particular event or process.

## **Regulation 10(4)(a)**

35. At review, Mr Adamson provided another name by which the property was known. In its review, SEPA relied on the exception in regulation 10(4)(a) of the EIRs for information relating to the property under that name.
36. The exception in regulation 10(4)(a) of the EIRs applies to information which is requested but which is not held by the Scottish public authority.
37. As explained above, the Commissioner is satisfied that SEPA carried out reasonable searches for information on the property under its alternative name. On the basis of these searches, she accepts that it holds no relevant information. She is therefore satisfied that the exception in regulation 10(4)(a) of the EIRs applied, in relation to information about the property under its alternative name.
38. The exception in regulation 10(4)(a) is subject to the public interest test in regulation 10(1)(b) of the EIRs and can only apply if, in all the circumstances, the public interest in maintaining the exception outweighs the public interest in making the information available. The Commissioner is satisfied that SEPA does not hold the information in question. Consequently, she does not consider there to be any conceivable public interest in requiring that the information be made available. The Commissioner therefore concludes that the public interest in making the requested information available is outweighed by that in maintaining the exception in regulation 10(4)(a) of the EIRs.
39. The Commissioner is satisfied that SEPA was entitled to rely on the exception in regulation 10(4)(a), on the basis that it did not hold the requested information.

## **Decision**

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The Commissioner finds that SEPA complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) and the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by Mr Adamson.

## **Appeal**

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Should either Mr Adamson or SEPA 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.

**Margaret Keyse**  
**Head of Enforcement**  
**13 April 2015**

## Appendix 1: Relevant statutory provisions

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### 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.

...

- (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

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- (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.

...

## 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;

...

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