

Decision Notice

Decision 053/2015: Miss Kathryn Bontoft and Scottish Water

Water levels at Elliston Weir

Reference No: 201402879

Decision Date: 17 April 2015



Scottish Information
Commissioner

Summary

On 23 July 2014, Miss Bontoft asked Scottish Water for information about the water levels at Elliston Weir. Scottish Water disclosed some data, and stated that it did not hold any further data.

During the Commissioner's investigation, Scottish Water found and disclosed additional data to Miss Bontoft.

The Commissioner found that, in responding to the request, Scottish Water failed to identify and retrieve all of the information it held which was covered by the request. However, the Commissioner was satisfied that Scottish Water had retrieved and provided all relevant information by the end of her investigation, and that it did not hold any further information. She did not require Scottish Water to take any action, but criticised its failure to identify all relevant information until several searches had been carried out.

Relevant statutory provisions

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (paragraphs (a) and (c) of definition of "environmental information"); 5(1) (Duty to make available environmental information on request)

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 23 July 2014, Miss Bontoft asked Scottish Water for the water levels at Elliston Weir (and two other places which are not the subject of this decision). She asked for all water level information, dating back as far as possible.
2. Scottish Water responded on 14 August 2014. It provided water level data from March 2011 to July 2014 (the data from 2012 was incomplete).
3. On 19 September 2014, Miss Bontoft emailed Scottish Water requesting a review of its decision on the basis that she considered that it was likely to hold more information.
4. Scottish Water notified Miss Bontoft of the outcome of its review on 21 October 2014. It disclosed water level data from 2005 to 2008 and stated that it did not hold any further data.
5. On 19 December 2014, Miss Bontoft emailed the Commissioner stating that she was dissatisfied with the outcome of Scottish Water's review and applying 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. Miss Bontoft considered that Scottish Water should hold more information than it had provided.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that Miss Bontoft 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.

7. On 13 January 2015, Scottish Water was notified in writing that Miss Bontoft had made a valid application.
8. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. On 27 January 2015, Scottish Water was invited to comment on this application and to answer specific questions including providing details of the searches it had conducted in locating the information falling within scope of the request.
9. During the investigation, Scottish Water carried out a number of additional searches for information covered by the request. These are described in the *Commissioner's analysis and findings*.

Commissioner's analysis and findings

10. In coming to a decision on this matter, the Commissioner considered all of the relevant submissions, or parts of submissions, made to her by both Miss Bontoft and Scottish Water. She is satisfied that no matter of relevance has been overlooked.

Application of the EIRs

11. It is clear from Scottish Water's correspondence with Miss Bontoft 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 the water levels at a weir and, as such, the Commissioner is satisfied that it would fall within either paragraph (a) or paragraph (c) of the definition of environmental information in regulation 2(1) of the EIRs (reproduced in Appendix 1 to this decision). Miss Bontoft has not disputed the application of the EIRs in this case and the Commissioner will consider her request in what follows solely in terms of that regime.

Was all relevant information identified and located by Scottish Water?

12. 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 it does not hold further information.
13. The Commissioner's decision can only consider Scottish Water's response in relation to the data that was held at the date it received the initial request (23 July 2014). Any data created after this date would not fall within scope of the request under consideration in this decision.

Details of Scottish Water's searches

14. Scottish Water provided an overview of the process of measuring water levels and recording data. It explained that an operator from the Water Operations Team goes to a Scottish Water reservoir to take a water level reading, which is recorded onto a pro forma sheet. The operator then puts the data into a spreadsheet on a computer at the local water treatment plant. This spreadsheet is then sent to the administration team who enters the data (water levels) into a corporate system called RSS (Reservoir Safety System) and the data is held indefinitely. The pro-forma sheets are not retained once the data is added to the RSS spreadsheet.

15. Scottish Water explained that it had located additional data when reviewing its response to Miss Bontoft's request, as it had widened its search beyond the data held in RSS. The data disclosed in the review response dates back to a time when RSS was not in use.
16. On 13 February 2015, Scottish Water explained that it had now located data for February to September 2012 on the local computer at the water treatment plant at Elliston Weir; this data had not been uploaded to RSS. Scottish Water disclosed this data to Miss Bontoft.
17. Scottish Water was asked to conduct further searches of its records, including a further search of the local computer at the water treatment plant to find out whether it held any records pre-dating 2005, noting that Scottish Water came into operation in 2002¹. Following a search of its archived records, Scottish Water found data for the period 1995 to 2000, which it disclosed to Miss Bontoft. Scottish Water explained that this data was taken by their statutory predecessor, West of Scotland Water Authority, when such data was recorded manually prior to the use of the current RSS system. Scottish Water explained that as this data had been archived, it was not included in its searches until a Reservoir Safety Team member recalled an archiving project from a few years previously, when information sent to Records Management had been examined and properly indexed.
18. In March 2015, the investigating officer contacted Miss Bontoft to enquire whether she was satisfied with the information that had been disclosed. Miss Bontoft considered that Scottish Water held data that it had not disclosed and identified gaps in the data she had received. This information was passed on to Scottish Water, who were asked to conduct a further search.
19. Scottish Water then discovered that the version of Excel that it previously used had cut off data after row 65,356 and so Miss Bontoft had received only data for January to the beginning of April in years 2009, 2010, 2011 and 2012. It confirmed that this problem had been rectified with the new version of Excel and provided a complete data set for period 2009 to 2014 to Miss Bontoft.
20. Scottish Water confirmed that, with the exception of the issue identified above, it considered that the searches it had undertaken had encompassed all relevant locations where the data could be possibly held and, as these locations had been carefully searched, it did not consider that it was necessary to search them again. Scottish Water submitted that it was satisfied that the archived data for 2000 to 2005 that it disclosed during the investigation was all the relevant information it held in archive store.
21. Scottish Water explained that as Miss Bontoft had asked for data as far back as possible, no date restrictions had been placed on its searches. It stated that data is not held by employees on individual laptops and they do not have individual desks or storage areas. In searching for the requested information, Scottish Water explained that it had asked the three teams it considered would hold the requested data: the Reservoir Safety Team, the Water Operations West Team which records the water levels, and the Water Resources Team which uses the requested data. Each team confirmed that they did not hold any further data.
22. Scottish Water was aware that Miss Bontoft was interested in knowing more about rising water levels which had reduced the area of land for the estate owners. Scottish Water could not offer any further explanation as to why there were gaps in the data disclosed, but stated

¹ <http://www.scottishwater.co.uk/business/international/about-swi/about-scottish-water>

that it had disclosed all the data it held. It noted that the recorded water levels show there has been no significant change, from the earliest records held to the latest.

23. In trying to provide Miss Bontoft with assistance relating to her request, Scottish Water provided her with alternative sources of water level data including the Scottish Environment Protection Agency and the Royal Society for the Protection of Birds.

Scottish Water's searches

24. The Commissioner has a number of concerns relating to the handling of Miss Bontoft's request and, in particular, the fact that on more than one occasion, Scottish Water stated that it had located all the requested data, but upon further questioning, more data was located and disclosed.
25. Scottish Water has stated that it has taken cognisance of the fact that its searches should have been wider in this case and will take these learning points on board in future.
26. Despite the obvious failings in the searches carried out by Scottish Water, the Commissioner accepts that, by the end of the investigation, it had taken adequate, proportionate steps to establish what information it held falling within the scope of the request. However, by failing to disclose all the information held when Miss Bontoft made her request for review, Scottish Water failed to comply with regulation 5(1) of the EIRs.
27. As the Commissioner is satisfied that Miss Bontoft has now received all the information which Scottish Water holds, in relation to her request, she does not require Scottish Water to take any further action in relation to this failure.

Decision

The Commissioner finds that Scottish Water failed to comply with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by Miss Bontoft.

The Commissioner accepts that Scottish Water has now identified and disclosed the information it holds with respect to Miss Bontoft's request. However, by failing to provide this information when Miss Bontoft made her request for review, Scottish Water failed to comply with regulation 5(1) of the EIRs.

The Commissioner does not require Scottish Water to take any action in respect of this failure in relation to Miss Bontoft's application.

Appeal

Should either Miss Bontoft or Scottish Water 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

17 April 2015

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;

...

(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.

...

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