

Decision Notice 136/2020

Biosecurity measures during the Burncrooks Water Treatment Works project

Applicant: The Applicant

Public authority: Scottish Water

Case Ref: 201902169



Scottish Information
Commissioner

Summary

Scottish Water was asked for information relating to the biosecurity measures that were taken during the Burncrooks Water and Treatment Works project. Scottish Water provided the Applicant with a single document.

The Commissioner investigated and found that Scottish Water failed to identify, retain and make available to the Applicant the information falling within the scope of his request. These failures constituted a breach of regulation 5(1) of the EIRs. He required Scottish Water to carry out a new review.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) (General entitlement); 2(1)(b) (Effect of exemptions; 39(2) (Health, safety and the environment); 50(1)(a) (Information notices)

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (definitions (a) and (c) of "environmental information"); 5(1) and (2) (b) (Duty to make available environmental information on request); 6 (Form and format of information); 17 (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 3 September 2019, Scottish Water received a request for information from the Applicant. The information requested was:

“...all information held relating to the biosecurity measures taken by Scottish Water and their contractors during the Burncrooks Water Treatment Works Project.

Please supply copies of material you hold in the form of paper and electronic records, including emails, method statements and minutes of meetings.”
2. Scottish Water failed to respond to this request.
3. On 9 October 2019, the Applicant wrote to Scottish Water requesting a review of its decision on the basis that it had failed to provide him with the information he had requested.
4. Scottish Water notified the Applicant of the outcome of its review on 11 November 2019. It provided the Applicant with one document with personal data redacted under regulation 11(2) (Personal data) of the EIRs.
5. On 25 November 2019, 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 he was dissatisfied with the outcome of Scottish

Water's review because he did not accept that he had been provided with all of the information falling within the scope of his request.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that the Applicant made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to him for a decision.
7. On 2 December 2019, Scottish Water was notified in writing that the Applicant had made a valid application and the case was 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. Scottish Water was invited to comment on this application and to answer specific questions.
9. The investigating officer contacted Scottish Water on 16 January 2020, to seek its comments on the application and to ask questions about its interpretation of the scope of the request, and on whether it held further information. Scottish Water was asked to respond to this letter by 30 January 2020.
10. Scottish Water failed to respond and the investigating officer contacted Scottish Water on 3 and 5 February 2020, noting the delay and seeking a response.
11. Scottish Water contacted the Commissioner on 7 February 2020, arguing that it had taken a narrower interpretation of the request than that suggested by the Commissioner and as a result it had instigated further searches. Scottish Water noted that it had understood the request to be seeking "all information held relating to land at a specified farm". Scottish Water noted that it was in the process of responding to a subject access request (under the Data Protection Act 2018) made by the Applicant, and this had unearthed information which might fall within the scope of the current request. Scottish Water asked for an extension to 14 February 2020, in order for it to be able to produce a detailed response that addressed the wider scope of the request.
12. The investigating officer contacted Scottish Water and reiterated that the current request did not mention a specific farm and that it was seeking all biosecurity measures in relation to the Burncrooks Water Treatment Works project. The investigating officer provided Scottish Water with another copy of the wording of the request (a copy of the request had already been provided to Scottish Water on 2 December 2019) and confirmed an extension to 14 February 2020.
13. No response was provided to the Commissioner by 14 February 2020.
14. The investigating officer contacted Scottish Water on 18 and 20 February 2020 seeking an update. Scottish Water responded on 21 February 2020, and submitted that there was a resourcing problem and there were difficulties contacting particular staff. Scottish Water apologised for the delay but confirmed that it would get a response back to the investigating officer that same day.
15. Scottish Water failed to provide a response that day.
16. On 24 February 2020, the investigating officer contacted Scottish Water noting that a response had still not been provided and that if no response was obtained, she would have

to raise matters with the Deputy Head of Enforcement, with a view to determining if an Information Notice was required.

17. Scottish Water acknowledged this email on 25 February 2020. It explained that there had been a lot of interaction, over a period of months, with the Applicant in this case. Scottish Water submitted that it believed that the Applicant (or the Applicant's agent) had been provided with all the relevant information it holds, but that it was having difficulty finalising checks on what was released in response to the subject access request. Scottish Water noted that it should have details of the subject access response shortly, which should enable it to respond to the investigating officer's letter.
18. Scottish Water failed to provide a response and the investigating officer contacted Scottish Water on 3 March 2020, expressing concern about the ongoing delays.
19. On 9 March 2020, the Commissioner issued Scottish Water with an Information Notice under section 50(1)(a) of FOISA, requiring it to provide him with information relating to the application. (In terms of regulation 17(1) of the EIRs, the provisions of Part 4 of FOISA apply for the purposes of the EIRs). Scottish Water was required to provide this information by 23 April 2020 and it responded on that date.

Commissioner's analysis and findings

20. In coming to a decision on this matter, the Commissioner considered all of the relevant submissions, or parts of submissions, made to him by both the Applicant and Scottish Water. He is satisfied that no matter of relevance has been overlooked.

Application of the EIRs

21. In its review outcome, Scottish Water notified the Applicant that it considered the information to be environmental and exempt from disclosure under section 39(2) of FOISA. Scottish Water then went on to consider the request under the EIRs.
22. It is clear that any information falling within the scope of the Applicant's request, which relates to biosecurity measures taken during a water supply project, having a clear impact on the elements of the environment, is properly considered to be environmental information, as defined in regulation 2(1) of the EIRs (the relevant provisions are reproduced in Appendix 1 to this decision). The Applicant made no comment on Scottish Water's application of the EIRs in this case and the Commissioner will consider the requests in what follows solely in terms of the EIRs.

Information held by Scottish Water

23. 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. While this duty is subject to certain qualifications, none of them appear to be relevant in this case. It is important to bear in mind that this obligation relates to information actually held by an authority when it receives the request, as opposed to information an applicant believes the authority should hold (but which is not in fact held at that time).
24. Under the EIRs, a public authority may refuse to make environmental information available if one or more of the exceptions in regulation 10 apply and, in all the circumstances of the case, the public interest in maintaining the exception or exceptions outweighs the public

interest in making the information available. If no such information is held by the authority, regulation 10(4)(a) of the EIRs permits the authority to give the applicant notice to that effect.

Submissions from Scottish Water

25. In its submissions to the Commissioner, Scottish Water explained that the Applicant made two separate information requests (each contained in a separate letter) that were delivered to its office on the same day (3 September 2019). Following correspondence with the Commissioner's office, it became clear to Scottish Water that this application only referred to the second request, the one requesting information on biosecurity measures taken by itself and its contractors during the Burncrooks Water Treatment Works project.
26. Scottish Water acknowledged that initially it had interpreted this request as only seeking biosecurity information related to the Applicant's farm. It apologised for this error. Scottish Water submitted that further searches had ascertained that it holds additional information which relates to, or may contain, information on biosecurity measures for the Burncrooks project.
27. Scottish Water noted that part of the Burncrooks pipeline crosses through a Site of Special Scientific Interest (SSSI) and that a lot of the information held for the SSSI may therefore include biosecurity measures. Scottish Water also noted that it was happy to contact the Applicant to explain the extent of the information held and to work with him to ascertain what he wanted to see.
28. Due to the Covid-19 pandemic restrictions, Scottish Water submitted that the retrieval of some information was problematic. It explained that information was currently with its contractors, but, due to the pandemic, its contractors had a number of staff involved in this project on furlough. In addition, due to site closures the usual information channels were not fully operational, so the immediate location and release of this information was not possible.
29. Scottish Water submitted that its intention was to share the outcome of the scoping exercise and any available information with the Applicant as soon as it was able to do so. It noted that it did hold some information and it was happy to release that to the Applicant.
30. Scottish Water subsequently contacted the Applicant and explained that it was undertaking a scoping exercise, and that it would be keen to work with him to determine the information he was seeking. In response, the Applicant argued that his request was very clear and he reiterated that he was seeking all of the information that fell within the scope of his request.
31. Scottish Water did not provide the Applicant with a list of the information identified during the scoping exercise until it was contacted by the investigating officer. As a result, the outcome of the scoping exercise was not provided to the Applicant until almost two months after the Applicant had stated that he wanted all of the information falling within the scope of his request. Scottish Water explained that it was unable to complete its initial scoping exercise at that time, because its contractors' site and local offices were physically closed. Therefore, its contractors had no access to certain information and documents. Scottish Water noted that, over the past few weeks, its services had returned and staff had now been provided with access to systems and documents.
32. Scottish Water eventually provided the Applicant with a list of 51 documents it considered to fall under the scope of the request (and which it was prepared to disclose). However, when questioned about the contents of the list, Scottish Water explained that four of these documents (that were held by its contractors) had been updated and the versions that were held at the time of the request were no longer held and could not be provided.

33. Scottish Water explained that when these four documents were updated the original versions were overwritten and that earlier versions cannot now be retrieved from the computer system. Scottish Water submitted that extensive searches had been undertaken by both itself and its contractors to try and locate the earlier version of these documents in other locations (e.g. in emails) but unfortunately, no copies were held.
34. Scottish Water wrote to the Applicant on 18 September 2020, and asked him how he would like to receive the information it had identified in its scoping exercise. The Applicant responded to Scottish Water on 2 October 2020, noting that he required hard copies of the information (the Commissioner notes that the Applicant had made it clear in his initial request that he was seeking hard copies of all information held).
35. At the time of writing, Scottish Water had not provided the Applicant with the information he had requested.

Commissioner's comments on the information held

36. The Commissioner has reviewed the scoping document which contains the creation and updated dates of each of the 51 documents. He notes that two of the four documents that were overwritten (7 and 10) were updated on 11 February 2020, some three months after the Applicant had made his application, and almost a month after the Commissioner had contacted Scottish Water to seek its comments on the application. The other two documents (1 and 11) were updated before the Applicant had appealed to the Commissioner (in October and November 2019) but after he had requested the information.
37. In relation to documents 7 and 10, the Commissioner concludes that, if Scottish Water had engaged with his office, and answered the investigating officer's letters and emails timeously, the earlier versions of these documents may have been retained. That the contents of these documents are now lost is purely down to Scottish Water's poor handling of the request and its subsequent failure to engage with the Commissioner's Office. In relation to documents 1 and 11, the Commissioner notes that, when a request for information is made, it captures information held at that time. Therefore, on receipt of the Applicant's request, it was Scottish Water's responsibility to identify all relevant information and ensure it was retained. The Commissioner finds that Scottish Water's failure to retain the information held in all four documents (1, 7, 10 and 11) is a breach of regulation 5(1) of the EIRs.
38. The Commissioner has considered the submissions made by Scottish Water and accepts that the four documents were overwritten as a result of poor practice and were not overwritten intentionally.
39. While the Commissioner has not viewed the contents of the documents in the scoping exercise, the descriptions of the documents appear to be relevant to the Applicant's request. Given this, it is clear that Scottish Water held relevant information at the time the Applicant had made his information request and this information should either have been disclosed to him or withheld under an exception provided for in regulation 10 of the EIRs. Scottish Water failed to take any of these actions. This failure constitutes a breach of regulation 5(1) of the EIRs.
40. The Commissioner requires Scottish Water to provide the Applicant with a compliant review outcome under regulation 16 of the EIRs. In doing so, the Commissioner notes that during his investigation Scottish Water submitted that it was willing to provide the Applicant all of the information listed in the initial scoping document (51 documents). In the absence of submissions to the contrary, the Commissioner requires Scottish Water to provide this

information in hard copy format, the format originally requested by the Applicant, in line with regulation 6(1) of the EIRs.

41. The Commissioner also considers that it would be appropriate for Scottish Water to apologise to the Applicant for its handling of his information request in its review outcome.

Commissioner's comments on Scottish Water's handling of the appeal

42. Scottish Water's failure to communicate timeously with the Commissioner's office has led to this case being significantly delayed. For example, it took Scottish Water more than three months to respond to the investigating officer's letter of 16 January 2020, but there does not seem to be any reasonable explanation as to why such a delay occurred. Scottish Water failed to acknowledge much of the correspondence sent by the investigating officer, who frequently had to chase up non-responses and, in return, received promises for responses which never materialised.
43. The Commissioner notes that Scottish Water made references to its handling of a subject access request by the Applicant and to a similar information request he had made. However, the Applicant's request was very clear and the Commissioner notes that Scottish Water was provided with a copy of the request in December 2019, when first notified of the application. Again, Scottish Water has been unable to give any reasonable explanation as to why the confusion arose or why it led to such a delay.
44. The Commissioner notes that Scottish Water is not relying on any exceptions to withhold information from the Applicant, and that it is willing to provide him with all of the relevant information it holds. Despite this, due to the poor handling of this request, the Applicant has (so far) had to wait over a year to obtain information that Scottish Water was obliged to make available to him. This is not acceptable.
45. The Commissioner is also concerned that Scottish Water's failure to correctly identify all relevant information at the time of the request, has resulted in some information (that contained in documents 1, 7, 10 and 11) being overwritten, meaning that it cannot be provided to the Applicant. This is undoubtably poor practice.
46. The Commissioner has noted these failures and poor handling in line with his Intervention Procedures¹ and will consider whether further intervention action is required.

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 the Applicant.

The information identified during this investigation should have been identified at the time of asking: by not making it available at that point, Scottish Water breached regulation 5(1) of the EIRs.

The Commissioner also finds that Scottish Water's failure to retain the information contained in documents 1, 7, 10 and 11, and which was captured by the Applicant's information request, breached regulation 5(1).

The Commissioner therefore requires Scottish Water to provide the Applicant with a new review

¹ <https://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/Briefings.aspx>
Decision Notice 136/2020

outcome, compliant with regulation 16 of the EIRs. In doing so, Scottish Water must adhere to the Applicant's request for hard copies in line with regulation 6(1). The Commissioner notes that Scottish Water is willing to provide all of the information captured by his request and which is detailed in the scoping exercise (sent to the Applicant on 9 September 2020). The Commissioner requires this action by 14 December 2020.

Appeal

Should either the Applicant 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.

Enforcement

If Scottish Water fails to comply with this decision, the Commissioner has the right to certify to the Court of Session that Scottish Water has failed to comply. The Court has the right to inquire into the matter and may deal with Scottish Water as if it had committed a contempt of court.

Margaret Keyse
Head of Enforcement

28 October 2020

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 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.

...

50 Information notices

- (1) Where the Commissioner -
 - (a) has received an application under section 47(1); ...
that officer may give the authority notice in writing (referred to in this Act as "an information notice") requiring it, within such time as is specified in the notice, to give the officer, in such form as may be so specified, such information relating to the application, to compliance with this Act ... as is so specified.

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;

...

(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.

...

6 Form and format of information

(1) Where an applicant requests that environmental information be made available in a particular form or format, a Scottish public authority shall comply with that requests unless-

(a) it is reasonable for it to make the information available in another form or format;

(b) the information is already publicly available and easily accessible to the applicant in another form or format.

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 the Act but with the modifications specified in paragraph (2)

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