



Scottish Information
Commissioner

230/2007 Mr Gordon Watson and Scottish Water

*Information relating to communications between Scottish Water and East
Renfrewshire Council in relation to work at a site in Newton Mearns*

Applicant: Mr Gordon Watson

Authority: Scottish Water

Case No: 200700109

Decision Date: 20 December 2007

**Kevin Dunion
Scottish Information Commissioner**

Kinburn Castle
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Decision 230/2007 Mr Gordon Watson and Scottish Water

Information relating to communications between Scottish Water and East Renfrewshire Council in relation to work at a site in Newton Mearns – information not held – Commissioner found that the Scottish Water had misapplied section 17 of FOISA in that relevant information was held and – since the information held was environmental information, the request should have been dealt with under EIRs – Commissioner found that Scottish Water had breached regulation 5 of the EIRs and required release of relevant documents.

Relevant Statutory Provisions and Other Sources

Environmental Information (Scotland) Regulations 2004 (the EIRs): regulations 2(1) (Interpretation) (definitions (a) and (c) of “environmental information”); 5(1) (Duty to make available environmental information on request); 10(4)(a) (Exceptions from duty to make environmental information available) and 17(1) (Enforcement and appeal provisions)

Freedom of Information (Scotland) Act 2002 (FOISA): section 1(1) (General entitlement); section 2(1) (Effect of exemptions); section 17(1) (Notice that information is not held) and section 39(2) (Health, safety and the environment)

The full text of each of these provisions is reproduced in the Appendix to this decision. The Appendix forms part of this decision.

Facts

Mr Watson requested copies of communications between Scottish Water and East Renfrewshire Council (the Council) relating to Scottish Water’s works at a site in Newton Mearns. Mr Watson also asked for any minutes, notes or communications held by Scottish Water relating to a meeting that took place in November 2004 between Scottish Water and the Council from Scottish Water. Scottish Water responded by stating that it did not hold any relevant information. Scottish Water added that although a meeting took place in November 2004, no notes were taken at this meeting. Scottish Water upheld this decision following a review. Mr Watson remained dissatisfied and applied to the Commissioner for a decision.



During the investigation, Scottish Water confirmed that it did hold information falling within the scope of Mr Watson's request. Although Scottish Water had dealt with the request under the Freedom of Information (Scotland) Act 2002 (FOISA), the information identified was environmental information, so the Commissioner found that Scottish Water had failed to deal with Mr Watson's request for information in accordance with regulation 5 of the EIRs. He required Scottish Water to disclose the information which it holds that falls within the scope of Mr Watson's request.

Background

1. On 23 October 2006, Mr Watson wrote to Scottish Water requesting the following information:
 - *Copies of any communications between Scottish Water and [the] Council, relating to Scottish Water's works at a site at Leslie Avenue, Newton Mearns; and*
 - *Copies of any minutes, notes or communications, held by Scottish Water relating to the November 2004 meeting between representatives of Scottish Water and [the] Council regarding Scottish Water's then-proposed works at a site at Leslie Avenue, Newton Mearns.*
2. By way of background to this request, I would note that the Council is the owner of the specified site in Newton Mearns. The development concerned involved the laying of sewage pipes.
3. On 14 November 2006, Scottish Water wrote to Mr Watson in response to his request for information. Scottish Water confirmed that, after checking with the relevant departments within Scottish Water and Scottish Water Solutions, there was no documentation that it was able to provide. Scottish Water also confirmed that although a meeting did take place in November 2004 between Scottish Water and the Council, no notes were written at the meeting.
4. On 25 November 2006, Mr Watson wrote to Scottish Water requesting a review of its decision. In particular, Mr Watson stated that he found it strange that Scottish Water did not hold copies of any communications with the Council for a major project which was conducted on the Council's land. He also drew Scottish Water's attention to its statement that "*no notes were written at this meeting*". Mr Watson noted that this statement did not exhaust the range of documentation requested in the second part of his letter.



5. On 20 December 2006, Scottish Water notified Mr Watson of the outcome of its review. Scottish Water upheld its original decision, confirming in terms of section 17 of FOISA that the information sought by Mr Watson was not held by Scottish Water.
6. On 24 January 2007, Mr Watson wrote to my Office, stating that he was dissatisfied with the outcome of Scottish Water's review and applying to me for a decision in terms of section 47(1) of FOISA (which also deals with applications under the EIRs).
7. He indicated *inter alia* that he found it inconceivable that there were no communications between Scottish Water and the Council about the development and that Scottish Water did not retain copies of these communications. He also indicated that he had evidence that such communications existed and that they were likely to still be on record
8. The application was validated by establishing that Mr Watson had made a request for information to a Scottish public authority and had applied to me for a decision only after asking the authority to review its response to that request.

The Investigation

9. On 26 January 2007, Scottish Water was notified in writing that an application had been received from Mr Watson and inviting comments as required under section 49(3)(a) of FOISA (which, in line with regulation 17 of the EIRs, applies for the purposes of the EIRs as it applies for the purposes of FOISA). Scottish Water was also asked to provide my Office with specified items of information required for the purposes of the investigation. Scottish Water responded on 28 January 2007 and the case was then allocated to an investigating officer.
10. Scottish Water's initial response confirmed the step taken to determine whether any information was held that fell within the scope of Mr Watson's request. It also reiterated the position set out in its correspondence with Mr Watson: i.e. that no relevant information was held. Scottish Water indicated that the only relevant communication between it and the Council was a "Section 3 Notice" issued under the terms of the Sewerage (Scotland) Act 1968 (the Sewerage Act). This notice had outlined the route of the proposed pipeline and was served on the Council pursuant to the Sewerage Act. Scottish Water stated that it did not hold a copy of this notice and advised that it may be available from the Council. It went on to state that no further communications exist between the parties in relation to the relevant project.



11. It would be useful at this point to explain that Scottish Water is legally required to issue a Section 3 Notice to the landowner (in this case, the Council) before it can start any works on that person's land. The Notice sets out the landowner's rights of objection and rights to compensation if the work would result in any loss to the landowner. A claim for compensation must be made by the landowner within 24 months after the date on which the loss is alleged to have arisen. Therefore, a Section 3 Notice is a formal legal document which will be an important stage in any works undertaken by Scottish Water involving another person's land.
12. In further communications, the investigating officer asked Scottish Water to provide additional details about the following areas:
 - a) searches undertaken in relation to this case;
 - b) the records that would normally be created in the course of a project of the type relevant to this request;
 - c) the processes followed where a Section 3 Notice is issued to a landowner both in general and in relation to the development relevant to Mr Watson's request;
 - d) its records management practices; and
 - e) the relationship between Scottish Water and Scottish Water Solutions (a company that undertakes work on Scottish Water's behalf, and which did so in relation to the development in Newton Mearns).
13. Further responses to these additional questions were provided by Scottish Water on 30 April 2007 and 24 August 2007. Although additional details were provided about Scottish Water's practices in general and in relation to the relevant project, in each case it maintained that it did not hold any recorded information falling within the scope of Mr Watson's request.
14. In its email of 24 August 2007, Scottish Water did acknowledge, however, that a second Section 3 Notice had been issued to the Council after an objection had been raised in relation to its initial plans. Again, however, Scottish Water maintained, that it did not hold a copy of this Notice and that no further relevant information was held.
15. During the investigation, Mr Watson had informed the investigating officer that he was in receipt of certain documentation that confirmed the existence of information that would fall within the scope of his request. Mr Watson provided my Office with copies of the documentation in question. Mr Watson also included a covering letter which explained in detail his views on the circumstances surrounding his request, along with background to the information he provided.



16. The documents provided by Mr Watson had been disclosed by the Council and Scottish Water in response to requests for information (made by another person) under the terms of FOISA and/or the EIRs. They demonstrated that communications had taken place between the Council and Scottish Water in relation to the project. They included the Section 3 Notices that had been referred to by Scottish Water, but also responses to these, and relevant emails. The fact that some of these had been disclosed by Scottish Water suggested that at least some relevant information had been held around the time of Mr Watson's request for information.
17. The Investigating officer wrote to Scottish Water again on 20 September 2007, this time providing a sample of the documents provided by Mr Watson for consideration, and specifically asking Scottish Water to comment on these documents and whether they had been held at the time of Mr Watson's information request.
18. At this stage, the investigating officer also asked Scottish Water to comment on whether any information that did fall within the scope of Mr Watson's request would be environmental information for the purposes of the EIRs. As the case related to planning matters, it was noted that it was likely that I would judge any relevant information to be environmental information, and that a decision should be issued under the terms of the EIRs. As such, Scottish Water was also asked to comment on whether it agreed with this interpretation and, if so, to comment on whether this would have an impact on its arguments presented to date.
19. Scottish Water responded on 4 October 2007. It agreed that information concerning planning matters is generally environmental, and so that this case (now that relevant information had been identified) should be handled under the terms of the EIRs. It confirmed that it would not have responded differently under the terms of the EIRs, and that there would be no exception that it would wish to apply to withhold any relevant information.
20. Also in this letter, Scottish Water confirmed that after additional searches, it had identified all the information from the sample my Office had provided to it which Mr Watson had provided to my Office. In doing this Scottish Water acknowledged that "serious errors" had been made in the way Mr Watson's request for information had been handled.



21. An Information Notice was subsequently issued on 6 November 2007, requiring Scottish Water to conduct a further search to establish whether any additional information that fell within the scope of Mr Watson's request was held. Following its search, Scottish Water was required to confirm whether any additional information had been identified, the search methodology followed and whether Scottish Water would now seek to withhold any additional information identified. Scottish Water was also invited to make any further comments that it wanted to be taken into consideration in making my decision in this case.
22. On 20 November 2007 Scottish Water issued a response to my Office. In this response Scottish Water provided copies of all documents it had located after completing additional searches, along with a schedule and its further comments of the case.

The Commissioner's Analysis and Findings

23. In coming to a decision in this matter, I have considered all of the information and submissions that have been presented to me by both Mr Watson and Scottish Water and I am satisfied that no matter of relevance has been overlooked.
24. As might be expected, given the description of my investigation above, I am deeply concerned by Scottish Water's approach to Mr Watson's request for information, and in its dealings with my Office in the course of the investigation.
25. On two occasions, Scottish Water informed Mr Watson that no information could be provided that fell within the scope of his request. The same assertion was then reiterated to my Office on three occasions.
26. However, Mr Watson was able to demonstrate that relevant communications and information had been created, and also to suggest that relevant information had been held by Scottish Water at the time when he made his request. Even had he not been able to do so, I would have been highly surprised had Scottish Water not retained any records demonstrating the statutory process provided for by section 3 of the Sewerage Act.
27. As a result of further investigations, it became clear that Scottish Water's submissions to my Office had been inaccurate both in relation to the question of whether any relevant information was held; but also in respect to the circumstances surrounding the relevant development in Newton Mearns.



28. As Scottish Water has acknowledged, serious errors were made in the handling of this information request. It is clear it acted incorrectly by notifying Mr Watson that no relevant recorded information was held.
29. In the circumstances, I can only conclude proper searches were not conducted, and appropriate steps were not taken to identify the information requested. This failure was not rectified when inaccurate responses were also provided in response to requests from my Office, even after Scottish Water was advised that my Office had received evidence suggesting that relevant information had been created and was likely to be held.

Information confirmed to be held that falls within the scope of Mr Watson's request

30. The following documents were sent to Scottish Water under cover of the investigating officer's letter of 20 September 2007, and I am satisfied that they each fall within the scope of Mr Watson's request. In response, Scottish Water confirmed that each of these was held and had inadvertently been withheld:
 - a) Email dated 23 November 2004, from Scottish Water Solutions to the Council.
 - b) Letter dated 16 August 2004 from Scottish Water to the Council, enclosing Section 3 Notice, schedule, associated plans and acknowledgement and response forms.
 - c) Response to (b) from the Council to Scottish Water dated 25 August 2004, and attached sheet stating objections.
 - d) Letter dated 7 December 2004 from Scottish Water to the Council, enclosing further Section 3 Notice, schedule, associated plans and response forms.
31. Following further searches undertaken in response to my request, Scottish Water identified (alongside other information relating to the development in Newton Mearns that does not fall within the scope of Mr Watson's specific request) the following further documents that fell within the scope of Mr Watson's request (numbers after document descriptions reflect those contained in Scottish Water's letter to my Office of 20 November 2007):
 - a) Drawing showing general arrangement of new manholes at Leslie Avenue (Document 1)
 - b) Drawing showing general arrangement of existing Leslie Avenue showing proposed alteration sheet 1 (document 2)
 - c) Drawing showing general arrangement of existing Leslie Avenue showing proposed alteration sheet 2 (document 3)



- d) Drawing showing site layout and longitudinal section of Leslie Avenue (Document 4)
- e) Email dated 1 December 2004 (document 5)
- f) Email dated 3 December 2004 (document 6)
- g) Letter from Scottish Water to the Council dated 19 June 2006 (document 17).

Consideration of this case under EIRs

- 32. Mr Watson's request for information was dealt with both initially and at review stage by Scottish Water under FOISA. At review stage Scottish Water cited section 17 of FOISA on the grounds that it held no information which fell within the terms of the request.
- 33. During the investigation, as it became clear that relevant information was held by Scottish Water, it also became evident that this information was likely to fall within the scope of the definition of environmental information contained within regulation 2 of the EIRs. A right of access to such information is provided, separately from the rights under FOISA, under the terms of the EIRs.
- 34. The investigating officer approached Scottish Water to seek its comments on this point when he sent copies of documents that had been supplied by Mr Watson listed in paragraph 30 above. In response, Scottish Water confirmed that it agreed that information of this type is generally environmental, and as such should be dealt with under the terms of the EIRs. Scottish Water confirmed that it did not propose to apply any exception under the EIRs to any information now identified.
- 35. Having considered the information set out in paragraphs 30 and 31 above, I have concluded that it is entirely environmental information. It is information directly relating to sewerage development and I am of the view that the construction of a public sewer would affect the state of the land, which is one of the elements of the environment listed in paragraph (a) of the definition of environmental information in regulation 2(1). Therefore, the information on this topic falls within the scope of paragraph (a) of the definition. I am also satisfied that the information requested falls within the scope of paragraph (c) of that definition. Therefore, for these reasons, I am satisfied that the information in question falls within the definition of environmental information in regulation 2(1).



36. In the circumstances of this case, I have taken Scottish Water's agreement that the request should have been handled under the EIRs to mean that it would wish to rely upon the exemption in section 39(2) of FOISA with respect to this information. This technical exemption provides that information that is environmental information for the purposes of regulation 2 of the EIRs is exempt information under FOISA (thereby allowing the request to be considered solely in terms of the EIRs). This exemption is subject to the public interest test in section 2(1)(b) of FOISA. My view is that, as there is a separate statutory right of access to environmental information, the public interest in maintaining this exemption and allowing access in line with the requirements of the EIRs outweighs the public interest in the disclosure of information under FOISA. Given this conclusion, I have made my decision in this case solely under the terms of the EIRs.

Breaches of the EIRs

37. Regulation 5(1) of the EIRs provides that a Scottish public authority that holds environmental information shall make it available when requested to do so by any applicant.
38. It is clear in this case that Scottish Water failed to act in accordance with regulation 5(1).
39. As noted above, Scottish Water has acknowledged that "serious errors" had been made in the handling of Mr Watson's request, and apologised for these. This includes the way it dealt directly with Mr Watson but also in the way it has responded to my Office over the course of the investigation. I am now satisfied that Scottish Water has carried out a robust search of its electronic and manual systems and files to confirm that it has identified all the relevant information that it holds that falls within the scope of Mr Watson's request.
40. It should be noted that Scottish Water has confirmed that it is willing to make available to Mr Watson all the information which it has identified which falls within the scope of his request. Scottish Water has not sought to rely on any exceptions under the EIRs in respect of the information which falls within the request.
41. I am aware that some of the information that has been identified in this case has already come into Mr Watson possession. However, none of it has been supplied by Scottish Water. In line with Mr Watson's wishes as expressed to my Office, I now require Scottish Water to provide to Mr Watson copies of all documents detailed in paragraphs 30 and 31 above in response to his request for information.



Decision

I find that Scottish Water failed to comply with the Environmental Information (Scotland) Regulations 2004 (the EIRs), and in particular with the requirements of regulation 5(1) in responding to the information request from Mr Watson.

I therefore require Scottish Water to provide Mr Watson with copies of the documents specified in paragraphs 30 and 31 of this decision, within 45 days after the date of intimation of this notice.

Appeal

Should either Mr Watson or Scottish Water wish to appeal against this decision, there is an appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days of the date of intimation of this decision notice.

Signed on behalf of Kevin Dunion, Scottish Information Commissioner, under delegated authority granted on 14 November 2007.

Margaret Keyse
Head of Investigations
20 December 2007



Appendix

Relevant statutory provisions

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.

[...]



10 Exceptions from duty to make environmental information available–

[...]

- (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;

[...]

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).

[...]

Freedom of Information (Scotland) Act 2002

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 –
- (a) the provision does not confer absolute exemption; and
- (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

17 Notice that information is not held

- (1) Where-
- (a) a Scottish public authority receives a request which would require it either-
- (i) to comply with section 1(1); or
- (ii) to determine any question arising by virtue of paragraph (a) or (b) of section 2(1),



if it held the information to which the request relates; but

(b) the authority does not hold that information,

it must, within the time allowed by or by virtue of section 10 for complying with the request, give the applicant notice in writing that it does not hold it.

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.

(3) Subsection (2)(a) is without prejudice to the generality of section 25(1).