

# Decision Notice

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**Decision 128/2019: Mrs Y and Scottish Borders Council**

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## **Sewage information**

Reference No: 201900483

Decision Date: 23 August 2019



Scottish Information  
Commissioner

## Summary

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The Council was asked for information relating to the blocking off of a specific sewage pipe. The Council provided some information.

Following an investigation, the Commissioner found that the Council had failed to identify all of the information that it held falling within the scope of the request.

Given that all of the information had been disclosed by the close of the investigation, the Commissioner did not require the Council to take any action.

## Relevant statutory provisions

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The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (paragraphs (b) and (c) of definition of "environmental information") (Interpretation); 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

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1. On 19 December 2018, Mrs Y made a request for information to Scottish Borders Council (the Council). Mrs Y made reference to an earlier response, which had advised that the Council intended to write a specific letter of notification, and asked the Council to supply:  
*"...the aforementioned notification letter and all documents and or correspondence in whatever format, both externally (to outside third parties) and internally (within the Council) that discusses/surrounds the blocking off of the sewage pipe within Kirkurd Graveyard. If the pipe has not been blocked off and no letters have been written, could the Council please confirm why this has not been done or when they intend to do this please?"*
2. The Council responded on 14 January 2019. The Council advised that the pipe had not been blocked off and so it held no letters. The Council provided some information relating to the decision not to block it off, with personal data redacted. The response was made under the EIRs, the Council having applied the exception in section 39(2) of the Freedom of Information (Scotland) Act 2002 (FOISA).
3. On 20 January 2019, Mrs Y wrote to the Council, requesting a review of its decision on the basis that she believed that the Council should hold further information. She explained why she believed further information was held.
4. The Council notified Mrs Y of the outcome of its review on 1 February 2019. It advised Mrs Y that she had been provided with all of the information that it held falling within the scope of her request.
5. On 13 March 2019, Mrs Y wrote to the Commissioner. She 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. Mrs Y stated she did not accept that the Council had provided all the relevant information it held, with reasoning.

## **Investigation**

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6. The application was accepted as valid. The Commissioner confirmed that Mrs Y 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 5 April 2019, the Council was notified in writing that Mrs Y had made a valid application. 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. The Council was invited to comment on this application and to answer specific questions, in particular to explain the steps it had taken to identify and locate the information requested.
9. The Council responded, confirming its view that the requests fell to be dealt with in terms of the EIRs and that section 39(2) of FOISA had been correctly applied. It also explained the searches and enquiries undertaken to establish what information was held. It advised that it had located further information falling within the scope of Mrs Y's request.
10. The Council confirmed that this additional information had been provided to Mrs Y, explaining that, having reconsidered the scope of the request, it accepted that the request also covered the initial decision to block off the sewage pipe in question, resulting in the additional information being identified and located.
11. Mrs Y confirmed receipt of the information disclosed during the investigation, but believed further information should be held by the Council.

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

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12. 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 Mrs Y and the Council. He is satisfied that no matter of relevance has been overlooked.

### **Application of the EIRs**

13. It is clear from the Council's correspondence with both Mrs Y and the Commissioner, and from the information itself, that the information sought by Mrs Y is properly considered to be environmental information, as defined in regulation 2(1) of the EIRs. It relates to correspondence regarding a sewage pipe, and so the Commissioner is satisfied that it falls within either paragraph (b) or paragraph (c) of the definition in regulation 2(1) (the text of each paragraph is reproduced in Appendix 1). Mrs Y has not disputed this and the Commissioner will consider the information in what follows solely in terms of the EIRs.

### **Information held by the Council**

14. Regulation 5(1) of the EIRs (subject to the various qualifications contained in regulations 6 to 12) requires a Scottish public authority which holds environmental information to make it available when requested to do so by any applicant. 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.

15. The standard proof to determine whether a Scottish public authority holds information is the civil standard of the balance of probabilities. In determining where the balance lies, the Commissioner considers the scope, quality, thoroughness and results of the searches carried out by the public authority. He also considers, where appropriate, any reason offered by the public authority to explain why it does not hold the information. While it may be relevant as part of this exercise to explore expectations as to what information the authority should hold, ultimately the Commissioner's role is to determine what relevant information is actually held by the public authority (or was, at the time it received the request).
16. The Commissioner has taken account of the submissions provided by Mrs Y, in which she provided reasons why she believed the Council should have held further information falling within the scope of her request. She provided names of Council staff she understood to have been involved, arguing that there should be further information held from those individuals.
17. The Council provided submissions in response to the questions put by the investigating officer on this matter. The Council confirmed the searches and enquiries it undertook to ascertain whether it held any information falling within the scope of Mrs Y's request, with evidence of the searches carried out and confirmation of the staff involved. It also explained the discovery of the additional information. In relation to the staff names provided by Mrs Y, the Council advised that they had either been consulted or had left the Council's employment. For those who had left the Council's employment, it confirmed that email accounts were automatically deleted after a three year period, as had happened here.
18. The Council concluded that, other than the information disclosed to Mrs Y, it held no further information falling within the scope of Mrs Y's request.
19. Having considered all relevant submissions and the terms of the requests, the Commissioner accepts that (by the close of the investigation) the Council identified and located all the information it held falling within the scope of the request under investigation. He is also satisfied that the information located during the investigation has now been provided to Mrs Y.
20. However, in failing to take adequate steps to identify, locate and provide all the relevant information at the time it dealt with Mrs Y's request, the Commissioner finds that the Council failed to comply with regulation 5(1) of the EIRs.

## Decision

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The Commissioner finds that Scottish Borders Council failed to comply with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by Mrs Y.

In failing to provide Mrs Y with all the information it held and which fell within the scope of her request, the SPS failed to comply with regulation 5(1) of the EIRs.

Given that all of the information has now been provided to Mrs Y, the Commissioner does not require the Council to take any action regarding this failure, in response to Mrs Y's request.

## **Appeal**

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Should either Mrs Y or Scottish Borders 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.

**Daren Fitzhenry**  
**Scottish Information Commissioner**

**23 August 2019**

## Appendix 1: Relevant statutory provisions

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### The Environmental Information (Scotland) Regulations 2004

#### 2 Interpretation

(1) In these Regulations –

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"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-

...

(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.

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