



Decision Notice 082/2023

Deposit Return Scheme

Authority: Scottish Ministers
Case Ref: 202200051

Summary

The Applicant asked the Authority for information relating to the timing of the launch of the proposed Deposit Return Scheme for drinks cans and bottles. The Authority refused to make relevant information available, arguing that it would be manifestly unreasonable to do so.

The Commissioner investigated and found that the Authority had been correct to rely on the exception in regulation 10(4)(b) of the EIRs. However, he also found the Authority had failed to inform the Applicant adequately of her appeal rights.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (2) (General entitlement); 21(10) (Review by Scottish public authority), 47(1) and (2) (Application for decision by Commissioner)

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (definition of “the Act”, “applicant” and “the Commissioner” and paragraphs (a), (b), (c) and (d) of the definition of “environmental information”) (Interpretation); 5(1) (Duty to make environmental information available on request); 10(1), (2) and (4)(b), (Exceptions from duty to make environmental information available) 17(1), (2)(a), (b) and (f) (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 25 October 2021, the Applicant made a request for information to the Authority. She asked that the Authority provide all information generated since 16 March 2020 and held by it relating to the timing of the launch of the proposed deposit return scheme for drinks cans and bottles. She highlighted information of particular relevance as including that covering the feasibility of the 1 July 2022 launch date (as set out in regulations on 16 March 2020), or external pressure either to delay that 1 July 2022 launch date or to stick to it.
2. In her request, the Applicant stated that, if the volume of information was too large or too expensive to collect, she would be happy to discuss how costs might be limited.
3. The Authority responded on 24 November 2021. The Applicant's request was processed and responded to in line with the EIRs. In its response, the Authority relied on the exception in regulation 10(4)(b) for refusing to make information available, as it considered it would be manifestly unreasonable to do so.
4. On 25 November 2021, the Applicant wrote to the Authority, requesting a review of its decision. The Applicant stated that she was dissatisfied with the decision because:
 - the request was narrowly time-limited, covering just over 19 months of the Authority's information
 - the request was narrowly subject-limited, covering only issues relating to the narrow question of the proposed start date for the deposit return scheme
 - the request was helpfully constructed, giving an indication, within what was already a narrow subject area, of the types of information of particular interest.

The Applicant indicated that it was impossible to limit the already narrow time period further and remain confident that the most germane information would not be excluded by doing so. Similarly, discussions of the feasibility of the launch date set in the regulations were one topic, impossible to subdivide meaningfully from the outside.

5. The Applicant also argued that the question of the deposit return scheme's launch date was an absolutely valid matter of public interest, not least given the Authority's announcement subsequent to her request being submitted. The Applicant stated that her request was not frivolous or designed to annoy.
6. The Authority notified the Applicant of the outcome of its review on 23 December 2021. The Authority upheld its decision to rely on the exception in regulation 10(4)(b) of the EIRs, with reasons why it considered the exception to be applicable.
7. In its response, the Authority also explained that, since the Applicant's requirement for review had been received, a Ministerial statement had been made to Parliament. It provided a link to the record of the meeting where the statement was made. A link was also provided to facilitate the Applicant in accessing an independent report prepared on the Deposit Return Scheme. The Authority considered this independent review contained information of relevance to the Applicant's request.
8. On 10 January 2022, 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 she was dissatisfied with the outcome of the Authority's review, challenging its claim that the cost of fulfilling this request would place an "unreasonable burden" on the Authority. In any case, she believed the public interest should require that openness overrule any inconvenience in meeting the request. She also noted that the Authority's review outcome had failed to provide particulars of her appeal rights.

Investigation

9. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
10. On 15 February 2022, the Authority was notified in writing that the Applicant had made a valid application. The case was allocated to an investigating officer.
11. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Authority was invited to comment on this application and to answer specific questions. These sought submissions and justification from the Authority as to why it considered the information request from the Applicant to be manifestly unreasonable. In particular, the Authority was asked to provide a breakdown of the cost to it of making the requested information available, and why this was considered to be an unreasonable burden. Questions were also asked around the Authority's consideration of the public interest test.
12. Further submissions were also sought and received from the Authority during the investigation.

Commissioner's analysis and findings

13. The Commissioner has considered all of the submissions made to him by the Applicant and the Authority.

Application of the EIRs

14. It is clear from the Authority's correspondence with both the Applicant and the Commissioner that the information sought by the Applicant is properly considered to be environmental information, as defined in regulation 2(1) of the EIRs. It relates to the policy of the Scottish Ministers to introduce a Deposit Return Scheme, to encourage the recycling of drinks cans and bottles. Therefore, the Commissioner is satisfied that it falls within one or more of paragraphs (a), (b), (c) or (d) of the definition in regulation 2(1) (the text of each paragraph is reproduced in Appendix 1). The Applicant has not disputed this, and the Commissioner will consider the information in what follows solely in terms of the EIRs.

Regulation 5(1) of the EIRs – Duty to make environmental information available

15. 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 information that is held by the authority when it receives a request.
16. On receipt of a request for environmental information, therefore, the authority must ascertain what information it holds falling within scope of the request. Having done so, regulation 5(1) requires the authority to provide that information to the requester, unless a qualification in regulations 6 to 12 applies (regulation 5(2)(b)).
17. Under the EIRs, a public authority may refuse to make environmental information available if one or more exceptions in regulation 10 applies.

Regulation 10(4)(b) of the EIRs – Manifestly unreasonable

18. Under the exception in regulation 10(4)(b) of the EIRs, a Scottish public authority may refuse to make environmental information available to the extent that the request for information is manifestly unreasonable.
19. In considering whether the exception applies, the authority must interpret it in a restrictive way and apply a presumption in favour of disclosure. Even if it finds that the request is manifestly unreasonable, it is still required to make the information available unless, in all the circumstances, the public interest in doing so is outweighed by that in maintaining the exception.

Test to be applied in the use of the exception

20. The Commissioner's general approach is that the following factors are relevant when considering whether a request is manifestly unreasonable (under regulation 10(4)(b) of the EIRs). These are that the request:
 - i) would impose a significant burden of the public body
 - ii) does not have a serious purpose or value
 - iii) is designed to cause disruption or annoyance to the public authority
 - iv) has the effect of harassing the public authority
 - v) would otherwise, in the opinion of a reasonable person, be considered to be manifestly unreasonable or disproportionate.
21. This is not an exhaustive list. Depending on the circumstances, other factors may be relevant, provided the impact on the authority can be supported by evidence. The Commissioner recognises that each case must be considered on its merits, taking all the circumstances into account.

The Applicant's submissions on the exception

22. The Applicant argued that compliance with her request was not manifestly unreasonable. In particular, the Applicant challenged the Authority's claim that the cost of fulfilling the request would place an unreasonable burden on it. The Applicant commented that she had limited the time period covered by the request to 19 months, and had limited the subject matter to information concerning only the timing of the launch of the proposed scheme. The Applicant also submitted that she had further refined the subject matter when requested and had, at all stages, been helpful and clear.
23. The Applicant did not consider it manifestly unreasonable to try to find out why the Authority has delayed their flagship circular economy scheme: the public have a substantial interest in this, which will be the most high-profile public policy waste intervention since the carrier bag charge.

The Authority's submissions on the exception

24. In its submissions, the Authority commented that, even with the ability to extend the timescale for responding under the EIRs by an additional 20 working days (regulation 7(1)), this would still not have given it enough time to fulfil this request.
25. The Authority explained that searches for relevant information were undertaken by colleagues in the Circular Economy Unit and Producer Responsibility & Deposit Return

Scheme Team. This was because they were most likely to hold the requested information, being the policy area responsible for managing the Deposit Return Scheme.

26. Given the nature and intensity of the process to design a Deposit Return Scheme, together with the centrality of the issue of the launch date to these considerations, the Authority submitted that the request would potentially cover the vast majority of the work of the team. The Authority asserted that the request was broad enough to mean that the team would have to take a wholesale review of all the documentation created by it over the timescale 16 March 2020 to 25 October 2021.
27. The Authority outlined the nature and breadth of searches carried out by relevant personnel and also documented the potential number of documents likely to contain information relevant to the Applicant's request, along with the estimated time to retrieve information which could be made available to fulfil the request.
28. The Authority submitted that, as a consequence of the searches carried out of relevant folders and systems, it had identified 3,177 documents which would contain information covered by the Applicant's request.
29. The Authority considered that most of the documents would require some level of redaction prior to the information being made available to the Applicant. Having undertaken a sample exercise to understand how long such redaction would take, the Authority concluded that it would take 238 hours to carry out the necessary redactions (where applicable).
30. Overall, taking into account the time to search for relevant information and sift the documents, as well as the time allowed for redaction, the Authority concluded that it would take approximately 300 hours to locate, retrieve and make available information which would fulfil the Applicant's request.
31. In determining the cost to it of fulfilling the Applicant's request, the Authority was guided by the £15.00 an hour rate cap prescribed in the Freedom of Information (Fees for Required Disclosure) (Scotland) Regulations 2004. While the Authority accepted that the EIRs do not set an upper cost limit, it estimated that the cost of responding to the request under the EIRs would be £4,505. The Authority was of the view that any reasonable person would consider this to be excessive.
32. The Authority also argued that because the work, in this case, needed to be carried out by an experienced member of staff with knowledge of the information and subject matter, the request was manifestly unreasonable in nature, due to the significant burden that providing the information would place on the organisation.

The Commissioner's view on the exception

Significant burden on the authority

33. In the [Commissioner's briefing on regulation 10\(4\)\(b\) of the EIRs](#), ¹the Commissioner indicates that a request will impose a significant burden on a public authority where dealing with it would require a disproportionate amount of time and the diversion of an unreasonable proportion of its financial and human resources away from its other statutory or core operations.
34. It is clear from her submissions that the Applicant did not consider, and in no way intended, her information request to impose a significant burden on the Authority. Indeed, the

¹ [BriefingRegulation104bManifestlyUnreasonableRequests.docx.pdf \(itspublicknowledge.info\)](#)

Applicant has repeatedly commented on the short timescale covered by the subject matter of her request and the specific focus placed on information about the decision to delay the launch of the scheme.

35. Whilst acknowledging that this is the case, the Commissioner is aware from the submissions made by the Authority (and accepts) that work to locate, retrieve and make available information which would fulfil the Applicant's request would have to be carried out by the team responsible for the creation and implementation of the Deposit Return Scheme.
36. Given the focus of the information request, however narrow it may appear, the Commissioner accepts that the work required would be likely to cover information relating to a significant proportion of the work of that team. This, together with the fact that only specific, suitably experienced officers would be knowledgeable enough to be able to carry out the exercise necessary to make the requested information available, leads the Commissioner to agree with the Authority that, based on the submissions received and in the circumstances of this particular case, making relevant information available to fulfil the Applicant's request in this case would impose a significant burden on it.

Manifestly unreasonable or disproportionate

37. It is evident from her submissions that the Applicant did not consider, and in no way intended, their information request to be manifestly unreasonable or disproportionate. Indeed, the Applicant has repeatedly commented on the short timescale covered by the subject matter of her request and the specific focus placed on information about the decision to delay the launch of the scheme.
38. Nevertheless, it is clear from the submissions made by the Authority, which broadly the Commissioner accepts, that the cost to it in terms of the time taken to locate, retrieve and provide relevant information to fulfil the request, together with the need to divert resources from the central team involved in the work around the launch and implementation of the Deposit Return Scheme, would place an unreasonable burden on the Authority. For those reasons, the Commissioner is satisfied that the request would, in the opinion of a reasonable person, be considered manifestly unreasonable or disproportionate.
39. For the reasons set out above, the Commissioner is satisfied that the request was manifestly unreasonable, in terms of regulation 10(4)(b) of the EIRs.

The public interest test - Regulation 10(1)(b)

40. As noted above, the exception in regulation 10(4)(b) is subject to the public interest test in regulation 10(1)(b) of the EIRs. This means that, although the Commissioner is satisfied that the request is manifestly unreasonable, he must still require the Authority to respond to the request if the public interest in making the information available outweighs that in maintaining the exception.

The Applicant's submissions on the public interest

41. It is the Applicant's view that the public have a substantial interest in the reasons why the Authority delayed its flagship circular economy scheme, which would be the most high-profile public policy waste intervention since the carrier bag charge.
42. The Applicant commented that she did not know what the cost to the Authority would be of fulfilling this simple and narrow request. The Applicant considered her requirement for review to rest on the public interest test, which she believed should have ensured openness even if the request was inconvenient to meet.

The Authority's submissions on the public interest

43. The Authority recognised some public interest in releasing the requested information, given the level of interest in the proposed Deposit Return scheme for single-use drinks cans and bottles. The Authority acknowledged that release would promote openness and transparency and further inform public debate.
44. However, the Authority considered this public interest in disclosure to be outweighed by the public interest in ensuring the efficient and effective use of public resources by not incurring excessive costs when complying with information requests. In addition, the Authority was of the view that publication of the gateway review and Ministerial statement helped to inform interested parties substantially about the viability of the original July 2022 launch date.
45. The Authority concluded that there would therefore be limited public interest served by the provision of further information, while the substantial costs remained apparent.
46. The Authority was also of the view that the information it had provided the Applicant with links to in their response to the requirement for review would be of interest to the Applicant and the public generally. The Authority considered this information would help inform the public and allow them to hold it to account in terms of their decision making in relation to this policy. However, it acknowledged, on reflection, that the publicly available information did not extend to cover all of the specific information requested in this case.

The Commissioner's view on the public interest

47. The Commissioner notes the Applicant's arguments in support of her view that it is in the public interest to understand the reasoning behind the decision of the Authority to delay the implementation of the Deposit Return Scheme, particularly given the high-profile nature of the scheme.
48. In the Commissioner's view, there is an inherent public interest in disclosure of information to ensure an authority is transparent and accountable for decisions it makes on matters of public policy. This is particularly so for a policy which would affect all members of the public, as well as producers and distributors in the drinks industry, and retailers.
49. Against this, the Commissioner has considered the strong public interest in ensuring an authority can carry out its statutory functions without unreasonable or disproportionate disruption.
50. As mentioned already, the Commissioner has accepted that making the requested information available in response to the request in this case would incur significant costs, and place a significant burden on the Authority in terms of staff time and resources and, to a certain extent, divert resources away from core functions.
51. The Commissioner considers there is a public interest in ensuring the EIRs are used responsibly. While public authorities should act in a transparent and accountable way, which benefits the public as a whole, the Commissioner also recognises that responding to requests which require them to devote excessive or disproportionate amounts of time can only be at the expense of other areas of work. While the Commissioner acknowledges the Authority's duty to respond to this request, he notes that it has a similar responsibility to respond to other requests it receives, as well as carrying out its other statutory functions, and there is a public interest in ensuring resources are not diverted away from these tasks disproportionately.

52. Therefore, on balance, the Commissioner accepts, in all the circumstances of this case, that the public interest in favour of making the information covered by this request available is outweighed by the public interest in maintaining the exception in regulation 10(4)(b) of the EIRs. As a consequence, the Commissioner finds that the Authority was entitled to refuse to make the requested information available under this exception.

Handling of the request

53. As noted above, the Applicant was unhappy with the Authority's failure to include within its response to her requirement for review the particulars required by section 21(10) of FOISA (relating to her rights of appeal - see Appendix 1).

54. Although the Applicant's request and requirement for review were processed and responded to in line with the EIRs, there was still a parallel duty to respond to the request in line with FOISA. While regulation 16(4) of the EIRs (which contains the requirement to notify the applicant of a review outcome) is couched in very general terms, the Commissioner cannot find that the more specific requirements on the content of notices contained in section 21 (including section 21(10)) of FOISA do not apply equally to responses made in line with regulation 16(4). (Regulation 17(2)(f) of the EIRs makes it clear that a reference to a notice under section 21(5) or (9) of FOISA is deemed to be a reference to a notice under regulation 16(4).)

55. Section 21(10) of FOISA requires that in response to a requirement for review, the Authority must include particulars about the rights of the requestor to make an application to the Commissioner, as well as the right of appeal to the Court of Session conferred by sections 47(1) and 56 of FOISA.

56. It is a matter of fact that this information was not included in the Authority's response to the Applicant's requirement for review. For that reason, the Commissioner finds the Authority failed to comply with section 21(10) of FOISA.

Decision

The Commissioner finds that the Authority partially complied with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by the Applicant.

The Commissioner finds that in relying on the exception in regulation 10(4)(b) the Authority complied with the EIRs.

However, in failing to include the information required by section 21(10) of FOISA in response to the Applicant's requirement for review, the Authority failed to comply with section 21(10) of FOISA.

Given that the Applicant was able to make an application to the Commissioner in respect of this request, the Commissioner does not require the Authority to take any action in respect of this failure, in response to the Applicant's application. However, this breach will be recorded within the Commissioner's case management system and will be taken into account when determining whether any future action should be taken in line with his Intervention Policy.

Appeal

Should either the Applicant or the Authority 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
4 August 2023**

Appendix 1: Relevant statutory provisions

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) The person who makes such a request is in this Part and in Parts 2 and 7 referred to as the “applicant.”

...

21 Review by Scottish public authority

...

- (10) A notice under subsection (5) or (9) must contain particulars about the rights of application to the Commissioner and of appeal conferred by sections 47(1) and 56.

47 Application for decision by Commissioner

- (1) A person who is dissatisfied with -
 - (a) a notice under section 21(5) or (9); or
 - (b) the failure of a Scottish public authority to which a requirement for review was made to give such a notice.

may make application to the Commissioner for a decision whether, in any respect specified in that application, the request for information to which the requirement relates has been dealt with in accordance with Part 1 of this Act.

- (2) An application under subsection (1) must -
 - (a) be in writing or in another form which, by reason of its having some permanency, is capable of being used for subsequent reference (as, for example, a recording made on audio or video tape);
 - (b) state the name of the applicant and an address for correspondence; and
 - (c) specify –
 - (i) the request for information to which the requirement for review relates;
 - (ii) the matter which was specified under sub-paragraph (ii) of section 20(3)(c); and
 - (iii) the matter which gives rise to the dissatisfaction mentioned in subsection (1).

...

The Environmental Information (Scotland) Regulations 2004

2 Interpretation

(1) In these Regulations –

“the Act” means the Freedom of Information (Scotland) Act 2002;

“applicant” means any person who requests that environmental information be made available;

“the Commissioner” means the Scottish Information Commissioner constituted by section 42 of the Act;

“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;
- (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;
- (d) reports on the implementation of environmental legislation;

...

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

...

- (b) the request for information is manifestly unreasonable;

...

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).

- (2) In the application of any provision of the Act by paragraph (1) any reference to -

- (a) the Act is deemed to be a reference to these Regulations;
- (b) the requirements of Part 1 of the Act is deemed to be a reference to the requirements of these Regulations;

...

- (f) a notice under section 21(5) or (9) (review by a Scottish public authority) of the Act is deemed to be a reference to a notice under regulation 16(4); and

...