

Decision Notice

Decision 065/2019: Mr M and Scottish Water

Milngavie Reservoirs – number of slips and falls

Reference No: 201801478

Decision Date: 23 April 2019



Scottish Information
Commissioner

Summary

Scottish Water was asked for the number of slips and falls in a six month period at Milngavie reservoirs.

Scottish Water disclosed some information and also explained how it managed the information sought. The Commissioner investigated and identified failures by Scottish Water to locate all the information held. More information was disclosed during the investigation.

Relevant statutory provisions

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (definitions (a), (c) and (f) of environmental information) (Interpretation); 5(1) and (2)(b) (Duty to make available environmental information on request); 10(1), (2) and (4)(a) (Exceptions from duty to make environmental information available)

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 2 May 2018, Mr M made a three-part request for information to Scottish Water. The information he asked for was:
 - i) A copy of the Scottish Water Health & Safety Policy and Procedures applicable to Scottish Water employees, its contractors and suppliers and members of the public.
 - ii) A copy of correspondence relating to slips and falls within the Milngavie reservoirs in the past six months.
 - iii) A copy of the Operational Requirement (OR) for the reservoirs, identifying the risks, vulnerable assets and appropriate security measures taken.

He specified that he would like the information provided in electronic pdf format.

2. On 9 June 2018, Mr M wrote to Scottish Water, seeking a review on the grounds that it had not responded to his request within statutory timescales.
3. Scottish Water notified Mr M of the outcome of its review on 21 June 2018. For the first part of the request, it disclosed information. For the second, it considered regulation 10(4)(a) of the EIRs to apply, stating no information was held relative to this part of the request. For the last part, Scottish Water commented to the effect it was unsure what was being sought. Despite this statement, and without seeking clarification, Scottish Water provided some health and safety documentation pertaining to Craigmaddie Reservoir.
 - i) On 5 September 2019, Mr M wrote to the Commissioner in respect of parts ii) and iii) of his request. Mr M 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 the Freedom of Information (Scotland) Act 2002 (FOISA) applies to the enforcement of the EIRs as it applies to the enforcement of FOISA, subject to specified modifications. Mr M stated he was dissatisfied

with the outcome of Scottish Water's review. In respect of part ii) of the request, he expected information to be held and contended it should be disclosed to him. In respect of part iii), he did not understand why Scottish Water had not sought his clarification and did not believe it had addressed this part of the request.

Investigation

4. The application was accepted as valid. The Commissioner confirmed that Mr M 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.
5. On 1 October 2018, Scottish Water was notified in writing that Mr M had made a valid application and the case was allocated to an investigating officer.
6. 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, with particular reference to steps taken to identify and locate any relevant information.
7. During the investigation, Scottish Water disclosed some information and gave further explanations to Mr M, who confirmed to the investigating officer (in an email dated 17 March 2019 and telephone conversation on 18 March 2019) that he did not wish to pursue part iii) further. For this reason, the Commissioner need only consider part ii) of Mr M's request (slips and falls within the past six months).

Commissioner's analysis and findings

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

Application of the EIRs

9. It is clear from Scottish Water's correspondence with both Mr M and the Commissioner that the information sought by Mr M is properly considered to be environmental information, as defined in regulation 2(1) of the EIRs. It relates to the state of the elements (land, water and air) and particularly the condition of the land surfaces of the pathways for safe use by the public at Milngavie reservoirs. The Commissioner is satisfied that any information covered by the request would fall within paragraphs (a), (c) or (f) of the definition in regulation 2(1) (the text of each paragraph is reproduced in Appendix 1). Mr M has not disputed this and the Commissioner will consider the information in what follows solely in terms of the EIRs.

Has all relevant information been identified, located and provided?

10. The Commissioner's remit is to investigate and reach a determination on information, if held. He cannot comment on what a public authority ought to hold, but he can consider whether Scottish Water took adequate, proportionate steps to establish what information, if any, it held falling within the scope of Mr M's request.
11. The standard of proof in considering 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. He will also consider, where appropriate, any reason offered by the public authority to explain why the information is not held.

12. In his application, Mr M submitted that there was historical evidence and correspondence demonstrating that more information was likely to be held.
13. Mr M provided details of his own correspondence with Scottish Water, which included photographs he had taken. For example, he provided an email to an Estates Surveyor dated 29 December 2017, which appears to have been copied to the Customer Services Department of Scottish Water. He could not see how Scottish Water stated it had no reports of slips and falls in light of this, and remained convinced that internal correspondence would have been generated relating to the Health and Safety issues he had raised. He was also concerned to pinpoint whether photos and attachments to his emails remained on record.

Searches

14. In part, Scottish Water dealt with part ii) of Mr M's request as a subject access request under the Data Protection Act 1998. Mr M has not taken exception to this and the authority's application of this legislation is not something the Commissioner has a statutory remit to consider. However, Scottish Water also identified and disclosed some other information (i.e. not Mr M's personal data) covered by part ii) at this stage: in not identifying and disclosing this earlier, the Commissioner finds that Scottish Water failed to deal with part ii) in accordance with regulation 5(1) of the EIRs. It was not, therefore, entitled to apply the exception in regulation 10(4)(a), which it could only do if it did not hold the information in question.
15. With regard to whether any further relevant information was held, Scottish Water described the searches carried out in its accident reporting system when responding to the request. It acknowledged that it had not carried out searches in its "Promise" customer contact system at that time, but confirmed that this had been done during the investigation, providing evidence of the search outcomes. It also acknowledged that search terms used initially would not have been adequate to locate the information discovered later. It explained its arrangements for managing information on the "Promise" system.

Conclusions

16. The Commissioner's remit here extends only to the consideration of whether Scottish Water actually held the information requested and whether it complied with the EIRs in responding to Mr M's request. The Commissioner cannot comment on what should have been recorded in any of its systems or for how long.
17. The Commissioner accepts that, by the end of this investigation, Scottish Water had conducted adequate and proportionate appraisals to establish what information it held and was capable of addressing part ii) of Mr M's request.
18. In all the circumstances, the Commissioner accepts that Scottish Water does not (and did not, at the time it received Mr M's request) hold any information in addition to that now disclosed which was capable of addressing this part of the request.

Decision

The Commissioner finds that, in respect of the matters specified in the application (as modified during the investigation), Scottish Water partially complied with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by Mr M.

The Commissioner finds that Scottish Water correctly disclosed some information at the time of asking, but also finds that more information was held and should have been disclosed at the time of asking. In failing to do so until the Commissioner investigated, Scottish Water breached regulation 5(1) of the EIRs.

Appeal

Should either Mr M 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

23 April 2019

Appendix 1: Relevant statutory provisions

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;

...

(f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in paragraph (a) or, through those elements, by any of the matters referred to in paragraphs (b) and (c);

...

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.

...

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
 - (a) it does not hold that information when an applicant's request is received;...

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