

Decision Notice

Decision 191/2018: Mr H and Scottish Water

Improvement works

Reference No: 201801355

Decision Date: 22 November 2018



Scottish Information
Commissioner

Summary

Scottish Water was asked about improvement works carried out at Milngavie Reservoirs. Scottish Water provided some information, while stating that other information was not held.

An application as made to the Commissioner, questioning whether Scottish Water held more information. The Commissioner was satisfied that Scottish Water had carried out appropriate searches and disclosed all the information it held.

Relevant statutory provisions

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (paragraphs (a) and (c) of definition of "environmental information"); 5(1) (Duty to make available environmental information on request); 10(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 28 March 2018, Mr H made a request for information to Scottish Water. The information requested was in relation to Milngavie Reservoirs and included a copy of the:
 - a) specification(s) for the preparation and paint treatments currently being applied to existing ironworks at the Reservoirs.
 - b) drawings, specifications and scope of works for the improvement works being carried out to the existing footpath to Mugdock Reservoir known as Lovers Walk.
 - c) Order(s) placed on the Contractor(s) for the execution of these works.
2. Scottish Water responded on 27 April 2018. It advised Mr H that the request fell to be considered under the EIRs and provided him with information. It explained that personal data had been redacted from the information.
3. On 29 April 2018, Mr H wrote to Scottish Water, requesting a review of its decision on the basis that he did not accept that all of the information requested had been provided.
4. Scottish Water notified Mr H of the outcome of its review on 21 June 2018. It provided Mr H with further information which, it stated, fell within parts a) and c) of his request. It advised that it did not hold information falling within the scope of part b) of his request.
5. On 27 June 2018, Mr H wrote to Scottish Water and sought clarification on the review outcome provided. He did not accept that he had been provided with all of the information that fell within part a) of his request and submitted that the information provided did not fall within the scope of part c) of his request, as suggested in the review outcome.
6. On 27 June 2018, Scottish Water wrote to Mr H and confirmed that, in its view, it had provided any information it held falling within part a) of his request. It advised that it did not hold any information falling within parts b) and c) of his request.

7. On 15 August 2018, Mr H wrote to the Commissioner. He applied to the Commissioner for a decision in terms of section 47(1) of the Freedom of Information (Scotland) Act 2002 (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. Mr H stated he was dissatisfied with the outcome of Scottish Water's review because he did not accept that all of the information had been provided for part (a) of the request. In addition, he refused to accept that Scottish Water held no information falling within parts b) and c) of his request.

Investigation

8. The application was accepted as valid. The Commissioner confirmed that Mr H 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.
9. On 13 September 2018, Scottish Water was notified in writing that Mr H had made a valid application. The case was then allocated to an investigating officer.
10. 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, focusing on the steps taken to identify and locate any relevant information.
11. Scottish Water responded, maintaining that it did not hold any further information, other than that already provided to Mr H.

Commissioner's analysis and findings

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 Mr H and Scottish Water. He is satisfied that no matter of relevance has been overlooked.

Application of the EIRs

13. It is clear from Scottish Water's correspondence with both Mr H and the Commissioner that the information sought by Mr H is properly considered to be environmental information, as defined in regulation 2(1) of the EIRs. It relates to the repair works carried out to a specific footpath and ironworks, and so the Commissioner is satisfied that it falls within either paragraph (a) or paragraph (c) of the definition in regulation 2(1) (the text of each paragraph is reproduced in Appendix 1). Mr H has not disputed this and the Commissioner will consider the information in what follows solely in terms of the EIRs.

Information held by Scottish Water

14. 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).
15. 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 requires that it give the applicant notice to that effect.

16. In this case, Scottish Water submitted that it had provided Mr H with any information it held falling within the scope of part a) of his request, and that it did not hold any information falling within the scope of parts b) or c).

Regulation 10(4)(a) of the EIRs

17. Regulation 10(4)(a) of the EIRs provides that a Scottish public authority may refuse to make environmental information available to the extent that it does not hold that information when an applicant's request is received. As with all exceptions in regulation 10 of the EIRs, the exception in regulation 10(4)(a) is subject to the public interest test.
18. The Commissioner has taken account of the submissions provided by Mr H, in which he provides reasons why he considers Scottish Water should hold further information falling within the scope of part a) his request, and also information relating to parts b) and c). While Mr H may have genuine reasons for believing that Scottish Water should hold further information, the Commissioner can only consider whether or not Scottish Water identified and located the information it actually held.
19. Scottish Water provided submissions in response to the questions put by the investigating officer on this matter. Scottish Water provided full submissions on the steps taken to identify and locate the information requested by Mr H. Scottish Water confirmed the searches and enquiries it undertook to ascertain whether it held any further information falling within the scope of Mr H's request, detailing the places searched. These included searches of relevant email records and consultation with relevant staff. The conclusion of these searches and enquiries was that no information was held, other than that provided to Mr H.
20. Scottish Water submitted that the information held and falling within the scope of part a) of Mr H's request had been located and provided to Mr H. It provided evidence to this effect.
21. Having considered all relevant submissions and the terms of Mr H's request, the Commissioner accepts that Scottish Water took adequate, proportionate steps to establish whether it held any information falling within the scope of those parts of Mr H's request covered by his application to the Commissioner.
22. As mentioned above, the Commissioner can only consider whether information is actually held by Scottish Water, not what information it should hold or what an applicant believes it should hold.
23. In all the circumstances, therefore, the Commissioner is satisfied that Scottish Water provided Mr H with all of the information it held falling within part a) of his request and accepts, on the balance of probabilities, that Scottish Water does not (and did not, at the time it received the request from Mr H) hold any information falling within the scope of parts b) and c) of the request. If Scottish Water did hold any further relevant information, the Commissioner is satisfied that it would have been found by the searches carried out.
24. The exception in regulation 10(4)(a) is subject to the public interest test in regulation 10(1)(b) of the EIRs and can only be upheld if, in all the circumstances, the public interest in maintaining the exception outweighs the public interest in making the information available. The Commissioner is satisfied that Scottish Water does not (and did not) hold the information in question. Consequently, he does not consider there to be any conceivable public interest

in requiring that the information be made available. The Commissioner therefore concludes that the public interest in making the requested information available is outweighed by that in maintaining the exception in regulation 10(4)(a) of the EIRs.

25. The Commissioner is satisfied, therefore, that Scottish Water, in addition to having provided the information it held falling within part a) of his request, was entitled to inform Mr H, under regulation 10(4)(a) of the EIRs, that it did not hold the information requested in parts b) and c) of the request.

Decision

The Commissioner finds that Scottish Water complied with the Environmental Information (Scotland) Regulations 2004 in responding to the information request made by Mr H.

Appeal

Should either Mr H 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

22 November 2018

Appendix 1 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

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(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;

...

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