



Scottish Information
Commissioner
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Decision Notice 153/2024

Whether request was manifestly unreasonable

Authority: Scottish Environment Protection Agency
Case Ref: 202400020

Summary

The Applicant asked the Authority for all information relating to it (the Applicant) over a five-year period. The Authority considered that responding to the request would be manifestly unreasonable. The Commissioner investigated and found that the Authority had been correct to rely on the exception in regulation 10(4)(b) of the EIRs.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 39(2) (Health, safety and the environment); 47(1) and (2) (Application for decision by Commissioner)

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (paragraphs (a), (b), (c) and (f) of definition of “the Act”, “applicant” and “the Commissioner”) (Interpretation); 5(1) and (2)(b) (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) and (b) (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 29 July 2022, the Applicant made a request for information to the Authority. Among other things, it asked for:

“All documents, reports and correspondence including emails, internal & external, file notes or any other items you hold relating to Soil Treatment Services Ltd (STS) between 1.1.2017 – 31.12.2021.”
2. The Authority did not respond to the information request, but updated the Applicant on 31 August 2022 with an apology that there would be a delay in responding to the request.
3. On 17 October 2022, the Authority asked the Applicant to clarify if the request related to Soil Treatment Services or Soil Treatment Systems. The Applicant responded the following day confirming that the request related to Soil Treatment Systems and that the reference to Soil Treatment Services was a typographical error.
4. On 24 October 2022, the Authority invited the Applicant to narrow the scope of the request due the large volume of information falling within scope. The Applicant did not narrow the request.
5. On 10 January 2023, the Applicant wrote to the Authority, requiring a review in respect of its failure to respond. The Applicant did not receive a response to their requirement for review.
6. The Applicant wrote to the Commissioner on 12 April 2023, stating that it was dissatisfied with the Authority’s failure to respond and applying to the Commissioner for a decision in terms of section 47(1) of FOISA. The enforcement provisions of FOISA apply to the enforcement of the EIRs, subject to specified modifications – see regulation 17.
7. In [Decision 052/2023](#)¹, the Commissioner found that the Authority had failed to respond to the Applicant’s request for information and requirement for review within statutory timescales and required the Authority to issue a response by 10 July 2023.
8. The Authority notified the Applicant of the outcome of its review on 7 July 2023. The Authority refused to make information available which would fulfil the request, arguing that it would be manifestly unreasonable (in line with regulation 10(4)(b)) to do so.
9. On 5 January 2024, 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 that it was dissatisfied with the outcome of the Authority’s review because it did not consider that its request was manifestly unreasonable and that the public interest favoured disclosure of the information requested.
10. The Applicant also explained that its request related to an application for, and correspondence associated with, a Mobile Plant Licence for the operation of a Thermal Desorption Unit (which the Authority had granted).

¹ <https://www.foi.scot/decision-0522023>

Investigation

11. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
12. On 7 February 2024, the Authority was notified in writing that the Applicant had made a valid application and the case was subsequently allocated to an investigating officer.
13. 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 on why it was of the view that it would be manifestly unreasonable for it to make information available which would fulfil the request.

Commissioner's analysis and findings

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

Application of the EIRs

15. It is clear from the terms of the request, the context provided by the Applicant and 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 (in particular, paragraphs (a), (b), (c) and (f)).
16. The Applicant has not disputed the Authority's decision to handle its request under the EIRs, and the Commissioner will consider the information in what follows solely in terms of the EIRs.

Section 39(2) of FOISA – Environmental information

17. The exemption in section 39(2) of FOISA provides, in effect, that environmental information (as defined by regulation 2(1) of the EIRs) is exempt from disclosure under FOISA, thereby allowing any such information to be considered solely in terms of the EIRs. In this case, the Commissioner accepts that the Authority was entitled to apply this exemption to the information withheld under FOISA, given his conclusion that it is properly classified as environmental information.
18. As there is a statutory right of access to environmental information available to the Applicant in this case, the Commissioner accepts, in all the circumstances, that the public interest in maintaining this exemption (and responding to the request under the EIRs) outweighs any public interest in disclosing the information under FOISA. Both regimes are intended to promote public access to information and there would appear to be no reason why (in this particular case) disclosure of the information should be more likely under FOISA than under the EIRs.
19. The Commissioner therefore concludes that the Authority was correct to apply section 39(2) of FOISA and to consider the Applicant's information request under the EIRs.

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

20. 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.

21. On receipt of a request for environmental information, therefore, the authority must ascertain what information it holds falling within the 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)).
22. Under the EIRs, a public authority may refuse to make environmental information available if one or more of the exceptions in regulation 10 applies.

Regulation 10(4)(b) – Manifestly unreasonable

23. Regulation 10(4)(b) provides that a Scottish public authority may refuse to make environmental information available to the extent that the request for information is manifestly unreasonable. 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.
24. The EIRs do not define the term “manifestly unreasonable”, and neither does the Directive on which the EIRs were based (Directive 2003/4/EC on public access to environmental information and repealing Directive 90/313/EEC). However, the Aarhus Convention Implementation Guide, named after the Convention on which the Directive was based, makes it clear that volume and complexity alone do not make a request “manifestly unreasonable”.
25. The Commissioner's general approach is that the following factors are relevant when considering whether a request is manifestly unreasonable. These are that the request:
 - (i) would impose a significant burden on 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 manifestly unreasonable or disproportionate.
26. 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

27. As rehearsed earlier, the Applicant explained that its request related to an application for, and correspondence associated with, a Mobile Plant Licence for the operation of a Thermal Desorption Unit (which the Authority had granted).
28. The Applicant submitted that prior to processing material through the plant it was required to additionally agree a Site-Specific Working Plan (SSWP) with the Authority. The Applicant explained that it had submitted 14 variations of this SSWP – in response to changes requested by the Authority over a period of three years – all of which had been rejected.

29. The Applicant argued that compliance with its request was not manifestly unreasonable, as the request related to a single, granted application and subsequent variations to an associated SSWP. In particular, the Applicant considered:
- the volume of correspondence associated with the matter was unlikely to place a disproportionate cost or burden on the Authority (given its size and resources)
 - the request had a serious purpose as disclosure of the information requested would cast light on the reasons for a three-year delay by the Authority in a licensing process that the Applicant considered should take 10 days only
 - the Authority had failed to detail and justify the significant burden of responding to the request
 - disclosure would demonstrate the Authority's fairness, transparency and competence
 - asking the Authority to provide information relating to this matter would not, therefore, be considered unreasonable or disproportionate by a reasonable person.

The Authority's submissions

30. The Authority submitted that it held a large volume of information, across a range of locations and formats, correspondence relating to this specific application and working plan, including extensive correspondence establishing whether the permit applied for was the correct one (in the specific circumstances), and extended conversations with the Applicant offering advice on its SSWP.
31. The Authority explained that it considered the factors outlined in the [Commissioner's guidance on regulation 10\(4\)\(b\)](#)² and concluded that, given the volume of relevant information held, complying with the request would:
- impose a "significant burden" on it as it would require a disproportionate amount of time and the diversion of an unreasonable proportion of resources, including financial and human, away from other statutory functions
 - otherwise, in the opinion of a reasonable person, be considered manifestly unreasonable or disproportionate.
32. 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.

Searches

33. The Authority explained that searches were undertaken by colleagues in its Registry, Waste and Industry and Greater Glasgow and Clyde Estuary teams as they were most likely to hold relevant information, being responsible for licensing matters, regulation of the Applicant (specifically) and the plant site itself.
34. The Authority submitted that these searches, and internal discussions, identified both a large volume of digital and paper-based information likely to be in scope and a wide range of teams and individuals within the organisation likely to hold further relevant information. The

² [BriefingRegulation104bManifestlyUnreasonableRequests.pdf \(foi.scot\)](#)

Authority explained that resulting attempts to narrow the request further, in consultation with the Applicant, had been unsuccessful.

35. Following notification of the Applicant's appeal to the Commissioner (which resulted in Decision 052/2023), the Authority confirmed that it had carried out further searches.
36. These searches were undertaken by seven colleagues and two teams, which resulted in the identification of a range of emails and documents. The Authority also carried out a digital search of its network, which had identified 2,375 items within the scope of the Applicant's request. The Authority provided evidence of these search returns to the Commissioner.
37. Having identified a large volume of information within scope, the Authority notified the Applicant of the outcome of its review on 7 July 2023 and refused to make information available which would fulfil the request, arguing that it would be manifestly unreasonable (in line with regulation 10(4)(b)) to do so.

Estimated cost of complying with the request

38. During the investigation, the Applicant suggested it might accept the information requested for a specified two-year (as opposed to five-year) period. The Authority confirmed that it still considered providing the information for a narrowed two-year timeframe to be manifestly unreasonable and provided the following evidence to support this:
 - Files identified – 1,968 files
 - Initial assessment and preparing itemised schedule – 935 hours
 - Removing duplicates and out of scope items – 14 hours
 - Considering application of relevant EIR regulations – 7 hours
 - Redacting withheld information – 492 hours
 - Conduct final review – 7 hours
 - Total time to comply with the request – 1,455 hours/207 working days
39. The Authority provided the following estimate to the Commissioner to support this. It explained that it had based this on a previous exercise to review files for personal data, and prepare an accompanying schedule, in the wake of a criminal cyberattack on the Authority in December 2020:
40. The Authority noted that the 1,968 files identified in its narrowed search did not include itemised emails or email attachments. It provided further evidence to the Commissioner that this information was held across several locations, including email folders, OneDrive, SharePoint and Teams.
41. The Authority submitted that, in order to respond to the request, Grade E officers would be required to carry out the work. The mid-point salary scale for Grade E is £37,572, which equates to an hourly rate of £21.06 and a total estimated cost to comply with the request of at least £30,642.
42. The Authority argued that to comply with the request would therefore have a significant impact on its ability to comply with its statutory obligation to respond to information requests. Specifically, it noted that seven Grade E staff (including its entire cohort of Information

Access Coordinators) would be fully engaged for 10 days carrying out the initial assessment and scheduling work described alone.

43. As a consequence, the Authority explained that there would be no appropriately-trained officers available to respond to information requests over that period. It estimated (on the basis of previous request volumes) that this would result in 90 requesters not receiving a response within statutory timescales.
44. The Authority further submitted that complying with the request would also have a detrimental impact on its ability to carry out its regulatory duties by diverting officials from conducting inspections and investigations assessing environmental operators' compliance with environmental laws.

The Commissioner's view

45. The Commissioner considers the terms of the Applicant's request to be critical here. The request is very broad; it effectively seeks *all* information held by the Authority relating to it (the Applicant) over a five-year period.
46. While the Applicant indicated that it might be prepared to reduce the time period covered by the request and subsequently explained that it is seeking information relating to its application for a Mobile Plant Licence, the Commissioner can only consider the terms of the original request.
47. Having considered the terms of the original request and the submissions provided by the Authority, the Commissioner accepts that there is a significant volume of information falling within the scope of the request. Complying with the request would therefore impose a significant burden on the Authority, given the time, cost and diversion of resources that would be involved.
48. The Commissioner recognises that requests which are too wide-ranging might lead to a response taking longer or mean unnecessary work for public authorities and, by extension, they may lead to the request being refused the grounds of the significant burden imposed.
49. While the Commissioner accepts a significant burden would be imposed on the Authority, he takes issue with some of the cost estimate provided by the Authority for the narrowed two-year search (which identified 1,968 documents).
50. For example, the Authority has estimated that it would take 935 hours to assess and prepare an itemised schedule and that it would take 15 minutes, on average, to physically redact each of the 1,968 documents. The Commissioner does not believe that either estimate is wholly accurate and he would urge authorities to ensure their estimates are accurate and robust.
51. The Commissioner also notes that the Authority has, in estimating the financial burden that would be imposed by complying with the request, included steps that could not be charged for under the EIRs were it to comply with, and make a charge for, the request.
52. However, the Commissioner recognises that the calculation above is based on a narrowed two-year search and that the Applicant's request effectively sought *all* information held by the Authority relating to it (the Applicant) over a five-year period. In other words, there is significantly more relevant information held by the Authority than that factored into the calculation above.

53. In the circumstances, despite his reservations over the accuracy of some of the Authority's estimated costs, the Commissioner is satisfied, on balance, that responding to this request, given its wide-ranging nature, would impose a significant burden on the Authority, which would, in the circumstances, be manifestly unreasonable. Having reached this conclusion, the Commissioner is required to consider the public interest test in regulation 10(1)(b) of the EIRs.

EIRs: the public interest test

54. 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 Applicant's request is manifestly unreasonable, he must still require the Authority to respond to that request if the public interest in making the information available outweighs that in maintaining the exception.

The Applicant's submissions on the public interest

55. The Applicant argued that the Authority had not applied a presumption in favour of disclosure, as it is required to do under regulation 10(2)(b) of the EIRs.

56. The Applicant stated that it had endured unacceptable delays in the process of seeking a SSWP and argued there was a public interest in understanding why an application it considered had the potential to create local jobs, and contribute to the reduction of CO², had stalled and not been progressed appropriately.

57. The Applicant further submitted that there was a public interest in identifying why a licensing process it considered should take ten days had now run into a third year (without prospect of conclusion). The Applicant argued that disclosure of the information requested would therefore help to ensure transparency and have the effect of holding the Authority publicly accountable for its performance.

The Authority's submissions on the public interest

58. The Authority acknowledged that there is a public interest in the transparency and openness of its operations, which extends to assessing its processes and ability to regulate Scotland's environment.

59. On the other hand, the Authority contended that there is a strong public interest in its ability to carry out its core functions effectively (including where these relate to access to information) without significant and unreasonable disruption or diversion.

60. The Authority submitted that complying with the request would temporarily restrict its ability to respond to information requests, which would impact on its ability to meet the targets set out in the Commissioner's [ongoing Level 2 Intervention](#)³ in respect of the Authority. It considered this would not be in the public interest.

61. The Authority further submitted that it was not the intention of the EIRs to require authorities to expend excessive time, cost and resource to the handling of an EIR request where this would be to the detriment of authorities' statutory functions (which it considered would be the case for it if it complied with the Applicant's request).

³ <https://www.foi.scot/interventions-activity>

62. On balance, the Authority concluded that the public interest in maintaining the exception under the terms of regulation 10(4)(b) of the EIRs outweighed that in making the information requested available.

The Commissioner's view on the public interest

63. In the Commissioner's view, there is an inherent public interest in disclosure of information to ensure an authority is transparent and accountable. In this case, disclosure would allow public scrutiny of the Authority's actions, particularly on matters relating to permits and whether it is properly discharging its functions in that regard.
64. 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.
65. As rehearsed earlier, the Commissioner has already accepted that providing the information requested in this case would incur significant costs to the Authority in staff time and resources and, to a certain extent, divert resources away from core functions.
66. The Commissioner considers there is a public interest in ensuring the EIRs are used responsibly. While public authorities are encouraged to 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.
67. While the Commissioner acknowledges the Authority's duty to respond to this request, he notes 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 this disproportionately.
68. The Commissioner recognises that there is a public interest in protecting the integrity of the EIRs, but it is not the intention of the legislation to require public authorities to devote excessive or disproportionate amounts of resource to a particular request.
69. On balance, therefore, the Commissioner accepts that, in all the circumstances of this case, the public interest arguments in favour of making the information captured by this request available are outweighed by the public interest in maintaining the exception in regulation 10(4)(b) of the EIRs. The Commissioner finds that the Authority was entitled to withhold the requested information under this exception.

Decision

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

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.

David Hamilton
Scottish Information Commissioner

16 July 2024

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.”
- ...
- (6) This section is subject to sections 2, 9, 12 and 14.

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 –
...
 - (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

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.

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;

...

“the Directive” means Directive 2003/4/EC of the European Parliament and of the Council on public access to environmental information and repealing Council Directive 90/313/EEC;

“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;

...

(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

...

(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

...