

Decision Notice 066/2020

Sponsorship of Wetland maintenance

Applicant: The Applicant

Public authority: Scottish Environment Protection Agency

Case Ref: 201901895



Scottish Information
Commissioner

Summary

SEPA was asked for details of grants from the Scottish Government for maintenance of Wetlands and Reed Bed Water Filter Systems by Scottish Water and conditions attached to public funding for maintenance.

SEPA explained it did not receive money from the Scottish Government to control or fund Scottish Water to undertake this work.

The Commissioner investigated and found that SEPA had complied with the EIRs in responding to the request.

Relevant statutory provisions

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

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (paragraphs (a) and (c) of definition 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 17 June 2019, the Applicant made a request for information to the Scottish Environment Protection Agency (SEPA). The information requested was:
 - Annual amount of all sponsorship monies, grant funding received from Scottish Government specifically for the maintenance of ALL wetlands and Reed Bed Filter Systems to be carried out by licence by Scottish Water. Advise if payments are received on an annual basis and supply this information for the past 3 years.
 - All information and signed conditions of reference for the sponsorship and/or conditions of grant specifically for all Wetlands and Reed Bed Water Filter Systems under your remit.
2. SEPA responded on 15 July 2019. It identified the request as a request for environmental information in terms of the EIRs. It stated that it did not hold the information requested and identified the Scottish Government or Scottish Water as the appropriate authorities to contact.
3. On 30 August 2019, the Applicant wrote to SEPA requesting a review of its decision. He commented that it is known that all funding/grant funding comes with conditions of funding, i.e. what the Scottish Government expect for their money.
4. SEPA notified the Applicant of the outcome of its review on 20 September 2019. SEPA upheld its handling under the EIRs and upheld the original response. SEPA explained that it

does not receive any funding from the Scottish Government for the specified activities and does not provided grant funding to Scottish Water for these activities. SEPA's response included a link to website information on Water Environment Fund.

5. On 14 October 2019, the Applicant wrote to the Commissioner. The Applicant 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.
6. The Applicant stated he was dissatisfied with the outcome of SEPA's review. He explained that the Scottish Government has a duty under the Water Framework Directive (WFD) to provide a comprehensive framework for protecting and improving the condition of the water environment across Europe, and SEPA, as the regulatory body, is to oversee legislation and the WFD to protect and improve the condition of water across Scotland.

Investigation

7. The application was accepted as valid. The Commissioner confirmed that the Applicant 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.
8. On 7 November 2019, SEPA was notified in writing that the Applicant had made a valid application and the case was allocated to an investigating officer.
9. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. SEPA was invited to comment on this application and to answer specific questions. These related to SEPA's role, if any, with regard to Wetlands and Reed Bed Water Filter Systems maintenance and sponsorship, searches undertaken to determine information held/not held and whether SEPA had ever held this information on its own behalf or on behalf of another authority.

Commissioner's analysis and findings

10. 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 the Applicant and SEPA. He is satisfied that no matter of relevance has been overlooked.
11. Having considered the terms of the request and SEPA's submissions, it is clear that any information falling within the scope of the request would be environmental information, as defined in regulation 2(1) of the EIRs. The information in question concerns the water environment and, as such, the Commissioner is satisfied that it would fall within either paragraph (a) or paragraph (c) of the definition of environmental information in regulation 2(1) of the EIRs (reproduced in Appendix 1 to this decision).
12. In this case, therefore, the Commissioner accepts that SEPA was entitled to apply the exemption in section 39(2) of FOISA, given his conclusion that it is properly considered to be environmental information.
13. This exemption is subject to the public interest test in section 2(1)(b) of FOISA. As there is a separate statutory right of access to environmental information available to the Applicant in this case, the Commissioner accepts that the public interest in maintaining this exemption and dealing with the request in line with the requirements of the EIRs outweighs any public

interest in disclosure of the information under FOISA. As such, he has proceeded to consider this case solely in terms of the EIRs.

Regulation 5(1) of the EIRs

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 an 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. 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 of the circumstances of the case, the public interest in maintaining the exception or exceptions outweighs the public interest in making the information available.
16. If no such information is held by the authority the exception in regulation 10(4)(a) of the EIRs will apply.
17. The Commissioner has taken into account the submissions provided by the Applicant, in which he provides reasons why he believes SEPA should hold the information requested.

Regulation 10(4)(a) of the EIRs

18. 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 the information when a request is received. As indicated above, the exception in regulation 10(4)(a) is subject to the public interest test.
19. SEPA explained that the first request relates to wetlands and reed beds used by Scottish Water as part of a waste water treatment system. These are often used to provide the final phase of treatment of waste water before discharge and as such are regulated under Water Environment (Controlled Activities) (Scotland) Regulations 2011 (the 2011 Regulations). SEPA explained that the 2011 Regulations specify the quality of the discharge from Scottish Water treatment systems and any means if treatment may be used providing the required quality of discharge effluent is achieved. As such, SEPA explained it does not control or fund Scottish Water to design, build or operate wetlands or reed bed systems; SEPA regulates them against the conditions of licence issued under the 2011 regulations.
20. The second element of the request relates to SEPA's wider duties under the WFD and concerns how SEPA undertakes its duties in relation to natural wetlands rather than man-made systems designed for water treatment. SEPA explained that it has a general duty to preserve and improve the quality of lochs, rivers, estuaries, wetlands, ground waters and coastal waters so they are sustainable for the future. In practice, this is achieved through the River Basin Management Plan and assessment through the planning and permitting processes. Planning applications received by SEPA will be assessed for any potential impact on wetlands. Activities which are likely to have an impact on the water environment, including wetlands, must be authorised under the 2011 regulations. Compliance with the licence is the responsibility of the holder and SEPA explained that it does not provide any funding to assist with this, only ensure compliance with the conditions of the licence.
21. During the investigation, SEPA provided submissions to the investigating officer confirming that searches were undertaken by relevant SEPA staff who have direct involvement with the

receipt of funding from the Scottish Government and the provision of funding to external bodies. Confirmation was provided that SEPA was not in receipt of funding from the Scottish Government for the purposes specified in the request.

22. Searches were also conducted of colleagues working on the provision of grants under the Water Environment Fund for any past or present projects to determine whether any funding had been provided within the terms of the Fund in relation to wetlands. Again, no information was identified.
23. Having considered all relevant submissions and the terms of the Applicant's request, the Commissioner accepts that SEPA took adequate, proportionate steps to establish whether it held any information falling within the scope of the request.
24. In this case the Commissioner is satisfied that SEPA did not hold the information requested by the Applicant.
25. 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 of the case, the public interest in maintaining the exception outweighs the public interest in making the information available. The Commissioner is satisfied that SEPA does not (and did not) hold the information in question. Consequently, he does not consider there to be any conceivable public interest in requiring the information to be made available.
26. 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.
27. SEPA was, therefore, entitled to apply regulation 10(4)(a) of the EIRs in this case and in appropriately giving notice it also complied with regulation 5(1) of the EIRs.

Decision

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

Appeal

Should either the Applicant or SEPA 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

11 June 2020

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.

...

- (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.

...

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;

...

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;

...

Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews, Fife
KY16 9DS

t 01334 464610

f 01334 464611

enquiries@itspublicknowledge.info

www.itspublicknowledge.info