

Decision Notice

Decision 064/2016: Mrs E and the Scottish Environment Protection Agency

Drainage at a named property

Reference No: 201501872

Decision Date: 16 March 2016



Scottish Information
Commissioner

Summary

On 1 August 2015, Mrs E asked the Scottish Environment Protection Agency (SEPA) for information about drainage at a named property.

SEPA disclosed a redacted telephone note in response to part (i) of the request. It informed Mrs E that it did not hold other information covered by her request.

During the investigation, SEPA disclosed additional information from the telephone note.

The Commissioner found that SEPA initially failed to provide Mrs E with all of the information she was entitled to from the telephone note. However, the Commissioner was satisfied that SEPA was entitled to withhold the remaining information within the telephone note and that it did not hold the other information she had requested.

The Commissioner does not require SEPA to take any action.

Relevant statutory provisions

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (definitions (a), (b) and (c) "environmental information") and 2(3) (definitions (b) and (d) ("the data protection principles" and "personal data"); 5(1) and (2) (Duty to make available environmental information on request); 10(1), (2), (3), (4)(a) and (5)(f) (Exceptions from duty to make environmental information available); 11(2), (3)(a)(i) and (b) (Personal data)

Data Protection Act 1998 (the DPA) sections 1(1) (Basic interpretative provisions) (definition of "personal data"); Schedules 1 (The data protection principles, Part I - the principles) (the first data protection principle) and 2 (Conditions relevant for purposes of the first principle: processing of any personal data) (Condition 6)

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. Mrs E had been given a copy of a letter which SEPA had sent to her neighbours in November 2013, identifying three drainage options for their property:
 - Option 1 – A septic tank (existing) discharging to a closed soakaway within their grounds.
 - Option 2 – A discharge to the unnamed burn across the public road; this would require secondary treatment.
 - Option 3 – Retain the discharge on their land and discharge to the small ditch running alongside their driveway. (SEPA commented that this was not ideal because the ditch was known to run dry, and would be considered to be a last resort in terms of options.)
2. On 1 August 2015, Mrs E made a request for information to SEPA. She asked:
 - (i) Why options 1 and 2 were ruled out and what were the range of reasons that were acceptable to SEPA that prevented options 1 and 2 being utilised.

- (ii) For any evidence that the burn into which effluent is now being discharged from [the named property] has a reasonable flow.
- 3. SEPA responded on 31 August 2015. In relation to part (i) of the request, SEPA disclosed a redacted version of a telephone note, withholding some information under regulation 11(1) and (2) of the EIRs. In relation to part (ii) of the request, SEPA stated that it did not hold any information and that the exception in regulation 10(4)(a) of the EIRs therefore applied.
- 4. On 2 September 2015, Mrs E wrote to SEPA requesting a review of its decision. She considered that she never had received any explanation (satisfactory or otherwise) to show why options 1 and 2 were discounted, and she did not accept that SEPA did not hold information about the flow in the burn (which she described as a ditch).
- 5. SEPA notified Mrs E of the outcome of its review on 29 September 2015. SEPA upheld its previous response without amendment.
- 6. On 9 October 2015, Mrs E 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.

Investigation

- 7. The application was accepted as valid. The Commissioner confirmed that Mrs E made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to her for a decision.
- 8. On 3 November 2015, SEPA was notified in writing that Mrs E had made a valid application. SEPA was asked to send the Commissioner the information withheld from her. SEPA provided the information 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 the application and answer specific questions including justifying its reliance on any provisions of the EIRs it considered applicable to the information requested.
- 10. SEPA provided its submission on 13 January 2016. It offered to disclose further information from the telephone note, and stated that it was now withholding the majority of the information under regulation 10(5)(f) of the EIRs, but names of individuals were being withheld under regulation 11(1) and (2) of the EIRs. SEPA provided submissions to support its position that it did not hold any information regarding the flow in the burn.
- 11. SEPA was asked for additional submissions as to why it did not hold further information about the choice of option and why it did not hold any information about the flow in the burn. It was invited to disclose further information from the redacted telephone note.
- 12. On 16 February 2016, SEPA disclosed further information from the telephone note to Mrs E and provided her with the information it held about the surrounding watercourses. It confirmed that it did not hold information about the burn or ditch into which the effluent was discharged. SEPA explained why it did not hold any further information.

Commissioner's analysis and findings

13. 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 her by both Mrs E and SEPA. She is satisfied that no matter of relevance has been overlooked.
14. In her application, Mrs E raised many questions about SEPA's practices regarding the authorisation of option 3, explaining that it has had a material impact on her and her family and appeared to be in contravention of the regulations on discharges into watercourses.
15. As stated in previous decisions, the Commissioner's remit extends only to the consideration of whether a Scottish public authority holds the requested information and whether it has complied with Part 1 of FOISA or the EIRs in responding to a request. The Commissioner cannot comment on whether a public authority should have recorded any, or more, information about a particular event or process.

Application of the EIRs

16. The Commissioner is satisfied that the information covered by this request is environmental information, as defined in regulation 2(1) of the EIRs (paragraphs (a) to (c) of the definition of "environmental information"). The information relates substantially to factors affecting the elements of the environment, specifically effluent entering a watercourse. Mrs E has not disputed SEPA's decision to handle the request under the EIRs and the Commissioner will consider the information solely in terms of the EIRs in what follows.

Was all relevant information identified, located and provided by SEPA?

17. 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 the information held by an authority when it receives a request.
18. Mrs E considered it likely that SEPA held more information than it had identified and disclosed in its response, specifically with regard to the flow at the burn.
19. SEPA stated that the telephone note was the only note of the reasons why options 1 and 2 were not taken forward. It confirmed that, while it held information on adjacent watercourses, it did not hold information about the burn or ditch in question. It noted that an assessment of the flow in the ditch was made during the investigation of Mrs E's complaint and was communicated to her in the Stage 2 Complaint response.

Searches carried out by SEPA

Part (i) - options

20. SEPA explained that its Borders Operations Team Unit maintains paper and electronic records of matters relating to the sewerage arrangements in the vicinity in question. This team had been involved in searching for information covered by the request.
21. SEPA submitted that all of the information within the scope of Mrs E's request had been collated previously, when answering an earlier information request which also related to sewerage issues in the vicinity of the named property. The earlier request had sought information within a specified date range and encompassed all documentation, including letters, emails and telephone calls between the named property and SEPA from the beginning of 2010 to the present day in connection with the named property and Mrs E's

house. The telephone note was one of the documents identified in relation to the earlier request (these documents were not disclosed to Mrs E).

22. SEPA explained that, under the Water Environment (Controlled Activities) (Scotland) Regulations 2011¹ (CAR), its role with respect to new registration discharges to the water environment (such as that at the neighbour's property) relates to assessing applications and issuing authorisations for such discharges to protect the water environment.
23. SEPA explained that any person can apply for a CAR authorisation without prior dialogue or approval. The applicant chooses which options they progress through an application to SEPA. The assessment of an application (in terms of whether SEPA can issue or refuse that application) will be undertaken during the determination period (30 days for a registration).

Part (ii) – flow at the burn

24. SEPA explained that its searches for information falling within this part of the request were carried out in the same manner the searches relating to part (i) of the request. SEPA's Borders Operations Team confirmed that flow survey information had been requested for an unnamed burn, but explained that "this is not the ditch that runs past the named property, but is the burn that the ditch runs into".
25. SEPA provided an extract from a response from one of its senior managers regarding the flow data held by SEPA in relation to the watercourses in the vicinity of the named property. This explained that SEPA does not hold any flow measurement information in relation to the "ditch", but does hold flow data and calculations for the burn into which the ditch flows. It confirmed that SEPA does not routinely monitor flows or water quality on such small watercourses, but had committed to undertake some effluent monitoring at the named property to ensure protection of the environment.
26. SEPA provided the above information to Mrs E, with other contextual information (disclosed in response to her other requests) regarding the watercourses in the vicinity of the named property.

The Commissioner's finding

27. Having considered all the relevant submissions, the Commissioner is satisfied that SEPA has taken adequate and proportionate steps to establish the information it held which fell within the scope of Mrs E's request. She accepts, on the balance of probabilities, that SEPA has identified all of the information falling within scope of Mrs E's request, and that SEPA does not hold any further information covered by the request.

Part (i) of the request

28. The Commissioner is satisfied that the only recorded information which is covered by this part of the request and which has been withheld is information from a note of a telephone conversation with the licence holder (the neighbour).
29. Some information from the withheld telephone note was disclosed to Mrs E after SEPA issued its review response. In relation to this information, the Commissioner finds that SEPA failed to comply with regulation 5(1) of the EIRs in responding to Mrs E's request, by failing to provide the information within the statutory timescale for response.

¹ <https://www.sepa.org.uk/regulations/water/small-scale-sewage-discharges/#six>

30. SEPA withheld the remaining information in the telephone note under regulations 11(1) and (2) and 10(5)(f) of the EIRs.

Regulation 11(1) of the EIRs - personal data of the applicant

31. SEPA submitted that some of the information being withheld was the personal data of Mrs E and should be excepted under regulation 11(1) of the EIRs.
32. Regulation 11(1) contains an absolute exception (i.e. not subject to the public interest test) in relation to personal data of which the applicant is the data subject. This exception exists under the EIRs because individuals have a separate right to request their own personal data under section 7 of the DPA (commonly known as a subject access request). The DPA will usually determine whether a person has a right to information about themselves. Therefore, the effect of the exception in regulation 11(1) of the EIRs is not to deny individuals a right of access to information about themselves, but to ensure that the right is exercised under the appropriate legislation.

Is the information under consideration Mrs E's own personal data?

33. "Personal data" are defined in section 1(1) of the DPA as "data which relate to a living individual who can be identified from those data, or from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller, and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual".
34. Having reviewed the information withheld in terms of regulation 11(1) of the EIRs, the Commissioner is satisfied that it comprises the personal data of Mrs E. Mrs E can be identified from the information, which focuses on her, and is biographical in relation to her: consequently, it relates to her. Therefore, it is the Commissioner's view that this information is excepted from disclosure under regulation 11(1) of the EIRs and that this information was correctly withheld by SEPA.
35. The Commissioner notes that, outwith the EIRs, SEPA has given Mrs E a version of the telephone note which includes her personal data.

Regulation 11(2) of the EIRs - personal data of third parties

36. SEPA withheld the name of the licence holder under regulation 11(2) of the EIRs.
37. In order for a Scottish public authority to rely on this exception, it must show (i) that the information is personal data for the purposes of the DPA, and (ii) that making it available would contravene at least one of the data protection principles laid down in the DPA. In this case, SEPA argued that the first data protection principle would be contravened if the information was disclosed.

Is the withheld information personal data?

38. The definition of personal data has been set out above. The Commissioner accepts that a living individual would be identified from the withheld information. The information relates to the individual in a biographical sense and is their personal data.

The first data protection principle

39. The first data protection principle states that the processing of personal data (in this case, making those data publicly available in response to a request made under the EIRs) must be fair and lawful and, in particular, that personal data shall not be processed unless at least

one of the conditions in Schedule 2 to the DPA is met. In the case of sensitive personal data, at least one of the conditions in Schedule 3 to the DPA must also be met. The Commissioner has considered the definition of sensitive personal data set out in section 2 of the DPA and does not consider any of the withheld information to be sensitive personal data.

40. There are three separate aspects to the first data protection principle: (i) fairness, (ii) lawfulness and (iii) the conditions in the schedules. These three aspects are interlinked. For example, if there is a specific condition which permits the personal data to be made available, it is likely that disclosure will also be fair and lawful.
41. The Commissioner will now go on to consider whether there are any conditions in Schedule 2 to the DPA which would permit the personal data to be made available. If any of these conditions can be met, she must then consider whether the disclosure of these personal data would also be fair and lawful.

Can any of the conditions in Schedule 2 to the DPA be met?

42. SEPA confirmed that the licence holder had not given consent to disclose the information, when consulted.
43. The Commissioner has considered all the conditions in Schedule 2 and considers that condition 6 is the only one which might be relevant in this case. Condition 6 allows personal data to be processed if the processing is necessary for the purposes of legitimate interests pursued by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject (i.e. the individual to whom the data relates). The processing in this case would be making the data available in response to Mrs E's request.
44. There are, therefore, a number of different tests which must be satisfied before condition 6 can be met. These are:
 - i. Is Mrs E pursuing a legitimate interest or interests?
 - ii. If yes, is the processing involved necessary for the purposes of those interests? In other words, is the processing proportionate as a means and fairly balanced as to ends, or could these interests be achieved by means which interfere less with the privacy of the data subject?
 - iii. Even if the processing is necessary for Mrs E's legitimate interests, is that processing nevertheless unwarranted in this case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject?

Is Mrs E pursuing a legitimate interest or interests?

45. There is no definition within the DPA of what constitutes a "legitimate interest", but the Commissioner takes the view that the term indicates that matters in which an individual properly has an interest should be distinguished from matters about which he or she is simply inquisitive. In the Commissioner's published guidance on regulation 11(2) of the EIRs², it states:

² <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section38/Section38.aspx>

“In some cases, the legitimate interest might be personal to the applicant - e.g. he or she might want the information in order to bring legal proceedings. With most requests, however, there are likely to be wider legitimate interests, such as the scrutiny of the actions of public bodies or public safety.”

46. SEPA accepted that Mrs E was pursuing a legitimate interest in making her information request.
47. Mrs E commented that if her neighbours’ sewage and surface water was confined to their own property then she could see why SEPA would withhold the information, but as it concerns other members of the public, Mrs E considers that there should be an open handed and transparent policy in place, whereby everyone can see and understand why option 1 was not taken up.
48. Mrs E considered that she had a legitimate interest in ascertaining how SEPA have arrived at the decision to allow her neighbours to discharge surface water and sewage into her property.
49. Having considered the submissions from both Mrs E and SEPA, the Commissioner accepts that Mrs E is pursuing a legitimate interest in seeking to understand the decision which has led to sewage being discharged into her property.

Is the processing necessary for the purposes of those legitimate interests?

50. Having concluded that Mrs E has a legitimate interest, the Commissioner must now consider whether disclosure of the withheld personal data is necessary to achieve those legitimate interests. In doing so, she must consider whether these interests might reasonably be met by any alternative means.
51. In this case, the withheld information is the licence holder’s name. Mrs E knows this name, but it is unlikely to be known by the wider public. The name of the licence holder can also be obtained from the public register of CAR licences. In this decision, the Commissioner is considering disclosure of the licence holder’s name in the context of the withheld information from the telephone note. The Commissioner is satisfied that disclosure of the licence holder’s name, in this context, would effectively disclose information about that individual’s actions and opinions into the public domain which would not be available from the information in the public register.
52. The Commissioner must come to a decision as to whether disclosure is necessary to fulfil Mrs E’s interests. In all the circumstances, the Commissioner is not satisfied that disclosure of the personal data under consideration in this case is necessary for the purposes of Mrs E’s legitimate interest in understanding the decision affecting her property. It is not clear how she would benefit from her neighbour’s name being disclosed into the public domain (this is the only personal data which has been withheld), given that she already knows it.
53. Having concluded that disclosure is not necessary, the Commissioner cannot find that condition 6 in Schedule 2 to the DPA is capable of being met in this case. In the absence of a condition permitting disclosure, she must find such disclosure to be unlawful. It therefore follows that disclosure of the personal data under consideration in this case would breach the first data protection principle. Accordingly, the Commissioner is satisfied that this information is exempt from disclosure, and that SEPA was entitled to withhold it under regulation 11(2) of the EIRs.

Regulation 10(5)(f)

54. SEPA withheld some information from the telephone note under the exception in regulation 10(5)(f) of the EIRs, applying this exception during the Commissioner's investigation.
55. In terms of regulation 10(5)(f) of the EIRs, a Scottish public authority may refuse to make environmental information available to the extent that its disclosure would, or would be likely to, prejudice substantially the interests of the person who provided the information where that person:
 - (i) was not under, and could not have been put under, any legal obligation to supply the information;
 - (ii) did not supply it in circumstances such that it could, apart from the EIRs, be made available; and
 - (iii) has not consented to its disclosure.
56. Regulation 10(2) of the EIRs provides that this exception must be interpreted in a restrictive way and that the public authority shall apply a presumption in favour of disclosure. The exception is also subject to the public interest test in regulation 10(1)(b).
57. There are a number of factors that should be addressed in considering whether this exception applies. These include:
 - (i) Was the information provided by a third party?
 - (ii) Was the provider, or could the provider be, required by law to provide it?
 - (iii) Is the information otherwise publicly available?
 - (iv) Has the provider consented to disclosure?
 - (v) Would disclosure of the information cause, or be likely to cause, substantial harm to the interests of the provider?
58. Although question (iv) makes reference to the consent (or otherwise) of the provider of information, it is the responsibility of the public authority to formulate and make submissions to the Commissioner to show why the information should be withheld.

Does regulation 10(5)(f) apply in this case?

59. SEPA provided a copy of its correspondence with the licence holder regarding potential disclosure of the telephone note recording their conversation.
60. SEPA explained to the licence holder that some of the information within the telephone note had been placed in the public domain by disclosure of other documents. SEPA was content to disclose this information, but withheld the remainder under regulation 10(5)(f) of the EIRs.
61. The licence holder confirmed to SEPA that they objected to the disclosure of the remaining information from the telephone note and stated that they had provided the information voluntarily.
62. SEPA confirmed to the Commissioner that the withheld information was not required for a regulatory purpose. The information is not part of an application form or other document that would be available via the SEPA Public Register. SEPA noted that information relating to option 3 had been disclosed as part of its response to earlier information requests from Mrs E, and details of the proposed sewerage arrangements and the requisite CAR licence (for the approved option) are available on the SEPA Public Register.

63. The Commissioner accepts that the information withheld under regulation 10(5)(f) was provided voluntarily by a third party, namely the licence holder whose conversation was recorded in the telephone note. SEPA has stated that it is not legally required to record why an applicant chose a particular option. The Commissioner is satisfied that the licence holder was not legally obliged to provide SEPA with this information.
64. The exception in regulation 10(5)(f) cannot apply to information which is otherwise publicly available. The Commissioner has received no evidence that the information which has been withheld from Mrs E is, or has been, publicly available.
65. The Commissioner is satisfied that the licence holder:
 - (i) was under no obligation, and could not be put under an obligation, to provide the information to SEPA;
 - (ii) did not supply the information about the options in circumstances such that it could be made available apart from under the EIRs and
 - (iii) has not consented to the information being disclosed.
66. She will therefore go on to consider whether disclosure of the information would, or would be likely to, prejudice substantially, the interests of any person who provided it. Unless disclosure would, or would be likely to, cause substantial prejudice, the information must be disclosed.

Substantial prejudice

67. If a Scottish public authority withholds information under regulation 10(5)(f), it must identify the harm that disclosure would cause to the interests of the person who provided the information. The harm must be real, actual and of substance.
68. SEPA considered that disclosure of the remaining information within the telephone note would adversely affect the interests of the licence holder, and provided an email from the licence holder which supported this view. SEPA noted that the court proceedings on this dispute were instigated in June 2015, prior to the receipt of the request, and were still ongoing at the date of its submission.
69. In her application, Mrs E provided a detailed explanation of the changes that had taken place in relation to sewerage in the vicinity of her house, and described the effect of these changes on her, her family, their property and the neighbouring area.
70. Mrs E considered that there should be an open-handed and transparent policy in place, whereby everyone can see and understand why her neighbours were unable to take up option 1 (which she believes would have been the best option). Mrs E noted that option 3 was SEPA's least preferred option.
71. The Commissioner fully understands Mrs E's concerns, given the effect that the sewerage discharge has had on her property. It is reasonable for her to want to understand why other options for the sewerage discharge were ruled out.
72. The Commissioner notes that SEPA has disclosed some information from the telephone note to Mrs E and has proactively disclosed information about the watercourses in the vicinity (information which is not covered by the terms of Mrs E's request). The Commissioner considers that these disclosures are of some assistance in providing information about the choice of option 3, but do not provide complete reasons.

73. After reviewing the information, the Commissioner has concluded that the information withheld from the telephone note would not provide any additional insight into the reasons why option 3 was selected (beyond what has already been disclosed) in preference of the other options.
74. The Commissioner is satisfied that disclosure of the withheld information would substantially prejudice the person who provided the information to SEPA. She notes that this person has objected to its disclosure and has specified the nature of the harm that disclosure would cause, in relation to court proceedings.
75. The Commissioner has therefore found that SEPA correctly applied the exception in regulation 10(5)(f) to the information under consideration. She will now go on to consider the balance of the public interest in relation to withholding or disclosing this information.

Public interest test

76. The exception in regulation 10(5)(f) is subject to the public interest test in regulation 10(1)(b) of the EIRs. Even if an exception has been judged to apply, a Scottish public authority may only refuse a request to make environmental information available if, in all the circumstances, the public interest in making the information available is outweighed by that in maintaining the exception (that is, withholding the information).
77. SEPA acknowledged that there is a public interest in disclosing information relating to the granting of licences in order to promote openness and transparency. It noted that copies of application forms and licences are held on SEPA's Public Registers for this purpose.
78. SEPA submitted that it had provided Mrs E with information on the scope of the options available to the licence holder. However, the specific reason why the licence holder chose option 3 was based on personal factors relating to the licence holder. This was not a decision made by a public authority.
79. SEPA explained that it had consulted directly with the licence holder about the potential effect that disclosure would have upon them. SEPA accepted that disclosure of the information would adversely affect licence holder, in relation to ongoing court proceedings. The licence holder has explained to SEPA the nature of the harm that could occur, if information relevant to the court proceedings was disclosed while they are still ongoing.
80. SEPA also contended that the disclosure of information provided voluntarily to SEPA during a telephone call would harm the duty of confidence underpinning the free flow of information to SEPA. (Although not stated explicitly in SEPA's submission, the implication is that this would not be in the public interest.)
81. Mrs E considered that there was considerable public interest in disclosure of the withheld information, since it concerns the discharge of sewage into neighbouring properties, including her property.
82. In considering the public interest in disclosure against that in maintaining the exception, the Commissioner acknowledges the public interest in transparency in environmental matters. Mrs E has raised concerns about matters relating to public health, which must always be a strong consideration when assessing the balance of public interest in relation to the disclosure of environmental information.
83. However, the Commissioner is mindful that there are ongoing legal proceedings involving Mrs E and her neighbour. The Commissioner takes the view that the public interest in protecting the course of justice outweighs the public interest in disclosure of the specific

information withheld, which was provided voluntarily to SEPA. She therefore finds that the public interest in maintaining the exception in regulation 10(5)(f) of the EIRs outweighs the public interest in disclosure of the withheld information, and that SEPA was entitled to withhold the information in question under regulation 10(5)(f) of the EIRs.

Part (ii) of request - regulation 10(4)(a)

84. SEPA stated that it did not hold any information regarding the flow in the burn (i.e. the ditch). It therefore applied regulation 10(4)(a) of the EIRs to this part of her request.
85. As explained above, the Commissioner is satisfied that SEPA carried out reasonable searches for information about the flow of the burn. On the basis of these searches, she accepts that it holds no relevant information. She is therefore satisfied that the exception in regulation 10(4)(a) of the EIRs applies to information which would fall within the scope of this part of the request.
86. 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 SEPA does not hold the information in question. Consequently, she 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.
87. The Commissioner is satisfied that SEPA was entitled to rely on the exception in regulation 10(4)(a), on the basis that it did not hold the requested information.

Decision

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

The Commissioner accepts that SEPA correctly applied the exceptions in regulations 11(1), 11(2) and 10(5)(f) of the EIRs to recorded information covered by the request. However, in relation to information which was covered by the request and disclosed during the investigation, SEPA failed to comply with regulation 5(1) of the EIRs.

The Commissioner finds that SEPA did not hold any information falling within scope of part (ii) of the request and correctly applied the exception in regulation 10(4)(a) of the EIRs.

The Commissioner does not require SEPA to take any action.

Appeal

Should either Mrs E 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

16 March 2016

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

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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;
- (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;

...

(3) The following expressions have the same meaning in these Regulations as they have in the Data Protection Act 1998, namely-

...

(b) "the data protection principles";

...

(d) "personal data".

...

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)-

- (a) shall be complied with as soon as possible and in any event no later than 20 working days after the date of receipt of the request; and
- (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.
- (3) Where the environmental information requested includes personal data, the authority shall not make those personal data available otherwise than in accordance with regulation 11.
- (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;...
- (5) A Scottish public authority may refuse to make environmental information available to the extent that its disclosure would, or would be likely to, prejudice substantially-
...
 - (f) the interests of the person who provided the information where that person-
 - (i) was not under, and could not have been put under, any legal obligation to supply the information;
 - (ii) did not supply it in circumstances such that it could, apart from these Regulations, be made available; and
 - (iii) has not consented to its disclosure; or....

11 Personal data

- ...
- (2) To the extent that environmental information requested includes personal data of which the applicant is not the data subject and in relation to which either the first or second condition set out in paragraphs (3) and (4) is satisfied, a Scottish public authority shall not make the personal data available.
 - (3) The first condition is-
 - (a) in a case where the information falls within paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998 that making the information available otherwise than under these Regulations would contravene-

(i) any of the data protection principles; or

...

(b) in any other case, that making the information available otherwise than under these Regulations would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.

...

Data Protection Act 1998

1 Basic interpretative provisions

(1) In this Act, unless the context otherwise requires –

...

“personal data” means data which relate to a living individual who can be identified –

(a) from those data, or

(b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,

and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual;

...

Schedule 1 – The data protection principles

Part I – The principles

1. Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –

(a) at least one of the conditions in Schedule 2 is met, and

(b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.

...

Schedule 2 – Conditions relevant for purposes of the first principle: processing of any personal data

...

6. (1) The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.

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