



Scottish Information
Commissioner
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Decision Notice 035/2024

Electricity consumption from non-renewable sources in Scotland in 2020

Authority: Scottish Ministers

Case Ref: 202200472

Summary

The Applicant asked the Authority for information regarding renewable and non-renewable sources of electricity consumption in Scotland in 2020. The Authority provided some information, referred to other information that was published online and claimed that some information was not held. The Commissioner investigated and found that the Authority did not hold all of the information it had originally claimed it held, and that other information which it claimed it did not hold, was in fact held.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2) and (6) (General entitlement); 47(1) and (2) (Application for decision by Commissioner)

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (definition of “the Act”, “applicant” and “the Commissioner” and paragraphs (a), (b) and (c) of definition of “environmental information”) (Interpretation); 5(1) (Duty to make environmental information available on request); 10(1), (2) and (4)(a) (Exceptions from duty to make environmental information available); 13(b) (Refusal to make information available) and 17(1), (2)(a), (b) and (f) (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 7 November 2021, the Applicant made a request for information to the Authority. She asked for:

Topic A

On the 25th October during her COP26 'Keynote Speech' at Strathclyde University in Glasgow, First Minister Nicola Sturgeon stated that '97% of all the electricity we use in Scotland comes from renewable sources' when discussing decarbonising Scotland's electricity supply. She also said that 'nearly 100% of our net electricity demand already comes from renewable sources'.

- i) Please provide the information and associated data which supports this statement from the First Minister that almost 100% of the electricity we use in Scotland comes from renewable sources.
- ii) Please provide information/data for when electricity demand in Scotland is met only with electricity generated from renewable sources.

Topic B

An extract from the Scottish Government 'Energy Statistics for Scotland' June 2021:

"Provisional figures for 2020 have been revised with the latest data and show that the equivalent of 95.9% of gross electricity consumption came from renewable sources – an increase of 7.5 percentage points from 2019".

- i) Please confirm when this provisional figure for 2020, referred to above, will be confirmed.
 - ii) Please provide a figure for the "equivalent" of gross electricity consumption coming from non-renewable sources in 2020.
2. In this decision, these requests shall be referred to as requests A i) and ii) and B i) and ii).
 3. The Authority responded on 20 December 2021. In relation to requests A i) and ii), it provided the Applicant with some information and directed her to other information on the [Energy Statistics Hub](#)¹. In relation to request B i), the Authority advised the Applicant that information would be published on 23 December 2021 (and provided a link to where this could be accessed), and in response to request B ii), it notified her that it did not calculate the equivalent value for non-renewable sources, and so it could not provide this information.
 4. On 8 January 2022, the Applicant wrote to the Authority requesting a review of its decision. The Applicant stated that she was dissatisfied with the Authority's response to request A i) as it had not provided her with evidence that supported the First Minister's statement. The Applicant was also dissatisfied with the Authority's response to request B ii) as she did not accept that the information was not held, and argued that the Authority could easily carry out the calculation.
 5. The Authority notified the Applicant of the outcome of its review on 15 February 2022. It maintained that it had provided her with evidence supporting the First Minister's statement as sought in request A i), and it upheld its position that it did not hold information falling within the scope of request B ii). Although it acknowledged that it should have formally applied regulation 10(4)(a) of the EIRs to this request.
 6. On 24 April 2022, 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

¹ <https://scotland.shinyapps.io/Energy/>

the enforcement of the EIRs as it applies to the enforcement of FOISA, subject to specified modifications. The Applicant stated that she was dissatisfied with the outcome of the Authority's review of request A i) because it had not provided information to support the specifics of the statement "that almost 100% of the electricity we use comes from renewable sources". The Applicant also rejected the Authority's reliance on regulation 10(4)(a) in relation to request B ii) and argued that the corresponding figure for the "equivalent" amount of Scotland's gross consumption coming from non-renewable sources should be provided.

Investigation

7. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
8. The Authority 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. The Authority was invited to comment on this application and to answer specific questions. These related to its reasons for applying regulation 10(4)(a) to request B ii) and for maintaining that it had already complied with request A i).

Commissioner's analysis and findings

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

Handling in terms of the EIRs

11. The Authority processed and responded to the Applicant's request and requirement for review in accordance with the EIRs.
12. Where information falls within the scope of the definition of "environmental information" in regulation 2(1) of the EIRs, a person has a right to access it (and the public authority a corresponding obligation to respond) under the EIRs, subject to various restrictions and exceptions contained in the EIRs.
13. The Applicant has not challenged the Authority's decision to deal with the information as environmental information. The Commissioner is satisfied that the information does comprise environmental information (see in particular paragraphs (a), (b) and (c) of the definition in regulation 2(1) of the EIRs) and will consider the handling of the request in what follows solely in terms of the EIRs.

Authority's change of position

14. During the investigation, the Authority conceded that it did not hold information that supported the First Minister's statement that "nearly 100% of our net electricity demand already comes from renewable sources". It submitted that the statement made by the First Minister (and similar statements by other Ministers in the Scottish Government) was made in

error, and it referred to a [letter](#)² issued by the UK Statistics Authority (UKSA) which commented on this matter.

15. The Authority contacted the Applicant directly and advised her that it was now relying on regulation 10(4)(a) in relation to requests A i) and B ii) as it considered that none of the information was held.

Regulation 5(1) – Information falling within scope of the request

16. 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 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.
17. 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 permits the authority to give the applicant notice to that effect.

Regulation 10(4)(a) – Information not held

18. As indicated above, regulation 10(4)(a) of the EIRs states that a Scottish public authority may refuse to make environmental information available to the extent that it does not hold that information when the request is received. In this case, the Authority is relying on the exception in regulation 10(4)(a) of the EIRs in relation to requests A i) and B ii).
19. The Commissioner has taken account of the submissions provided by the Applicant, in which she explained why she believes the Authority does hold information falling within the scope of request B ii). The Applicant also queried the amount of time the Authority took to confirm that it did not hold information falling within the scope of request A i).

Test to be applied in the use of the exception

20. The standard of proof to determine whether a Scottish public authority holds information is the civil standard of the balance of probabilities. In determining where the balance lies, the Commissioner considers the scope, quality, thoroughness and results of the searches carried out by the public authority. He also considers, where appropriate, any reason offered by the public authority to explain why it does not hold the information. While it may be relevant as part of this exercise to explore expectations as to what information the Authority should hold, ultimately the Commissioner's role (as indicated above) is to determine what relevant recorded information is actually held by the public authority (or was, at the time it received the request).

Considering the exception as applied to request A i)

21. As noted above, during the investigation the Authority acknowledged that it did not hold any evidence to support the former First Minister's statement that "nearly 100% of our net electricity demand already comes from renewable sources". The Applicant has not disputed the Authority's reliance on regulation 10(4)(a) for request A i) but she has asked the Commissioner to reach a finding on the Authority's handling of the request, and she has

² <https://uksa.statisticsauthority.gov.uk/correspondence/sir-robert-chote-to-stephen-kerr-msp-renewable-energy/>

argued that the Authority should have confirmed that it held no information falling within the scope of request A i) sooner.

22. The Commissioner notes that the [letter](#)³ issued by the UKSA, in response to a question raised by Stephen Kerr MSP, and referenced by the Authority in its correspondence to the Applicant, was issued on 2 November 2022, after the Applicant had made her information request and subsequent appeal to his office. In its submissions to the Commissioner, the Authority referred to the error contained in the former First Minister's statement and it stated,

We have publicly acknowledged this error and have corrected a speech made by the former First Minister in the Scottish Parliament on 29 September 2022.

23. It is clear to the Commissioner that the Authority has known, since at least 2 November 2022, that the statement made by the former First Minister (and other Scottish Government Ministers) contained factual inaccuracies and it did not hold any evidence to substantiate the claims made. However, the Authority did not notify the Applicant of this fact until 29 June 2023. It is the Commissioner's view that the Authority should have notified the Applicant that it did not hold any information falling within the scope of request A i) as soon as it became aware of this factual error, and that it should not have waited (some seven months) until it was being questioned as part of his investigation into the matters raised by the Applicant in her Appeal.
24. Taking into account the submissions made by the Authority, and the contents of the letter from the UKSA, the Commissioner is satisfied that the information requested by the Applicant in request A i) was not held by the Authority when she made her request and that regulation 10(4)(a) applies.

Public interest test

25. The exception in regulation 10(4)(a) of the EIRs is subject to the public interest test in regulation 10(1)(b) and so can only apply if, in all the circumstances of the case, the public interest in maintaining the exception outweighs that in making the information available. The question of whether or not a public authority holds information is a factual one, determined on the balance of probabilities. If a public authority does not hold the information, then there is no meaningful public interest test that can be undertaken.
26. In this case, for the reasons set out above, the Commissioner is satisfied that the Authority does not (and did not, on receiving the request) hold any information covered by the request. Consequently, he accepts that there is no conceivable public interest in requiring the disclosure of such information and finds that the public interest in making information available is outweighed by that in maintaining the exception.
27. The Commissioner is satisfied that the Authority was entitled to rely on the exception in regulation 10(4)(a) on the basis that it did not hold the information requested.
28. However, in failing to provide the Applicant with a refusal notice which stated that the exception in regulation 10(4)(a) applied to the information in request A i), the Commissioner finds that the Authority failed to comply with regulation 13(b) of the EIRs.

³ <https://uksa.statisticsauthority.gov.uk/correspondence/sir-robert-chote-to-stephen-kerr-msp-renewable-energy/>

Considering the exception as applied to request B ii)

29. In its review outcome of 15 February 2022, the Authority gave the Applicant formal notice that it did not hold any information falling within the scope of request B ii), and it applied regulation 10(4)(a) of the EIRs to this request.
30. As noted above, in request B, the Applicant referred to the following statement published by the Scottish Government in June 2021, in “Energy Statistics for Scotland”.

Provisional figures for 2020 have been revised with the latest data and show that the equivalent of 95.9% of gross electricity consumption came from renewable sources – an increase of 7.5 percentage points from 2019.

And in request B ii) she asked

- ii) Please provide a figure for the “equivalent” of gross electricity consumption coming from non-renewable sources in 2020.

Applicant’s comments on regulation 10(4)(a) as it applies to request B ii)

31. In her submissions, the Applicant referred to other information requests she had made, and which the Authority had responded to. One of her requests (202300345980) sought “...details of all internal Scottish Government discussion/meetings (including between Ministers, Civil Servants, and Special Advisers) relating to the use of statistics on renewable electricity by the First Minister of Scotland and other Scottish Minister’s and the importance of making it clear what the underlying statistics measure, to avoid misinterpretation.”
32. In its response on 27 March 2023, the Authority provided the Applicant with an internal email dated 29 September 2022, which contained the following text:

To confirm re the FM’s statement, it was incorrect on two counts:

- *Referred to energy when it was clear that she was intending electricity*
- *Inferred that all of Scotland’s electricity consumption is from renewable sources; to clarify: electricity generated from renewable sources is equivalent to 98.8% of gross consumption and electricity generated from non-renewable sources is equivalent to 61% of gross consumption. What we actually consume is a mix of renewables and non-renewables.*

33. The Applicant argued that this correspondence not only acknowledged that a statement made by the former First Minister relating to renewable electricity “inferred” that all consumption was coming from renewable sources, but it also included the figure for the “equivalent” of gross electricity consumption coming from non-renewable sources in 2020 which was the information she sought in request B ii)

34. The Applicant referred to another response she received from the Authority in relation to a different request (FOI/202200334333) which contained a briefing document that stated:

In addition, the statement infers that 100% of electricity consumed in Scotland in 2020 came from renewable generation. This is an inaccurate representation of the renewable electricity target.

35. The Applicant contended that the former First Minister and other Scottish Government Ministers chose to use this particular terminology (the equivalent of gross consumption generated) to illustrate how much electricity was produced from renewable sources but there was no corresponding figure for electricity from non-renewable sources for this to be directly compared with.
36. The Applicant referred to an email she received from the Authority on 29 June 2023. In this email, the Authority told her that “one of the building blocks” required to carry out the calculation for request B ii) was the total electricity consumption data for Scotland. This data was provided by the UK Government, and the Authority confirmed it received pre-release access to this information on 20 December 2021. The Applicant referred to the Authority’s argument that as her information request was received on 7 November 2021, the information required to undertake the calculation was not held at the time it received her request.
37. The Applicant rejected this argument and argued that the Authority required the same information to carry out the calculation for the equivalent of gross electricity consumption coming from renewable sources in 2020 as it did from non-renewable sources. She noted that the former First Minister referred to this figure for renewable sources on numerous occasions throughout COP26 in Glasgow in November 2021, and in her speech on the 25 October 2021 at Strathclyde University, which she referred to in her original information request.
38. The Applicant referred to the [Scottish Government’s Energy Statistics for Scotland Q4 2020 Figures](#)⁴ published in March 2021, which stated that:

Provisional figures indicate that in 2020, the equivalent of 97.4% of Scotland’s gross electricity consumption was from renewable sources, falling just short of the 100% by 2020 renewable electricity target. This uses an estimate of gross consumption. The final figure will be available in December 2021.

39. The Applicant noted that provisional data was sufficient for the Authority to carry out the calculation for renewable sources which was referenced by Scottish Ministers throughout COP26, and was also available on the Scottish Government website from March 2021. Given this, the Applicant challenged the Authority’s statement that “the information was not held at the time of the request”. The Applicant also queried why the provisional data was deemed sufficient for statements made at COP 26, which received wide-spread media coverage, but was deemed insufficient to complete a simple calculation for an information request submitted by a member of the general public.
40. The Applicant referred to part of the Authority’s email of 29 June 2023, which notified her that:

The calculation needed to produce the information you requested [in request B ii)] was carried [out] on 29 September 2022 to support work being carried out on how to represent the renewable electricity target.

She argued that this statement demonstrated that the Authority acknowledged that the

⁴ <https://www.gov.scot/binaries/content/documents/govscot/publications/statistics/2018/10/quarterly-energy-statistics-bulletins/documents/energy-statistics-summary---march-2021/energy-statistics-summary---march-2021/govscot%3Adocument/Corrected%2B-%2BScotland%2BEnergy%2BStatistics%2BQ4%2B2020%2B-%2B25%2BMarch%2B2021.pdf>

information she asked for in request B ii) was a useful calculation to carry out and was one it has used “internally” in its work on how to “represent the renewable electricity target”. She submitted that request B ii) simply asks that this information be released for the interest and benefit of the public.

Authorities comments on regulation 10(4)(a) as it applies to request B ii)

41. In its submissions, the Authority explained that the Scottish Government set a target to generate the equivalent of 100% of Scotland’s own electricity demand from renewable sources by 2020. It noted that the renewable electricity indicator is derived from calculations carried out by the Scottish Government specifically to look at renewable electricity generation to monitor its progress in achieving that target. It also noted that the Applicant requested an equivalent figure to be calculated for non-renewable electricity generation for 2020. The Authority argued that the figure requested by the Applicant was not required to monitor renewable electricity generation, and that it would need to carry out a calculation based on other information held in order to produce this figure. It argued that it would need to create new information to be able to respond to the request.
42. The Authority explained that the renewable electricity indicator compares the total amount of renewable electricity generated in Scotland with the amount of electricity used in Scotland (less net exports of electricity). It noted that since Scotland both exports and imports electricity, it is entirely possible for the indicator to be greater than 100% with the balance accounted for by net exports of electricity.
43. The Authority submitted that deriving the comparable indicator for non-renewables is therefore not a simple matter of subtracting the renewable electricity indicator from 100%, as the two indicators don't add up to 100%.
44. The Authority explained that the calculation for the non-renewable electricity indicator is analogous to that for the renewable electricity indicator and it set out the way it would be calculated:
 - i) From [Energy Trends table 5.1](#)⁵, combine the quarterly electricity generated from all generating companies for non-renewable technologies to give annual figures and convert to GWh.
 - ii) Repeat this step for renewable technologies.
 - iii) From [Energy Trends table 5.6](#)⁶, combine the quarterly import and export figures to give annual figures for each. Then take imports away from exports to give a net exports figure.
 - iv) Total the numbers created in steps one and two together and subtract the number created in step three from this to provide a gross consumption figure.
 - v) Divide the number created in step one with the number created in step four.

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1173946/ET_5.1_JUL_23.xlsx

6

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1166034/ET_5.6_JUN_23.xlsx

45. The Authority explained that while the building blocks of this calculation are published on the [Scottish Energy Statistics hub](#)⁷, it would need to draw the data together from different parts of the hub to carry out the calculation. In addition, the Authority noted that the UKSA's response to Stephen Kerr MSP observed that the figure represents a complex mixture of different statistics. The Authority submitted that the production of the figure requested by the Applicant, required complex skill and judgement to produce, and so it was not held for the purposes of the EIRs.
46. When questioned about the above submissions, the Authority explained that one of the building blocks required to carry out the calculation in request B ii), was the total electricity consumption data for Scotland. It reiterated its comments to the Applicant that this data was provided to the Authority by the UK Government and was subsequently published (by the UK Government) on 23 December 2021. The Authority explained that it received pre-release access to this data on 20 December 2021.
47. The Authority commented that as the request was received on 7 November 2021, this information was not held at the time of the request and it reiterated that, notwithstanding the fact that it considered calculating the gross electricity consumption coming from non-renewable sources figure to be creating new information, it did not hold all of the information required to undertake the calculation at the time of the request.
48. The Authority noted that the review request was received 8 January 2022, at which time it did hold the total electricity consumption data for Scotland and the other building blocks required to calculate the gross electricity consumption coming from non-renewable sources in 2020. However, it argued that the review considered whether it was entitled to respond to the request under regulation 10(4)(a) at the time of responding to the initial request. It maintained that creating this information would have taken complex skill and judgment as a calculation that would have needed to be formed and carried out by analytical specialists.
49. The Authority acknowledged that the final figure quoted in the email dated 29 September 2022, and referred to by the Applicant, contained the information requested by the Applicant in request B ii). The Authority also accepted that it could have been clearer in its earlier submissions and more helpful when responding to the Applicant during this appeal, by providing her with the information that was outwith the scope of this request (because it was not held and could not be calculated at the time this request was received).
50. The Authority apologised for its previous submissions which stated that the calculation required for request B ii) had not been carried out. It submitted that it had responded to the Commissioner's questions in good faith and had not deliberately attempted to mislead his office in any way. It argued that this was an oversight and it acknowledged that the figure had been calculated in the time between responding to the request and review and preparing its appeal submissions.
51. The Authority explained that the figure was calculated on 29 September 2022, following notification from the Applicant of a number of occasions where the renewable electricity target had been publicly misrepresented. This figure was a final figure, based on finalised data for 2020. It submitted that, as a result of advice to colleagues on the use of this statistic on 29 September 2022, the figure was calculated on that date to provide additional context around the renewable electricity indicator.

⁷ <https://scotland.shinyapps.io/Energy/?Section=WholeSystem&Chart=EnProd>

52. In its final submissions to the Commissioner, the Authority reiterated that it did not hold the information requested at the time it received the Applicant's information request. It argued that in order to provide this information, if it had been in possession of all of the building blocks needed to calculate the figure requested, it would have required the creation of new information using skill and judgement.
53. The Authority noted that request B ii) asked for;

A figure for the 'equivalent' of gross electricity consumption coming from non-renewable sources in 2020.

It submitted that it had interpreted this as requesting a final figure for 2020, which it was unable to calculate at the point that the request was made as it did not have the final figure for one of the components (electricity consumption in 2020) until 23 December 2021. It acknowledged that it did perform calculations for renewable energy using provisional figures because this was a target that was reported on, but it did not carry out the calculations using provisional figures for non-renewable sources.

The Commissioner's view about the exception

54. It is clear that since 29 September 2022, the Authority has held a finalised version of the information that was asked for in request B ii) and it provided the Applicant with a copy of this data on 27 March 2023, in response to a separate information request. However, the question the Commissioner must answer in this case is whether or not the Authority held the provisional data at the time it received the Applicant's information request on 7 November 2021, as this was the information she has requested.
55. The Authority initially argued that the figure requested by the Applicant was not required to monitor renewable electricity generation (its main focus) and the calculation required to produce the figure requested in request B ii) was complex and involved multiple steps. Due to the complexity required to calculate the information, the Authority argued that the information was not held. Later on, the Authority explained that at the time it received the information request it did not hold one of the key "building blocks" required for the calculation, and so it could not create the figure requested by the Applicant and therefore the information was not held. Finally, the Authority acknowledged that it had in fact carried out the calculation using finalised data in September 2022, but it maintained that it had interpreted request B ii) as seeking a "final figure" for 2020, and at the time of the request, it only held provisional data, and so the information was not held.
56. The Commissioner has carefully considered all of the submissions made by the Authority and he is not persuaded by its arguments. He does not accept that it was reasonable for the Authority to interpret the request as seeking a "final figure" for 2020. He notes that in request B, the Applicant provided an extract from the Scottish Government [Energy Statistics for Scotland June 2021](#)⁸, which stated:

Provisional figures for 2020 have been revised with the latest data and show that the equivalent of 95.9% of gross electricity consumption came from renewable sources – an increase of 7.5 percentage points from 2019.

⁸ <https://www.gov.scot/binaries/content/documents/govscot/publications/statistics/2018/10/quarterly-energy-statistics-bulletins/documents/energy-statistics-summary---june-2021/energy-statistics-summary---june-2021/govscot%3Adocument/Scotland%2BEnergy%2BStats%2BQ1%2B2021.pdf>

57. Following this quote, the Applicant then asked in request B ii)

Please provide a figure for the “equivalent” of gross electricity consumption coming from non-renewable sources in 2020.

58. Given the context of the quote from the Energy Statistics for Scotland June 2021, which clearly refers to provisional figures, it is obvious to the Commissioner that the Applicant was seeking provisional figures for the “equivalent” gross electricity consumption coming from non-renewable sources in 2020. The Applicant essentially wanted the Authority to carry out the same calculation for non-renewable sources as it had already carried out and publicised for renewable sources. As the figure it had published on renewable sources was based on provisional data, then it is clear to the Commissioner that provisional data should have been used to determine the figure for non-renewable sources. It is not clear why the Authority failed to recognise this.
59. The Commissioner is satisfied that the Authority held provisional data at the time it received request B ii) and he does not accept that calculating the equivalent figure for non-renewable sources was overly onerous or complex, as claimed by the Authority. He has viewed the email of 29 September 2022, where an official working for the Authority has provided a final equivalent figure for non-renewable energy consumption, and there is no indication that this calculation took specialist skills or significant time to produce. Additionally, as noted above, the Authority has confirmed that the calculation was carried out on the day of 29 September 2022. It therefore appears to be a straightforward calculation based on information held by the Authority, and calculated in one day. Given this, the Commissioner must find that the Authority wrongly withheld the information asked for in request B ii) under regulation 10(4)(a) of the EIRs.
60. Although the Authority has since provided the Applicant with a final figure for non-renewable electricity gross consumption in 2020 (disclosed in its email of 29 September 2022) it has not provided her with a provisional figure, which was the information that was asked for in request B ii). Given this, the Commissioner now requires the Authority to provide the Applicant with the information she requested in B ii)
61. As he has found the exception in regulation 10(4)(a) to have been wrongly applied to request B ii), the Commissioner is not required to consider the public interest test in regulation 2(1) of the EIRs.

Decision

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

The Commissioner finds that the Authority failed to comply with regulation 13 of the EIRs when it claimed, in its initial response, that information fulfilling request A i) was published on a website, and then later established that it did not hold this information. In relation to information requested but not held, it is implicit in the obligation in regulation 5(a) of the EIRs, that the authority must apply regulation 10(4)(a) and give a proper notice under regulation 13, and it did not do that in this case. The Commissioner therefore finds that the Authority failed to comply with regulation 5(1) of the EIRs.

As the Authority later notified the Applicant, under regulation 10(4)(a) of the EIRs, that it did not hold any information falling within the scope of request A i), the Commissioner does not require the Authority to take any action in respect of this failure in response to the Applicant's application.

The Commissioner also finds that the Authority failed to comply with regulation 5(1) of the EIRs as it was not entitled to rely on the exception in regulation 10(4)(a) of the EIRs for information which would fulfil request B ii). He is satisfied that this information is held (and was at the time of the Applicant's request).

The Commissioner requires the Authority to provide the Applicant with a revised review outcome, either disclosing the information which falls within scope of part B ii), or explaining why (in accordance with any relevant provision in the EIRs) the information cannot be disclosed, by **3 May 2024**.

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.

Enforcement

If the Authority fails to comply with this decision, the Commissioner has the right to certify to the Court of Session that the Authority has failed to comply. The Court has the right to inquire into the matter and may deal with the Authority as if it had committed a contempt of court.

David Hamilton
Scottish Information Commissioner

19 March 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.

...

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;

“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;

...

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

(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;

...

13 Refusal to make information available

Subject to regulations 10(8) and 11(6), if a request to make environmental information available is refused by a Scottish public authority in accordance with regulation 10, the refusal shall-

...

- (b) specify the reasons for the refusal including, as appropriate, any exception under regulation 10(4) or (5) or provision of regulation 11 and how the Scottish public authority has reached its decision with respect to the public interest under regulation 10(1)(b);

...

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

...