

# Decision Notice

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## Decision 003/2016: Mr Ian Lindsay and the Scottish Ministers

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### Responsibility for safe sewerage discharge

Reference No: 201501306

Decision Date: 6 January 2016



## Summary

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On 20 February 2015, Mr Lindsay asked the Scottish Ministers (the Ministers) for information demonstrating responsibility for safe sewerage discharges. The Ministers responded with an explanation and directed Mr Lindsay to a website containing further relevant information. Mr Lindsay remained dissatisfied and applied to the Commissioner for a decision.

The Commissioner investigated and was satisfied that the Ministers had identified, located and disclosed all the information they held and which fell within the scope of Mr Lindsay's request. However, she also found that the Ministers fell short of good practice in failing to provide Mr Lindsay with details of his rights to seek a review and apply to the Commissioner.

## Relevant statutory provisions

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The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (paragraphs (a), (c) and (f) of definition of "environmental information"); 5(1) and (4) (Duty to make available environmental information on request)

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

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1. On 20 February 2015, Mr Lindsay made a request for information to the Ministers. The information requested was:  
  
"... details of which Scottish Government department or appointed agency has the duty and responsibility for ensuring discharges of sewerage effluent from Sewerage Treatment Works into the water environment has no, or an acceptable, risk of harm to the health and wellbeing of recreational users of the water environment and in particular the discharge from the Castle Douglas Sewerage Treatment Works."  
  
In his request, Mr Lindsay also listed organisations which he said had informed him that they were not responsible for aspects of the subject matter of his request.
2. The Ministers responded on 2 March 2015, giving some background to the situation and describing the Scottish Environment Protection Agency's responsibilities in particular. They also directed Mr Lindsay to a website called "Scotland's Environment", which provided information on the classification of the relevant bodies.
3. On 16 March 2015, Mr Lindsay wrote to the Ministers requiring a review of their decision. He did not believe the Ministers had addressed his request fully.
4. The Ministers notified Mr Lindsay of the outcome of their review on 20 March 2015, upholding their original decision and setting out their reasoning.
5. On 17 July 2015, Mr Lindsay wrote to the Commissioner. He applied to the Commissioner for a decision in terms of section 47(1) of the Freedom of Information (Scotland) Act 2002 (FOISA). By virtue of regulation 17 of the EIRs, Part 4 of FOISA applies to the enforcement of the EIRs as it applies to the enforcement of FOISA, subject to specified modifications. Mr

Lindsay stated he was dissatisfied with the outcome of the Ministers' review because it failed to address the terms of his request.

## Investigation

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6. The application was accepted as valid. The Commissioner confirmed that Mr Lindsay 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.
7. On 31 July 2015, the Ministers were notified in writing that Mr Lindsay had made a valid application. The case was allocated to an investigating officer.
8. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Ministers were invited to comment on this application and answer specific questions, with particular reference to the steps taken to identify and locate any relevant information.
9. Submissions were received from the Ministers. Mr Lindsay also provided submissions during the investigation.

## Commissioner's analysis and findings

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10. 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 Mr Lindsay and the Ministers. She is satisfied that no matter of relevance has been overlooked.

### Application of the EIRs

11. 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 discharges into the water environment and human health. In this context, the Commissioner is satisfied that it would fall within paragraph (a), (c) or (f) of the definition of environmental information in regulation 2(1) of the EIRs (reproduced in Appendix 1 to this decision). In the circumstances, the Commissioner will consider Mr Lindsay's request in what follows solely in terms of the EIRs.
12. The issue for the Commissioner is whether the Ministers identified, located and made available all the information they held and which fell within the scope of Mr Lindsay's request. The state of the water environment and whether the Ministers ought to be able to define more clearly who has responsibility are clearly matters of concern to Mr Lindsay, but not ones falling within the remit of this Commissioner.

### Regulation 5(1) of the EIRs

13. 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 applies to any relevant information held by the authority when it receives the request.
14. The question is whether the Ministers identified and located all the relevant information they actually held. It may be relevant, in reaching a view on this, to consider what information the Ministers should have recorded and held, but these are not themselves questions the Commissioner can rule on.

15. The EIRs also place an onus on the Ministers (regulation 5(4)) to ensure (so far as practicable) that any information it complies and makes available under regulation 5(1) is up to date, accurate and comparable. In considering what the Ministers made available to Mr Lindsay, therefore, the Commissioner will consider whether they took such steps as were practicable to achieve this.
16. In his application, Mr Lindsay commented on the explanations provided by the Ministers, complaining they had in fact stated who was not responsible rather than who was. He submitted that the Ministers misinterpreted his request and failed to address what he actually asked for: he believed the Ministers should be able to provide confirmation that a single department or agency either was or was not responsible for the matters specified in his request.
17. During the Commissioner's investigation, the Ministers explained their handling of the request. They believed that they had answered the request adequately, but that in doing this it was necessary to distinguish between different locational/environmental circumstances and the responsibilities which applied to each of these. They considered they had provided a factual response as to where the various responsibilities lay. This had to be a multifaceted answer, as the current legislative framework did not allow a response, as Mr Lindsay appeared to be seeking, identifying a single authority with responsibility.
18. The Ministers also explained to the investigating officer that they had not considered it necessary to carry out detailed searches in this case. Given the nature of the question, it could be answered from the specialist knowledge of the staff concerned.
19. The standard of proof to be applied in determining whether a Scottish public authority holds information is the civil standard of the balance of probabilities. The same standard applies in respect of both FOISA and the EIRs. In determining whether a Scottish public authority holds information, the Commissioner will consider the scope, quality, thoroughness and results of the searches carried out by the public authority. She will also consider, where appropriate, any reason offered by the public authority to explain why it does not hold the information (or why searches have not been considered necessary in the circumstances), along with any relevant submissions received from the applicant.
20. In this case, the Commissioner has considered all relevant submissions, along with the information disclosed to Mr Lindsay. As the Commissioner has explained in other decisions (see, for example, *Decision 160/2015: Mr James Duff and the Scottish Ministers*<sup>1</sup>), the function of FOISA (and the EIRs) is to provide access to information held by Scottish public authorities, not to facilitate the provision of legal advice to members of the public. In this case, as explained above, the Commissioner can only consider the terms of Mr Lindsay's request and whether the Ministers held recorded information falling within its scope.
21. Essentially, Mr Lindsay's request is more in the nature of a request for legal advice than one for information the Ministers might reasonably be expected to hold in definitive form. Insofar as they could reasonably be expected to hold information, the Commissioner is satisfied that the Ministers took reasonable steps in the circumstances to identify and locate that information, and make it available to Mr Lindsay. In those respects, they complied with regulation 5(1) of the EIRs. In doing so, the Commissioner is satisfied that the Ministers took reasonable steps in the circumstances to ensure that what they provided was up to date, accurate and comparable, in line with regulation 5(4): to a substantial extent, that is

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<sup>1</sup> <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2015/201500708.aspx>

evidenced by the Ministers' efforts to make clear that they could not meet Mr Lindsay's expectation of a single, all-embracing answer to his request.

### **Information about rights of review and appeal**

22. In both his request for review and his application, Mr Lindsay complained that he was not informed properly of his rights to seek a review and subsequently to apply to the Commissioner.
23. Where a public authority responds in full to a request, it is not required to inform the requester of their rights to seek a review or to apply to the Commissioner. However, the Ministers' Code of Practice on the discharge of functions by Scottish public authorities under FOISA and the EIRs (the Section 60 Code)<sup>2</sup> states (at paragraph 9.11 in Part 2) that applicants should always be provided with details of the relevant rights, even where all the requested information is being disclosed.
24. The content of Part 2 of the Section 60 Code is recognised good practice, which Scottish public authorities should always follow in the absence of a good reason for doing otherwise. No such reason has been offered by the Ministers and the Commissioner finds that the Ministers fell short of the expected good practice, in this respect, in their handling of Mr Lindsay's request.

## **Decision**

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

## **Appeal**

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Should either Mr Lindsay or the Ministers 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**

**6 January 2016**

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<sup>2</sup> <http://www.gov.scot/Resource/0046/00465757.pdf>

### The Environmental Information (Scotland) Regulations 2004

#### 2 Interpretation

(1) In these Regulations –

“the Act” means the Freedom of Information (Scotland) Act 2002;

...

"environmental information" has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on

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(a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;

...

(c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in paragraphs (a) and (b) as well as measures or activities designed to protect those elements;

...

(f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in paragraph (a) or, through those elements, by any of the matters referred to in paragraphs (b) and (c);

...

#### 5 Duty to make available environmental information on request

(1) Subject to paragraph (2), a Scottish public authority that holds environmental information shall make it available when requested to do so by any applicant.

...

(4) A Scottish public authority shall, in making environmental information compiled by it available in accordance with paragraph (1), ensure so far as practicable that that information is up to date, accurate and comparable.

...

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