

# Decision Notice



Decision 188/2011 Ms Morna Simpson and Scottish Water

Broughty Ferry Flood Alleviation Project

Reference No: 201100850

Decision Date: 15 September 2011

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**Kevin Dunion**

Scottish Information Commissioner

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## Summary

Ms Morna Simpson requested information from Scottish Water relating to the Broughty Ferry Flood Alleviation Project and any claims arising from that work. Scottish Water responded by giving Ms Simpson notice, in terms of section 17(1) of FOISA, that it did not hold the information she had requested. Following a review, Ms Simpson remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner was satisfied that Scottish Water did not hold any information falling within the scope of Ms Simpson's request, and that it had complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) by providing Ms Simpson with written notice to that effect, as required by section 17(1) of FOISA. However, the Commissioner noted that Scottish Water failed to comply with the timescale specified in section 10(1) of FOISA. He did not require Scottish Water to take any action.

## Relevant statutory provisions and other sources

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (4) (General entitlement); 10(1) (Time for compliance) and 17(1) (Notice that information is not held)

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulation 2(1) (Interpretation) (definition of "environmental information")

The full text of each of the statutory provisions cited above is reproduced in the Appendix to this decision. The Appendix forms part of this decision.

## Background

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1. On 18 January 2011, Ms Simpson wrote to Scottish Water requesting information in the following terms:
  - a. How many enquiries have you received (including those in process and those where a claim was not upheld) for Public Liability Insurance Claims (PLIC) in which the work carried out on the Broughty Ferry Flood Alleviation Project (BFFAP) was identified as a possible cause of damage to public or private property?



- b. What is the total cost of claims submitted for damages (including those in process, and those where a claim was not upheld) to public or private property in which the work carried out on the BFFAP was identified as the possible cause?
  - c. Please name of the company, and who specifically (the surveyors) who carried out the surveys to property in the Broughty Ferry area prior to, or in the early stages of the works.
  - d. Please name of the company, and who specifically (the surveyor) who carried out the survey to a named address.
  - e. Please supply copies of the survey reports (questions c and d)
  - f. Please supply a copy of minutes of meetings in which the potential for damages to property, relating to the above works was raised as a concern (please to back to meetings prior to the project start date).
  - g. Please supply a copy of minutes of meetings in which actual damages to property, relating to the above works was raised.
2. Scottish Water responded on 23 March 2011. In its response, Scottish Water gave Ms Simpson notice, in terms of section 17(1) of FOISA that it did not hold any of the information she had requested.
3. Scottish Water went on to explain that the BFFAP was not carried out by Scottish Water, but instead by Scottish Water Solutions Ltd (Solutions), a separate organisation which is not covered by FOISA. It explained that Solutions is a joint venture comprised of a number of private companies who carry out the works.
4. On 23 March 2011, Ms Simpson wrote to Scottish Water requesting a review of its decision. In particular, Ms Simpson expressed dissatisfaction with its failure to comply with the required 20 working day timescale, and indicated that it seemed quite unbelievable to her that Scottish Water did not hold any of the requested information. Ms Simpson argued that since Scottish Water undertook the works involved in the BFFAP, it must have ensured that surveys were carried out before and after the work and it must have access to this information or know who holds it.
5. Scottish Water notified Ms Simpson of the outcome of its review on 21 April 2011. In its response, Scottish Water upheld its previous decision that it did not hold any of the information she had requested and reiterated that the BFFAP was carried out by Solutions, which is not subject to FOISA. Scottish Water also indicated that it was trying to obtain the name of the company who undertook the surveys and it would forward this information to Ms Simpson once it was received.



6. On 7 May 2011, Ms Simpson wrote to the Commissioner, stating that she was dissatisfied with the outcome of Scottish Water's review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA. By virtue of regulation 17 of the Environmental Information (Scotland) Regulations 2005 (EIRs), Part 4 of FOISA applies to the enforcement of the EIRs as it applies to the enforcement of FOISA, subject to certain specified modifications.
7. The application was validated by establishing that Ms Simpson had made a request for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its response to that request. The case was then allocated to an investigating officer.

## Investigation

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8. The investigating officer subsequently contacted Scottish Water giving it an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking it to respond to specific questions. In particular, Scottish Water was asked to provide details of the searches it had undertaken to determine whether it held the information requested by Ms Simpson.
9. Scottish Water was also asked whether it considered the information requested by Ms Simpson constituted environmental information as defined in the EIRs, and so whether her request should have been considered under the EIRs. It was also asked to provide comments in response to questions about whether Solutions conducted work and/or held information on behalf of Scottish Water.
10. Scottish Water responded to this letter on 17 June 2011. It provided detailed arguments to explain its view that the information requested by Ms Simpson was not environmental information. It also provided an overview of the searches it had conducted, noting that it could provide specific details of the searches if given more time.
11. Scottish Water also explained the relationship between Scottish Water and Solutions, submitting that Solutions neither undertook work nor held information on behalf of Scottish Water. It explained that the companies were entirely separate organisations and Solutions undertook works as required in the context of its contractual arrangements with Scottish Water.
12. In further correspondence, the investigating officer asked Scottish Water to provide full details of the searches it had undertaken, and indicate why it had not yet provided Ms Simpson with the name of the company(s) who undertook the surveys, as it had suggested it would in its email of 21 April 2011.
13. Scottish Water responded to these requests, providing full details of its searches and indicating that since it had concluded that it did not hold the names of the company(s) undertaking the surveys, it had not sent this information on to Ms Simpson.



14. The submissions received from both Scottish Water and Ms Simpson, insofar as relevant, will be considered fully in the Commissioner's analysis and findings below.

## Commissioner's analysis and findings

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15. In coming to a decision on this matter, the Commissioner has considered all of the withheld information and the submissions made to him by both Ms Simpson and Scottish Water and is satisfied that no matter of relevance has been overlooked.

### Section 17(1) – Information not held

16. Section 17(1) of FOISA states that, where a Scottish public authority receives a request for information which it does not hold, it must, in accordance with section 17(1) of FOISA, give the applicant notice in writing that it does not hold the information. In terms of section 1(4), the information an authority is required to provide in response to a request is generally that held by it at the time the request is received (see the Appendix for the full text of the subsection).
17. In its submissions, Scottish Water argued that it did not hold any information falling within the scope of Ms Simpson's request. As noted above, Scottish Water highlighted that the project referred to by Ms Simpson (the BFFAP) was not undertaken by Scottish Water, but was work carried out by Solutions.
18. Scottish Water explained that Solutions is a private limited company, separate to Scottish Water, with its own Board of Directors. Scottish Water explained that while it holds 51% of the shares of Solutions, the other 49% are owned by two consortia of private companies. Scottish Water submitted that both consortia have directors on Solutions' board of directors, and that Scottish Water can be outvoted by non Scottish Water Directors on specific issues. Therefore, Scottish Water submitted that it does not have day to day control of the management of the company.
19. Scottish Water advised that Solutions is a separate legal entity and that it does not deliver projects on behalf of Scottish Water, but that it delivers projects in accordance with the contractual framework that exists between Scottish Water and Solutions. Scottish Water noted that it does not 'control' Solutions just as it cannot and does not control any of its other contractors. Scottish Water submitted that Solutions does not hold any information on its behalf. Scottish Water also noted that Solutions is not subject to the provisions of FOISA.
20. Scottish Water submitted that it conducted extensive searches for the information requested by Ms Simpson despite establishing that the BFFAP was a Solutions project and was not work that Scottish Water undertook.



21. Scottish Water explained that its first action was to identify all of the people involved in the BFFAP (regardless of whether they worked for Solutions or Scottish Water) and ask them if any information was held. Once it was established that the BFFAP was a Solutions project, Scottish Water then contacted members of its own staff (who had been seconded to Solutions) to determine whether they held any relevant information in their email files. Scottish Water noted that no information was found during these searches.
22. Following the above searches, Scottish Water explained that it then contacted key personnel in its Complaints Management Unit (CMU), Tax and Treasury Department (TTD) as well as its record management team and asked them to search for any information falling within the scope of Ms Simpson's request. The CMU advised that Solutions and/or other contractors carried out surveys before and after the work and that they (Solutions and/or other contractors) were dealing with any damage or claims that were received. Despite this, Scottish Water checked its corporate systems for any information falling within the scope of Ms Simpson's request, but none was found.
23. Scottish Water advised that it also consulted key staff in the TTD regarding the information requested by Ms Simpson. The TTD team searched Scottish Water's claims list which is computer based. The TTD team searched for any claims relating to the Broughty Ferry area as well as claims made between 2007 and 2009 and could not find any that related to property damage as a result of the BFFAP. Scottish Water submitted that it also undertook searches of the three electronic databases that index all of the records it holds. In total, these databases index over 200,000 documents. Scottish Water used a variety of search terms to interrogate these databases including the address specified by Ms Simpson, along with broader terms such as Broughty Ferry and the name of the contractor involved in the BFFAP and no records of relevance were found.
24. Scottish Water has argued that it has undertaken extensive and exhaustive searches of its records and files and could find no information that falls within the scope of Ms Simpson's request. Accordingly, Scottish Water submitted that it does not hold any of the information requested by Ms Simpson.
25. Having considered the searches undertaken by Scottish Water, the Commissioner is satisfied it has undertaken thorough searches to establish whether or not the requested information was held, and that it does not hold the information requested by Ms Simpson. Consequently, he finds that Scottish Water was correct to give her notice, in terms of section 17(1) of FOISA, that it did not hold the information she had requested. The Commissioner is satisfied that the BFFAP was a project contracted to Solutions and that Scottish Water does not hold any of the information requested by Ms Simpson.

#### **Is the requested information environmental information?**

26. The Commissioner has considered whether the information requested by Ms Simpson in this case is environmental information.



27. Environmental information is defined in regulation 2(1) of the EIRs, (reproduced in full in the Appendix to this decision). Where information falls within the scope of this definition, a person has a right to access it under the EIRs, subject to regulations 6 to 12 of the EIRs.
28. Scottish Water has provided extensive arguments to explain its reasoning as to why the information requested by Ms Simpson is not environmental information (and so why it was correct to respond to Ms Simpson's request solely in terms of FOISA).
29. The Commissioner has considered these submissions in full, but has concluded that at least some of the information requested by Ms Simpson, if held, would be likely to be environmental information. Although Scottish Water's submissions focussed to a significant extent on whether "claims information" should be considered to be environmental information, the Commissioner recognises that information about claims made in relation to damage to property formed only part of the information requested by Ms Simpson.
30. For example, the Commissioner considers that, if the requested information were held, it is highly likely that relevant survey reports (as requested in part e of Ms Simpson's request) would contain information falling within the scope of one or more of parts (a), (b), (c) and (f) of the definition of environmental information.
31. However, the Commissioner also recognises that, in this case, where the Commissioner has accepted that the information is not held by Scottish Water, it is difficult to reach a definitive decision on this point.
32. In any event, the Commissioner considers that if he did find the requested information to be environmental, he would still find it to be excepted from disclosure under regulation 10(4)(a) of the EIRs. Regulation 10(4)(a) of the EIRs excepts information from disclosure if it does not hold that information when an applicant's request is received.
33. Scottish Water has submitted that it would seek to rely upon regulation 10(4)(a) of the EIRs, if the Commissioner concluded that the requested information was environmental.
34. Since the outcome of this case would have been the same whether it was considered in terms of FOISA or the EIRs, the Commissioner has not dwelt on this point further, and he has made his decision solely in terms of FOISA.

### **Section 10(1) – Time for compliance**

35. The Commissioner notes that Ms Simpson submitted her initial request for information on 18 January 2011, but that she did not receive a response from Scottish Water until 23 March 2011. The Commissioner notes that this response was provided well outwith the 20 working days provided for in section 10(1) of FOISA. Given that the information in this case was not held (and Scottish Water was not required to collate or redact documents, or consider any exemptions that might be applicable) the Commissioner would have expected Scottish Water to have responded to Ms Simpson's initial request within the time required by section 10(1) of FOISA.



36. On this occasion, the Commissioner does not require any action to be taken in relation to this failure to comply with the timescales set out in section 10(1). However, it has been noted and may be taken into account in determining whether any future action should be taken in respect of Scottish Water under the Commissioner's Enforcement Strategy.

## DECISION

The Commissioner finds that Scottish Water partially complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Ms Simpson.

The Commissioner is satisfied that none of the information requested by Ms Simpson is held by Scottish Water. As a consequence, the Commissioner finds that Scottish Water was correct to notify Ms Simpson, in line with section 17(1) of FOISA, that it did not hold the information she was seeking.

However, the Commissioner finds that Scottish Water failed to respond to Ms Simpson's information request in line with the timescale required by section 10(1) of FOISA and, in doing so, failed to comply with Part 1 of FOISA. The Commissioner does not require Scottish Water to take any action in relation to this breach in response to this decision.

## Appeal

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Should either Ms Simpson or Scottish Water wish to appeal against this decision, there is an 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 notice.

**Margaret Keyse**  
**Head of Enforcement**  
**15 September 2011**





## Appendix

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### 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.

...

- (4) The information to be given by the authority is that held by it at the time the request is received, except that, subject to subsection (5), any amendment or deletion which would have been made, regardless of the receipt of the request, between that time and the time it gives the information may be made before the information is given.

...

##### 10 Time for compliance

- (1) Subject to subsections (2) and (3), a Scottish public authority receiving a request which requires it to comply with section 1(1) must comply promptly; and in any event by not later than the twentieth working day after-

- (a) in a case other than that mentioned in paragraph (b), the receipt by the authority of the request; or

- (b) in a case where section 1(3) applies, the receipt by it of the further information.

...

##### 17 Notice that information is not held

- (1) Where-

- (a) a Scottish public authority receives a request which would require it either-

- (i) to comply with section 1(1); or

- (ii) to determine any question arising by virtue of paragraph (a) or (b) of section 2(1),

if it held the information to which the request relates; but



(b) the authority does not hold that information,

it must, within the time allowed by or by virtue of section 10 for complying with the request, give the applicant notice in writing that it does not hold it.

...

## The Environmental Information (Scotland) Regulations 2004

### 2 Interpretation

(1) In these Regulations –

...

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

- (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
- (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;
- (d) reports on the implementation of environmental legislation;
- (e) costs benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in paragraph (c); and
- (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);

...