

# Decision Notice



Decision 144/2012 Mr William Speirs and Scottish Water

Flooding of property

Reference No: 201200510

Decision Date: 28 August 2012

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**Rosemary Agnew**  
Scottish Information Commissioner

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## Summary

Mr Speirs asked Scottish Water for information relating to flooding which affected his property. He did not accept that Scottish Water had provided him with all of the information it held and which fell within the scope of his request. Following an investigation, the Commissioner identified a failure to recognise the requests as requests made under the Environmental Information (Scotland) Regulations 2004 (the EIRs) and to deal with them as such, but also concluded that Scottish Water held no further relevant information.

## Relevant statutory provisions

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The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (Interpretation – definition (a) to (c) of “environmental information”); 5(1) and 2(a) (Duty to make environmental information available on request)

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 31 January 2012, Mr Speirs wrote to Scottish Water requesting information relating to flooding which had affected his property.
2. Scottish Water responded on 6 February 2012, dealing with Mr Speirs’ letter as a complaint. His requests for information were not recognised as such at this stage.
3. On 8 February 2012, Mr Speirs wrote to Scottish Water again, highlighting that he had made requests for information and requesting a review in respect of Scottish Water’s failure to respond.
4. Scottish Water notified Mr Speirs of the outcome of its review in letters of 24 February and 2 March 2012. Between these letters, it provided responses to all of his requests.



5. On 13 March 2012, Mr Speirs wrote to the Commissioner, stating that he 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 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.
6. The application was validated by establishing that Mr Speirs had made requests 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 those requests. The case was then allocated to an investigating officer.

## Investigation

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7. On 18 April 2012, the investigating officer 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. Scottish Water was asked to explain the manner in which Mr Speirs' requests were handled and the steps it had taken to identify and locate the information which fell within the scope of those requests.
8. Mr Speirs' letter of 31 January 2012 contained 14 questions, only four of which (1, 6, 7 and 9) could reasonably be construed as requests for recorded information. This was explained to Mr Speirs at the outset of the investigation. The Commissioner's investigation is therefore limited to these four requests – and specifically, given the terms of Mr Speirs' application, to whether Scottish Water identified, located and provided Mr Speirs with all of the information it held and which fell the scope of these requests.
9. The relevant submissions received from both Scottish Water and Mr Speirs will be considered fully in the Commissioner's analysis and findings below.

## Commissioner's analysis and findings

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10. In coming to a decision on this matter, the Commissioner has considered all of the relevant submissions made to her by both Mr Speirs and Scottish Water and is satisfied that no matter of relevance has been overlooked.

### Handling of request

11. In its submissions to the Commissioner, Scottish Water apologised for its misunderstanding in not identifying Mr Speirs' requests for information at the outset. Scottish Water acknowledged that it failed to identify the requests embedded in his letter of 31 January 2012 and that these requests should have been extracted from the correspondence and processed as such.



12. Scottish Water explained the ongoing correspondence with Mr Speirs relating to the flooding of his property. In the circumstances, Scottish Water formed the view that a single letter responding to all the issues raised by Mr Speirs would be the most sensible course of action. Unfortunately, in doing this, Scottish Water failed to identify his information requests and deal with them accordingly under the legislation.
13. The Commissioner is disappointed to note Scottish Water's failure to appropriately identify and process the requests for information separately from the other issues raised Mr Speirs. In failing to do this, it failed to deal with the requests in accordance with regulation 5(1) of the EIRs. She encourages Scottish Water to remain vigilant for requests for information embedded within other correspondence, particularly customer complaints.

### **Environmental information**

14. Within its submissions to the Commissioner, Scottish Water indicated that it would accept the Commissioner's conclusion that the information requested by Mr Speirs was environmental.
15. The information requested by Mr Speirs relates to incidences of flooding at a particular location and the measures taken as a result of these incidences. The requests relate to the state of an element of the environment (paragraph (a) of the definition), to discharges of that element into the environment likely to affect other elements of the environment (paragraph (b) of the definition) and to measures likely to affect those elements and factors (paragraph (c) of the definition). Consequently, the Commissioner concludes that the information requested by Mr Speirs would fall within the definition of environmental information for the purposes of the EIRs.

### **Information held by Scottish Water**

#### *Request 1*

*"Can you provide any information, report, testimony, photograph that supports this statement that heavy rainfall causes problems to the property?"*

16. Scottish Water confirmed that no formal external investigation or reports had been commissioned to confirm the cause of the flooding in question. It explained that its conclusion that it was caused by periods of heavy rainfall resulted from analysis of the nearby sewer network and associated infrastructure. It advised that analysis and numerous investigations have taken place, primarily at the property during site visits. Information on these would be held in its Promise database. Scottish Water advised that all relevant information held in its Promise database and its conclusions from its investigations had been provided to Mr Speirs in response to previous requests. Scottish Water acknowledged that this should have been made clear to Mr Speirs in response to his requests for information, apologising for this oversight.
17. A further search was carried out by Scottish Water during the investigation, which resulted in additional information, relating to "heavy rainfall", being supplied to Mr Speirs.



#### Request 6

*“We have in writing confirmation that a possible resolution to the problem had been identified and a decision had been made not to proceed but to place the matter on the local “At Risk” register. Do you accept this statement, and if so, can I ask you **to provide the date this was done** and the reasoning behind this decision?” [emphasis added]*

18. Scottish Water, in its submissions to the Commissioner, advised that it did not hold any information on the property being put on the “at risk” register. Various elements of work had been carried out to help minimise or resolve the flooding issue, but the property was not on the “at risk” register. However, it might be placed on that register following further investigations and work in response to the flooding.

#### Request 7

*“It is clearly stated that following the reinstatement of the emergency overflow the situation would be monitored (his words not mine) to ensure the system was working correctly. Can you confirm this was done and can you **provide any record** of such monitoring.”*

#### Request 9

*“Should the monitoring of the system not have been more stringent between those two incidents. Again could you **provide any records** pertaining to such monitoring” [emphasis added]*

19. Again, within its submissions to the Commissioner, Scottish Water advised that it did not hold information relating to these requests.
20. Scottish Water explained that its reference to a commitment to monitoring the system related to the reinstated emergency overflow at the Templeton Pumping Station, as opposed to the bung in the local manhole. Scottish Water advised that such monitoring had taken place and continued by way of a telemetry-based early warning system. However, it was not normal practice for it to monitor non mechanical/working pieces of equipment such as a bung, with the result that no information was held falling within the scope of these requests.
21. Given the explanations set out above, the circumstances of Mr Speirs’ requests and details of the searches undertaken to locate the requested information, the Commissioner is satisfied that Scottish Water does not hold any further information falling within the scope of Mr Speirs’ requests.



## DECISION

The Commissioner finds that Scottish Water failed to comply with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information requests made by Mr Speirs. By failing to identify Mr Speirs' requests for environmental information as such and deal with them accordingly under the EIRs, Scottish Water failed to comply with regulation 5(1).

Given that the Commissioner is now satisfied with the steps taken by Scottish Water to deal with Mr Speirs' requests, she does not require it to take any action in this case.

## Appeal

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Should either Mr Speirs 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**  
**28 August 2012**



## Appendix

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### Relevant statutory provisions

#### 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;

...

##### 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.

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