

Decision Notice



Decision 147/2008 Spencer and Barbara Ellis and the Scottish Ministers

Report to Ministers and associated information

Reference No: 200801048

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Kevin Dunion

Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews KY16 9DS
Tel: 01334 464610



Summary

Mr and Mrs Ellis requested from the Scottish Ministers (the Ministers) a copy of a report to Ministers and related information. The Ministers responded by providing some information to Mr and Mrs Ellis, but withheld the remainder under section 39(2) of FOISA (on the basis that it was environmental information and therefore subject to the EIRs) and regulations 10(4)(e) and 10(5)(d) of the EIRs. Following a review (which resulted in the release of some further information) Mr and Mrs Ellis remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the Ministers had dealt with Mr and Mrs Ellis's request for information in accordance with Part 1 of FOISA and the EIRs, in particular by withholding the information as internal communications under regulation 10(4)(e) of the EIRs. He did not require the Ministers to take any action.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 16 (Refusal of request); 39(2) (Health, Safety and the Environment).

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (Interpretation – definition of environmental information); 5(1) and (2) (Duty to make environmental information available on request); 10(1), (2) and 4(e) (Exceptions from duty to make environmental information available); 13 (Refusal to make information available).

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

1. On 25 April 2008, Mr and Mrs Ellis wrote to the Ministers requesting the following information:
“a copy of the report (and/or any other written or electronically stored information in relation to the report) prepared for Scottish Ministers in relation to the ‘call in’ of CAR/L/1015528 and CAR/L/1000580 ... copies of all papers prepared by your team that relate to the decision to uphold Scottish Water’s appeal on the basis of a deemed refusal of the applications.”



2. The Ministers responded on 27 May 2008. In their response, the Ministers provided Mr and Mrs Ellis with a number of documents which related to their request. The Ministers confirmed that they also held other information (including information redacted from the released documents) which would address Mr and Mrs Ellis's request but withheld this under section 39(2) of FOISA (as they considered the requested information to be environmental information as defined in regulation 2(1) of the EIRs) and regulations 10(4)(e) and 10(5)(d) of the EIRs.
3. Mr and Mrs Ellis wrote to the Ministers on 4 June 2008 requesting a review of their decision. In particular, Mr and Mrs Ellis put forward a number of reasons why they disagreed with the Ministers' application of regulations 10(4)(e) and 10(5)(d), the public interest test, the EIRs generally and certain other aspects of their handling of the request.
4. The Ministers notified Mr and Mrs Ellis of the outcome of their review on 4 July 2008. They addressed each of the points raised by Mr and Mrs Ellis in their request for review, and in doing so provided some further information to Mr and Mrs Ellis that was relevant to their request. The Ministers upheld their reliance on section 39(2) of FOISA and regulations 10(4)(e) and 10(5)(d) of the EIRs for the information they were continuing to withhold.
5. On 11 July 2008, Mr and Mrs Ellis wrote to the Commissioner's Office, stating that they were dissatisfied with the outcome of the Ministers' 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 and Mrs Ellis 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.

Investigation

7. On 18 July 2008, the Ministers were notified in writing that an application had been received from Mr and Mrs Ellis and were asked to provide the Commissioner with any information withheld from the applicant. The Ministers responded with the information requested and the case was then allocated to an investigating officer.
8. The investigating officer subsequently contacted the Ministers, providing them with an opportunity to make comments on the application (as required by section 49(3)(a) of FOISA) and asking them to respond to specific questions. In particular, the Ministers were asked to explain why they dealt with the request under the EIRs rather than FOISA and to justify their reliance on regulation 10(5)(d) of the EIRs (which appeared on receipt of the withheld information to be the only exception claimed) and where appropriate the application of the public interest test in regulation 10(2).



9. The Ministers responded to these questions and also explained that they were relying on the exception in regulation 10(4)(e) of the EIRs, along with regulation 10(5)(d), for withholding the remaining information from Mr and Mrs Ellis. The Ministers also provided arguments in support of their contention that the public interest in making the information available was outweighed by the public interest in maintaining each exception.
10. In their application to the Commissioner, Mr and Mrs Ellis set out a number of grounds for their dissatisfaction with the Ministers' review, which will be considered further (along with the Ministers' arguments) in the Commissioner's analysis and findings below. Mr and Mrs Ellis have, however, been advised that a number of the points raised in their application cannot be considered in this decision, as they relate to new requests for information which were raised only at the review stage.

Commissioner's analysis and findings

11. In coming to a decision on this matter, the Commissioner has considered all of the submissions and other information presented to him by both the Ministers and the applicants and is satisfied that no matter of relevance has been overlooked.
12. The Ministers dealt with Mr and Mrs Ellis's request on the basis that the information requested was environmental information as defined in regulation 2(1) of the EIRs, which is reproduced in the Appendix below. Given that the information requested (including that withheld by the Ministers) relates to an application by Scottish Water to SEPA for the discharge of screened sewage into Campbeltown Loch, and the Ministers' calling-in of that application under the Water Environment (Controlled Activities) (Scotland) Regulations 2005 (CAR), the Commissioner is satisfied that it falls within the definition of environmental information set out in regulation 2(1), in particular regulation 2(1)(c), as it concerns measures affecting or likely to affect the elements of the environment, which include water.

Handling of the request

13. In their application to the Commissioner, Mr and Mrs Ellis asked the Commissioner to consider whether they should have been provided with a list of all documents the Ministers had identified as falling within the scope of their request. The Commissioner notes that when Mr and Mrs Ellis made this point to the Ministers they responded by advising them that there was no provision in either the EIRs or FOISA which required them to provide such a list.



14. Regulation 13 of the EIRs concerns a refusal by a Scottish public authority to make information available. This regulation details the information the authority is required to give an applicant where it refuses to release environmental information in response to a request. Such a refusal must be provided in writing and must specify the authority's reasons for refusal. This should include details of any exception the authority considers applicable under regulation 10(4), 10(5) or 11, with the basis on which these are considered to apply, and also how the public authority has reached its decision with respect to the public interest under regulation 10(1)(b). Section 16 of FOISA makes similar provision: here, the authority is also required to state specifically that it holds the requested information, but not to list specific documents. There are no requirements in either FOISA or the EIRs which require a Scottish public authority to provide a list of the information it holds in relation to a particular request or is refusing to disclose in response to that request. Therefore the Commissioner is content that the Ministers did not contravene any provision of the EIRs or FOISA in failing to provide Mr and Mrs Ellis with a list of the information.
15. In their application, Mr and Mrs Ellis also asked that the Commissioner consider the Ministers' failure to identify to them the fact that a particular document existed and was being withheld from them. Mr and Mrs Ellis argued that this amounted to deliberate concealment on the part of the Ministers.
16. As mentioned above, there is no requirement in FOISA or the EIRs for a Scottish public authority to provide the applicant with a list of all of the documents withheld in any given case. In both their response to Mr and Mrs Ellis's request for review and their submissions to the Commissioner, the Ministers advised that they considered the exceptions in regulations 10(4)(e) and 10(5)(d) of the EIRs to apply to the information withheld in this case. The Ministers went on to explain in their submissions to the Commissioner that their response to Mr and Mrs Ellis's request referred to "certain other documents" as being withheld (in addition to those released with redactions) and cited the exceptions they were claiming under the EIRs for withholding these documents. The document referred to by Mr and Mrs Ellis was one of these, and was also among the documents provided to the Commissioner for the purposes of his investigation. In relation to this document, the Ministers re-asserted their position that there is no requirement in the EIRs to provide a list of the withheld documents and advised that it was not their practice to do so.
17. The Commissioner accepts these submissions from the Ministers, and in particular does not consider their reference to a number of documents by the collective term "certain other documents" as amounting to deliberate concealment. In the circumstances, having considered the relevant submissions, he is satisfied that the Ministers identified and considered all of the relevant information held by them in responding to Mr and Mrs Ellis's request.



Section 39(2) of FOISA – environmental information

18. Essentially, the exemption in section 39(2) of FOISA provides that environmental information as defined by regulation 2(1) of the EIRs is exempt information under FOISA (thereby allowing any such information to be considered solely in terms of the EIRs), subject to the public interest test in section 2(1)(b) of FOISA. As indicated in paragraph 12 above, the Commissioner accepts that the Ministers were correct to treat the withheld information as environmental information. In this case, as there is a separate statutory right of access to environmental information available to the applicant, the Commissioner also accepts that the public interest in maintaining this exemption and dealing with the requests in line with the requirements of the EIRs outweighs any public interest in disclosure of the information under FOISA.

Regulation 10(4)(e) of the EIRs – internal communications

19. Under regulation 10(4)(e) of the EIRs, a Scottish public authority may refuse to make environmental information available to the extent that the request involves making available internal communications.
20. As with all of the exceptions under regulation 10, a Scottish public authority applying this exception must interpret it in a restrictive way and apply a presumption in favour of disclosure (regulation 10(2)). Even where the exception applies, the information must be released unless, in all the circumstances, the public interest in making the information available is outweighed by that in maintaining the exception (regulation 10(1)(b)).
21. For information to fall within the scope of the exception, it need only be established that the information is an internal communication. Only if the Commissioner decides that a document is an internal communication will he be required to go on to consider the public interest test.
22. Having considered the withheld information in the 6 relevant documents, 4 of which have been released subject to redaction of certain information and 2 of which have been withheld in their entirety, the Commissioner is satisfied that this does fall within the definition of internal communications for the purposes of regulation 10(4)(e) of the EIRs.
23. The information which has been withheld by the Ministers in this case comprises or relates to legal advice provided to the Ministers and their officials regarding the decision as to whether the Ministers should exercise their powers to "call in" the Scottish Water applications referred to in paragraph 12 above. As he has indicated in similar circumstances, for example in *Decision 056/2008 Mr Rob Edwards and the Scottish Ministers*, the Commissioner is satisfied in the circumstances that these communications, which were all conducted entirely within the Scottish Government, can be regarded as internal communications for the purposes of regulation 10(4)(e).



Public interest in relation to regulation 10(4)(e)

24. The Ministers recognise a public interest in this information, particularly as it concerns an issue of public sensitivity and continues to be subject to debate. However, they do not consider that the public interest in release of the withheld information outweighs the public interest in ensuring that the Government, solicitors and their clients can discuss relevant issues and give and receive legal advice in confidence. They submit that their decisions must be taken, where appropriate, in a fully informed legal context which may set out the arguments for and against a particular issue. It is the Ministers contention that without such comprehensive advice the quality of their decision making would be restricted, which would not be in the public interest.
25. The Ministers also refer to the importance placed by the courts on the strong public interest in maintaining the right to confidentiality of communications between legal advisor and client on administration of justice grounds, arguing on this basis that such communication should be released only in highly compelling cases. The Ministers do not consider this to be such a case.
26. In their application to the Commissioner, Mr and Mrs Ellis set out what they consider to be the public interest in release of this information. They feel that it is entirely appropriate to release this information on the grounds that it is in the public interest that all information relating to sewage disposal is in the public domain (and certainly everything relating to Campbeltown, where, in their view, the sewage system is not compliant with certain regulatory requirements and illegal polluting spills of sewage are frequent into waters used for recreational and commercial activities). Mr and Mrs Ellis have indicated that there is an overriding need for transparency in the public interest, and believe the withholding of certain information relating to public health to be completely inappropriate.
27. In previous decisions where the Commissioner has examined the application of regulation 10(4)(e) in relation to the obtaining and provision of internal legal advice (for example, *Decision 056/2008 Mr Rob Edwards and the Scottish Ministers*), he has concluded that there will always be a strong public interest in maintaining the right to confidentiality of communications between legal adviser and client. As the Ministers have indicated, the courts have long recognised the strong public interest in maintaining the right to confidentiality of communications between legal adviser and client on administration of justice grounds. Many of the arguments in favour of maintaining confidentiality of communications were discussed in the House of Lords case, *Three Rivers District Council and others v Governor and Company of the Bank of England (2004) UKHL 48*.



28. While the Commissioner recognises that the withheld information would to some extent inform public debate as to the position of the Ministers in determining whether the Scottish Water applications should be called in, and in particular as to the legal advice they received, he is of the view that to a large extent that public interest has been met by the information provided to Mr and Mrs Ellis in response to their information request. In the circumstances, he considers there to be a greater public interest in allowing Ministers and their officials to have access to full, frank and comprehensive legal advice on which to base their deliberations and decision making. While the law of confidentiality of communications would not necessarily apply to all of the redacted passages, overall he accepts the Ministers' arguments as to the effect of disclosure on the provision of such advice.
29. Having considered all of the relevant arguments in relation to the withheld information, therefore, on balance the Commissioner has concluded that in this case the public interest in making this information available is outweighed by that in maintaining the exception in regulation 10(4)(e) of the EIRs.
30. As the Commissioner has found that the Ministers were correct to rely on the exception in regulation 10(4)(e) of the EIRs for withholding this information, he is not obliged to consider the application of the exception in regulation 10(5)(d).

DECISION

The Commissioner finds that the Scottish Ministers acted in accordance with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) and the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by Mr and Mrs Ellis.

Appeal

Should either Mr and Mrs Ellis or the Scottish Ministers 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.

Kevin Dunion
Scottish Information Commissioner
27 November 2008



Appendix

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.

...

- (6) This section is subject to sections 2, 9, 12 and 14.

2 Effect of exemptions

- (1) To information which is exempt information by virtue of any provision of Part 2, section 1 applies only to the extent that –

...

- (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

....

16 Refusal of request

- (1) Subject to section 18, a Scottish public authority which, in relation to a request for information which it holds, to any extent claims that, by virtue of any provision of Part 2, the information is exempt information must, within the time allowed by or by virtue of section 10 for complying with the request, give the applicant a notice in writing (in this Act referred to as a "refusal notice") which-

- (a) discloses that it holds the information;
- (b) states that it so claims;
- (c) specifies the exemption in question; and
- (d) states (if not otherwise apparent) why the exemption applies.



- (2) Where the authority's claim is made only by virtue of a provision of Part 2 which does not confer absolute exemption, the notice must state the authority's reason for claiming that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs that in disclosure of the information.
- (3) The authority is not obliged to make a statement under subsection (1)(d) in so far as the statement would disclose information which would itself be exempt information.
- (4) A Scottish public authority which, in relation to a request for information, claims that section 12(1) applies must, within the time allowed by or by virtue of section 10 for complying with the request, give the applicant a notice which states that it so claims.
- (5) A Scottish public authority which, in relation to such a request, claims that section 14 applies must, within that time, give the applicant a notice which states that it so claims; except that the notice need not be given if-
 - (a) the authority has, in relation to a previous identical or substantially similar such request, given the applicant a notice under this subsection; and
 - (b) it would in all the circumstances be unreasonable to expect it to serve a further such notice in relation to the current request.
- (6) Subsections (1), (4) and (5) are subject to section 19.

39 Health, safety and the environment

....

- (2) Information is exempt information if a Scottish public authority-
 - (a) is obliged by regulations under section 62 to make it available to the public in accordance with the regulations; or
 - (b) would be so obliged but for any exemption contained in the regulations.

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);

...

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)-
 - ...
 - (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.
- (4) A Scottish public authority may refuse to make environmental information available to the extent that
-
- (e) the request involves making available internal communications.

...

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-

- (a) be given in writing as soon as possible and in any event no later than 20 working days after the date of receipt of the request for the information;
- (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);
- (c) state the basis on which any exception relied on under regulation 10(4) or (5) or provision of regulation 11 applies if it would not otherwise be apparent;
- (d) if the exception in regulation 10(4)(d) is relied on, state the time by which the authority considers that the information will be finished or completed; and
- (e) inform the applicant of the review provisions under regulation 16 and of the enforcement and appeal provisions available in accordance with regulation 17.