

Decision Notice

Decision 076/2016: Mr Rob Edwards and the Scottish Ministers

Correspondence with HRH Prince Charles

Reference No: 201501588

Decision Date: 30 March 2016



Scottish Information
Commissioner

Summary

On 25 June 2015 Mr Edwards asked the Scottish Ministers (the Ministers) for correspondence between HRH Prince Charles and Mr Alex Salmond (when he was First Minister) on the topics of climate change, food, devolution, the independence referendum, wildlife, agriculture and historic buildings.

The Ministers responded, disclosing some information and informing Mr Edwards that they did not hold information on some of the topics. The Ministers also withheld some information as they believed disclosure would prejudice Prince Charles's interests as the provider of the information.

Following a review, the Ministers disclosed further information in the form of extracts. Mr Edwards remained dissatisfied and applied to the Commissioner for a decision. During the investigation, the Ministers disclosed further information to Mr Edwards.

The Commissioner investigated. She found that the Ministers were not entitled to rely on regulation 10(5)(f) of the EIRs to withhold the remaining information. She also made additional comments on the Ministers' handling of the request.

The Commissioner required the Ministers to provide Mr Edwards with the information requested.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 39(2) (Health, safety and the environment)

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (paragraphs (a), (c) and (f) of definition of "environmental information") (Interpretation); 5(1) and 2(b) (Duty to make available environmental information on request); 10(1), (2) and (5)(f) (Exceptions from duty to make environmental information available)

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 22 June 2015, Mr Edwards made a request for information to the Scottish Ministers, seeking correspondence between HRH Prince Charles and Mr Alex Salmond, when Mr Salmond was First Minister.
2. The Ministers responded on 22 June 2015. They referred to their response to a previous, related request from Mr Edwards where they had informed him that correspondence was filed by subject matter, and not by the names of individuals/organisations with whom the Ministers had corresponded. As the correspondence was retained by the relevant policy area, the Ministers asked Mr Edwards to refine his request, specifying the subject area(s) in which he was interested.
3. On 23 June 2015, Mr Edwards refined his request, seeking copies of the relevant correspondence on the topics of environment, food, rural affairs, climate change, health, devolution and the independence referendum.

4. The Ministers responded on 24 June 2015. They confirmed they could progress some aspects of his request, for example on the topics of devolution and the independence referendum, but explained that other topics remained potentially broad, citing “environment”, “rural affairs” and “health”. Responding to these, they explained, would still likely involve a large amount of staff resources in locating the correspondence. They asked Mr Edwards to narrow his request again, further clarifying the types of information he was seeking.
5. On 25 June 2015, Mr Edwards further refined his request, confirming that he was seeking copies of the relevant correspondence on the topics of climate change, food, devolution, the independence referendum, wildlife, agriculture and historic buildings. He pointed out that, as he did not know what topics Prince Charles and Mr Salmond had corresponded on, he had to guess the subject areas where such correspondence might be filed.
6. The Ministers acknowledged Mr Edwards’ refined request on 1 July 2015.
7. The Ministers responded to the refined request on 23 July 2015, informing Mr Edwards that his request had been handled partly under FOISA and partly under the EIRs, as some of the information was environmental. They disclosed some information, and informed Mr Edwards that they did not hold correspondence between the named parties on the topics of devolution or the independence referendum, applying section 17(1) of FOISA. They also confirmed they held no such correspondence on wildlife, applying regulation 10(4)(a) of the EIRs.
8. The Ministers withheld some information under regulation 10(5)(f) of the EIRs, as they believed disclosure would prejudice Prince Charles’s interests by inhibiting his ability to put forward his views in future. They also considered disclosure would significantly impair the Ministers’ ability to develop policies and make decisions on the basis of fully informed advice from key parties, which would not be in the public interest.
9. On 23 July 2015, Mr Edwards wrote to the Ministers, requesting a review of their decision to withhold an unspecified amount of correspondence on climate change, food, agriculture and historic buildings. He accepted that the Ministers could not provide information on the topics for which it has said none was held.
10. Mr Edwards argued that Prince Charles had well known views on the topics for which information was being withheld. Consequently, he did not believe disclosure would have the prejudicial effect stated by the Ministers. Mr Edwards believed there was an overwhelming public interest in knowing what suggestions the heir to the throne was making to political leaders, referring to the disclosure of similar correspondence¹ under the FOI Act in England and Wales.
11. The Ministers notified Mr Edwards of the outcome of their review on 25 August 2015, upholding their original decision with modification. They maintained their reliance on regulation 10(5)(f) for some of the withheld correspondence and disclosed the remainder in the form of extracts, excluding information about subjects outwith the scope of Mr Edwards’ request.
12. On 27 August 2015, Mr Edwards 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 the enforcement of the EIRs as it applies to the enforcement of FOISA, subject to specified modifications. Mr Edwards stated he was dissatisfied with the outcome of the Ministers’ review because he questioned whether it was in the public interest to withhold the remaining

¹ <https://www.supremecourt.uk/cases/uksc-2014-0137.html>

information. Highlighting that his original request (prior to refinement) was for all correspondence, Mr Edwards questioned whether it was reasonable for the Ministers to provide only extracts for the majority of it, rather than the full text. He also questioned whether it was reasonable for the Ministers to ask him to repeatedly narrow his request as apparently they held no central record of letters from Prince Charles.

Investigation

13. The application was accepted as valid. The Commissioner confirmed that Mr Edwards made a request for information to a Scottish public authority and asked the authority to review their response to that request before applying to her for a decision.
14. On 24 September 2015, the Ministers were notified in writing that Mr Edwards had made a valid application. The Ministers were asked to send the Commissioner the information withheld from Mr Edwards. The Ministers provided the information and the case was allocated to an investigating officer.
15. 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 what information they held and the exception(s) applied to the information withheld. The Ministers were also asked to comment on other aspects of their handling of Mr Edwards' request.
16. The Ministers provided submissions to the investigating officer. Clarification of aspects of these was sought, and obtained, during the investigation. Mr Edwards also provided submissions on why he believed it was in the public interest for the information to be disclosed.

Commissioner's analysis and findings

17. In coming to a decision on this matter, the Commissioner has considered all of the withheld information and the relevant submissions, or parts of submissions, made to her by both Mr Edwards and the Ministers. She is satisfied that no matter of relevance has been overlooked.

Application of the EIRs

18. In this case, the Ministers submitted that the information under consideration at review stage was all clearly environmental (relating to the topics of climate change, food, agriculture and historic buildings), so the review was considered under the EIRs only. Following disclosure of the majority of the withheld information at review stage, the Ministers adhered to this view, submitting that the information was environmental information as defined in regulation 2(1) of the EIRs. They provided submissions in terms of the EIRs, applying section 39(2) of FOISA to the information.
19. Where information falls within the scope of the definition in regulation 2(1), a person has a right to access it (and the public authority has a corresponding obligation to respond) under the EIRs, subject to the various restrictions and exceptions contained in the EIRs.
20. Having considered the nature of the withheld information, the Commissioner is satisfied that it is all environmental information as defined within regulation 2(1) of the EIRs. The Commissioner considers it would fall within paragraph (a) of the definition of environmental

information (as information on the state of the elements of the environment), paragraph (c) of that definition (as information on measures designed to protect those elements), or paragraph (f) (as information on cultural sites and built structures). Mr Edwards has not disputed the Ministers' decision to handle these parts of his request under the EIRs.

Section 39(2) of FOISA – Environmental information

21. The exemption in section 39(2) of FOISA provides, in effect, that environmental information (as defined by regulation 2(1) of the EIRs) is exempt from disclosure under FOISA, thereby allowing any such information to be considered solely in terms of the EIRs. In this case, the Ministers provided submissions solely in terms of the EIRs, on the basis that they were applying section 39(2). The Commissioner accepts that the Ministers were entitled to apply this exemption to the withheld information, given her conclusion that it is properly classified as environmental information.
22. As there is a statutory right of access to environmental information available to Mr Edwards in this case, the Commissioner accepts, in all the circumstances, that the public interest in maintaining this exemption (and responding to these parts of the request under the EIRs) outweighs any public interest in disclosing the information under FOISA.
23. The Commissioner therefore concludes that the Ministers were correct to apply section 39(2) of FOISA and consider these parts of Mr Edwards' information request under the EIRs. In what follows, she will consider the information solely in terms of the EIRs.

Information held

24. In order to ascertain whether all relevant information had been identified and located by the Ministers, they were asked to provide an explanation of how the information was held, and the searches that they had undertaken in order to identify, locate and retrieve that information.

How the information is held

25. The Ministers explained that correspondence was filed according to subject matter, and not by correspondent name, as this best suited their business needs. The Ministers submitted that they had no business need for records of correspondence with Prince Charles to be filed separately, arguing that there was no requirement under FOISA or the EIRs to create and maintain records specifically to anticipate and/or answer information requests.

Searches

26. The Ministers explained the searches carried out and search terms used. These included a search of their eRDM records management system, using the search terms "Prince of Wales", "Duke of Rothesay" and "Prince Charles": some information within the scope of Mr Edwards' refined request had been identified in this way. Inbox searches were also carried out by the following teams: First Minister's Office, Protocol Team, Food and Drink, Climate Change Teams, Agriculture, Wildlife and Historic Buildings, all with varying results, but again identifying some information within scope. A search of their old Ministerial Correspondence System was also carried out, using the surnames "Wales", "Rothesay", "Leishman" and "Nye", which also identified some information within scope.
27. Having considered all the relevant submissions, the terms of the refined request and the way in which relevant correspondence is held by the Ministers, the Commissioner is satisfied that the Ministers took adequate, proportionate steps to identify, locate and retrieve the information they held and which fell within the scope of Mr Edwards' refined request. While it

may seem somewhat surprising that the only way the Ministers could identify, locate and retrieve correspondence with such a prominent figure would be through a trawl of all records held by the policy areas for the subjects specified, the Commissioner has no basis for doing other than accepting the Ministers' explanation that there was no alternative means of identifying such correspondence. She therefore accepts that any information falling within the scope of the refined request would have been identified using the searches described by the Ministers.

Regulation 5(1) of the EIRs

28. 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 relates to information that is held by the authority when it receives a request.
29. On receipt of a request for environmental information, therefore, the authority must ascertain what information it holds and which falls within the scope of the request. Having done so, regulation 5(1) requires the authority to provide that information to the requester, unless a qualification in regulations 6 to 12 applies.
30. 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. The exceptions must be interpreted restrictively, applying a presumption in favour of disclosure.
31. In their submissions, the Ministers confirmed that they wished to rely on regulation 10(5)(f) in respect of the remaining withheld information.

Regulation 10(5)(f)

32. Regulation 10(5)(f) of the EIRs provides that a Scottish public authority may refuse to make environmental information available to the extent that its disclosure would, or would be likely to, prejudice substantially the interests of the person who provided that information, where that person -
 - (i) was not under, and could not have been put under, any legal obligation to supply the information;
 - (ii) did not supply it in circumstances such that it could, apart from the EIRs, be made available; and
 - (iii) has not consented to its disclosure.

Does regulation 10(5)(f) apply in this case?

33. A number of factors should be addressed in considering whether this exception applies. These include:
 - Was the information provided by a third party?
 - Was the provider, or could the provider be, required by law to provide it?
 - Is the information otherwise publicly available?
 - Has the provider consented to disclosure?

- Would disclosure of the information cause, or be likely to cause, substantial harm to the interests of the provider?

Was the information provided by a third party?

34. Having viewed the withheld information, the Commissioner accepts that some of the information (specifically that in the correspondence from Prince Charles) was provided by a third party.
35. The Ministers were asked to confirm whether they wished to rely on regulation 10(5)(f) in respect of the remaining correspondence from Mr Salmond to Prince Charles. In response, the Ministers maintained that the exception applied to the information in this correspondence, as it could not be disclosed without revealing the substance of the information in the preceding correspondence from Prince Charles.
36. The Ministers argued that regulation 10(5)(f) applied when disclosure of the information would cause the substantial prejudice envisaged by the exception, and the origins of the correspondence containing that information were of little or no importance.
37. While the Commissioner accepts the distinction drawn between information and the medium in which it is conveyed, and that information obtained from a third party may be reiterated in correspondence back to that third party, she cannot accept that this follows for the whole of the letter from Mr Salmond. It applies to the subject heading, and the first, second and seventh sentences only: the remainder of the letter can only be described as conveying information and comment from the First Minister.
38. In the Commissioner's view, only information which was provided by a third party can fall under the scope of regulation 10(5)(f). Only that information referred to above can qualify as information provided by another person and therefore be covered by the exception. For that reason, the Commissioner does not consider the information in the remainder of the letter from Mr Salmond to qualify for exception under regulation 10(5)(f). The Ministers have not chosen to apply any other exception in relation to this other information and so she finds that it must be disclosed to Mr Edwards.
39. The Commissioner will now go on to consider the other tests required for this exception to apply, in relation to the information she is satisfied was provided by a third party.

Was the provider, or could the provider be, required by law to provide it?

40. The Ministers submitted that the letters were an exchange of correspondence initiated by Prince Charles, arguing that he was clearly not under, or put under, any legal obligation to supply the information in the correspondence.
41. Having viewed the withheld information, in the context in which it was provided, the Commissioner is satisfied that it is not information that Prince Charles was required, or could have been required, to provide by law.

Is the information otherwise publicly available?

42. The Ministers submitted that the correspondence was sent in the expectation that it was private and confidential, and so would not be made publicly available.
43. From examination of the withheld information, together with the information disclosed to Mr Edwards in the Ministers' review outcome, it is clear that some of the information that continues to be withheld had already been disclosed by the Ministers in other correspondence. Furthermore, as a result of research by the investigating officer, it was

evident that further information surrounding the subject matter of the correspondence was already in the public domain.

44. In all the circumstances, therefore, the Commissioner is satisfied that a substantial amount of the withheld information has already been made public.

Has the provider consented to disclosure?

45. The Ministers submitted that they would not routinely make available any correspondence sent to a Scottish Minister without first consulting the correspondent. Referring to section 7 in Part 2 of the Scottish Ministers' Code of Practice on the Discharge of Functions by Scottish Public Authorities under FOISA and the EIRs² (the Section 60 Code), and to steps 8 and 32 of the Ministers' own Step by Step Guide to Handling FOI/EIRs Requests³, the Ministers explained that they routinely notify the Royal Household of any such requests, and consult them about any response.
46. The Ministers confirmed they had consulted the Royal Household in this case, the response being that the information was personal and confidential, and should not be disclosed. The Ministers did not provide the Commissioner with any evidence in support of this position.
47. The Commissioner has carefully considered the Ministers' submissions on this matter. As explored in Decision 022/2016 *Mr Marc Ellison and the Board of Trustees of the Royal Botanic Garden Edinburgh*⁴, the Commissioner's view is that consent (and its refusal) will involve an active expression of the wishes of the individual concerned, specific to the circumstances for which it has been sought. She considers that this matter must therefore be approached on a case-by-case basis and must clearly apply to the information in question.
48. The Commissioner is not convinced, from the submissions provided by the Ministers, that consent can be considered to have been properly sought from, and duly refused by, Prince Charles in this particular case, in relation to disclosure under the EIRs of the withheld information under consideration here.

Substantial prejudice

49. As regulation 10(5)(f) is focused on substantial prejudice to the interests of the person who provided the information, the Ministers were invited to explain specifically what interests of Prince Charles would be prejudiced, in what way, and how this could be expected to follow from disclosure of the particular information requested.
50. The Ministers acknowledged there had been media attention following the earlier publication of Prince Charles's correspondence by both the Scottish and UK Governments. These articles noted, in the main, that the Prince was writing to Ministers about various issues in which his interest was already well known. The Ministers observed there had been little criticism of the Prince or his motives following those publications.
51. The Ministers submitted that the withheld information in this case was different. They believed disclosure would cause substantial prejudice by leading to speculation of a political nature, based on the timing of the correspondence. Referring to previous similar requests from journalists who had subsequently published news stories featuring the Prince, the

² <http://www.gov.scot/About/Information/FOI/Section60Code/s60codeofpractice>

³ <http://www.gov.scot/About/Information/FOI/access/internalguide>

⁴ <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2016/201501528.aspx>

Ministers submitted it was highly likely that disclosure of the withheld information would likewise lead to news stories which, on this occasion, would substantially prejudice the Prince's interests as the future monarch.

52. The Commissioner has considered the submissions made by the Ministers on the perceived substantial prejudice to Prince Charles's interests. She must take into account all factors bearing on the expectations it would be reasonable to hold in relation to the information. She must, above all, take account of the information itself.
53. The Commissioner has touched on the question of confidentiality above, in considering whether the information was publicly available. Having considered the content of the withheld correspondence, together with the information already in the public domain (and its age), the Commissioner can find nothing from which it can be inferred that Prince Charles would have a reasonable expectation that the contents of this correspondence would be held in confidence by the Scottish Ministers. This view is supported by the Ministers' disclosure, at review stage, of some of the withheld information relating to the subject in question. It is further evidenced by the fact that some of the information being withheld is already in the public domain: indeed, some of it is available on Prince Charles's official website (www.princeofwales.gov.uk).
54. The Commissioner does not consider that the Ministers have provided sufficient evidence to satisfy her that disclosure of the information would result in the prejudice claimed to Prince Charles's interests. She does not accept that the information could be characterised as confidential, while the submissions on harm to the Prince's future role as monarch appear to be speculative and wholly unrelated to the nature of the information withheld.
55. The Ministers' arguments focus on the timing of the withheld correspondence. The Commissioner is not convinced by the Ministers' argument that this would lead to political speculation in the event of disclosure. Having examined the withheld information, there is nothing to infer any political motive, and there appear to be perfectly sound reasons for the timing of the correspondence, wholly unrelated to any political circumstances.
56. Having considered all the evidence before her, therefore, the Commissioner does not accept that the Ministers were entitled to apply regulation 10(5)(f) to the remainder of the withheld information, and so she finds that it must be disclosed to Mr Edwards.
57. As the Commissioner has found that the exception contained in regulation 10(5)(f) does not apply, she is not required to consider the public interest test in regulation 10(1)(b) of the EIRs.

Compliance required

58. The Ministers are required to disclose to Mr Edwards all the withheld correspondence they have identified as falling within the scope of this request (three items of correspondence). Mr Edwards has already indicated to the Commissioner that he does not object to the redaction of any personal information (such as name, address, signature): on this basis, the Commissioner will accept the redaction of signatures from the correspondence, in addition to any private names and addresses (bearing in mind that the names of the Prince's private residences, at least, are already well known).

Other Matters – handling of the request and good practice

Disclosure of extracts

59. In his application to the Commissioner, Mr Edwards expressed dissatisfaction that he had been provided with extracts only of correspondence, querying whether it was reasonable for the Ministers not to provide the full text of the letters.
60. In their submissions to the Commissioner, the Ministers explained they had provided extracts only, mainly as the remaining parts of these letters were either outwith the scope of Mr Edwards' request, were the personal data of the corresponding parties, or were withheld under regulation 10(5)(f). They believed it was more helpful to provide extracts, rather than heavily redacted copies of letters, this making no difference to the information that was disclosed.
61. The Ministers further submitted that this matter was overtaken by the publication, on their website, of further correspondence between Prince Charles and Mr Salmond, in response to a subsequent, broader request. They explained that this provided Mr Edwards with fuller versions of some of the correspondence originally provided in extract format, where much of the information had been out of scope of his refined request of 25 June 2015.
62. The Commissioner accepts that, on the basis of Mr Edwards' refined request of 25 June 2015, it was acceptable for the Ministers to provide him with extracts only, in response to that request.
63. The Commissioner notes, however, that the Ministers were clearly aware, from Mr Edwards' initial request of 22 June 2015, that he was seeking all correspondence between Prince Charles and Mr Salmond (when he was first Minister). Taking cognisance of the fact that Mr Edwards could not be expected to know which topics the parties had corresponded on, she considers it would have been good practice for the Ministers to have informed Mr Edwards of the further topics on which they held information (as contained in the fuller versions of the correspondence identified). This would have allowed him the opportunity to submit a further request for this information.

Narrowing of Request

64. In his application to the Commissioner, Mr Edwards expressed dissatisfaction that he had been repeatedly asked to narrow his request, effectively having to guess the topics on which the parties might have corresponded. He queried whether this was reasonable, as the Ministers apparently held no central record of letters from Prince Charles.
65. The Ministers explained that correspondence was filed according to its subject matter, and not by correspondent. They submitted that, at the time of Mr Edwards' request, they were unable to advise him of the topics on which they held such correspondence, as this could only have been achieved following an authority-wide trawl of all records held to find the relevant correspondence, and thereafter identifying the subjects. The Ministers submitted this would have involved the same amount of work as providing the information requested in Mr Edwards' initial (unrefined) request of 22 June 2015.
66. The Ministers maintained that they believed they had provided Mr Edwards with adequate advice and assistance, as this had enabled him to reduce the scope of his request, allowing it to be answered within the cost limit.
67. With regard to records management, the Ministers submitted their current systems met their operational and business needs, and were sufficient to answer the majority of information

requests. Prior to March 2015 (the time of the Supreme Court judgement ordering the disclosure of Prince Charles's correspondence under the FOI Act in England and Wales), requests to the Ministers for Prince Charles's correspondence were infrequent, and tended to focus on particular topics. Requests of this nature spiked during the period March-August 2015. The Ministers argued that, even if Mr Edwards' request had been anticipated prior to March 2015, an authority-wide trawl of correspondence would still have been required to locate and retrieve the correspondence. Given the resources that would have been required to undertake such a task, the Ministers considered it would have been unreasonable to be expected to carry out such work, solely in anticipation of a possible information request.

68. The Ministers explained that, since Mr Edwards' request of 25 June 2015, they had received a number of further, narrower requests for correspondence of this nature. In recognition of this wider interest in Prince Charles's correspondence, and in line with their duty to assist, the Ministers explained that they had undertaken extensive searches which had allowed them to identify what they believed to be all such correspondence. They submitted that this should enable them to respond to any similar request in future, without invoking the cost limit.
69. Having considered the Ministers' explanations surrounding the way in which they hold correspondence with Prince Charles, the Commissioner must accept that, in the circumstances, the Ministers provided Mr Edwards with adequate advice and assistance to enable him to narrow his request and bring it within the cost limits.
70. However, the Commissioner would also observe that it appears reasonable to expect that there would be occasion, for a range of business reasons, for an authority to be able to search for information by name of correspondent. She recognises that authorities must have adequate records management systems in place to conduct their business, including (as a statutory function) responding to information requests, but, as the Commissioner stated to Ministers in Decision 042/2016 *Mr Tommy Kane and the Scottish Ministers*⁵, she would expect the Ministers to take reasonable steps to ensure that systems are designed recognising the need to search for, locate and retrieve information efficiently.

⁵ <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2016/201502221.aspx>

Decision

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

The Commissioner finds that the Ministers were correct to apply section 39(2) of FOISA to the remaining withheld information, and consider it under the EIRs.

However, the Commissioner also finds that the Ministers failed to comply with the EIRs, as they were not entitled to withhold the remaining withheld information under regulation 10(5)(f) of the EIRs.

The Commissioner therefore requires the Ministers to disclose the remaining withheld information to Mr Edwards (with personal data redacted where required) by **16 May 2016**.

Appeal

Should either Mr Edwards or the Scottish 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.

Enforcement

If the Scottish Ministers (the Ministers) fail to comply with this decision, the Commissioner has the right to certify to the Court of Session that the Ministers have failed to comply. The Court has the right to inquire into the matter and may deal with the Ministers as if they had committed a contempt of court.

Rosemary Agnew
Scottish Information Commissioner

30 March 2016

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.

...

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;

...

(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.

(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.

...

- (5) A Scottish public authority may refuse to make environmental information available to the extent that its disclosure would, or would be likely to, prejudice substantially-

...

- (f) the interests of the person who provided the information where that person-
- (i) was not under, and could not have been put under, any legal obligation to supply the information;
 - (ii) did not supply it in circumstances such that it could, apart from these Regulations, be made available; and
 - (iii) has not consented to its disclosure; or

...

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