

Decision Notice



Decision 094/2010 Mr Rob Edwards and the Scottish Ministers

Nirex sites

Reference No: 200601048
Decision Date: 14 June 2010

www.itspublicknowledge.info

Kevin Dunion
Scottish Information Commissioner

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



Summary

Mr Rob Edwards, Environment Editor of the Sunday Herald requested from the Scottish Ministers (the Ministers) copies of all of the documents within the file IMH/5/2/1: Nirex sites. The Ministers disclosed some documents, but withheld the remainder under a number of exemptions within the Freedom of Information (Scotland) Act 2002 (FOISA). Following a review in which a small number of additional documents were disclosed, Mr Edwards remained dissatisfied and applied to the Commissioner for a decision.

During the investigation, Mr Edwards agreed that certain documents could be excluded from consideration. The Ministers reconsidered the remaining withheld documents and disclosed the majority (264 out of 297) to Mr Edwards. They accepted that Mr Edwards' information request should have been dealt with under the Environmental Information (Scotland) Regulations 2004 (EIRs) and sought to rely upon the exceptions in regulations 10(4)(e) and 10(5)(f) of the EIRs to withhold the remaining information.

Following the investigation, the Commissioner found that the Ministers were entitled to withhold the remaining under regulations 10(4)(e) and 10(5)(f) of the EIRs.

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) and 39(2) (Health, safety and the environment)

Environmental Information (Scotland) Regulations 2004 (EIRs): regulations 2(1) (Interpretation) (definition of "environmental information"); 5(1) and (2)(b) (Duty to make available environmental information on request) and 10(1), (2) and (4)(e) 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 the Appendix to this decision. The Appendix forms part of this decision.



Background

1. On 14 October 2005, Mr Edwards emailed the Ministers requesting all documents contained within the file IMH/5/1/2: Nirex Sites. Mr Edwards requested the contents of a number of other files at the same time, but this decision will be concerned only with the request for file IMH/5/1/2.
2. On 10 November 2005 and 13 January 2006, the Ministers wrote to Mr Edwards advising him that, due to the substantial number of documents contained within the requested file, their response would be delayed.
3. The Ministers provided their response to Mr Edwards' request on 4 May 2006. They apologised for their delayed response and released some information from the IMH/5/1/2 file. The Ministers withheld the remaining information, maintaining that some information was not held by them for the purposes of FOISA (in terms of section 3(2)(a)(ii) of FOISA) whilst the remaining information was exempt from disclosure under sections 28(1), 29(1)(a), 29(1)(b), 30(b) and 30(c) of FOISA.
4. On 10 May 2006, Mr Edwards emailed the Ministers requesting a review of their decision. He commented that it was difficult for him to judge whether the public interest would favour disclosure of the withheld documents as he had not seen the withheld information, and he asked the Ministers to reconsider their response and in particular whether the public interest might favour disclosure.
5. The Ministers notified Mr Edwards of the outcome of their review on 7 June 2006. They disclosed additional information, but withheld the remainder under the previously cited exemptions.
6. On 12 June 2006, Mr Edwards wrote to the Commissioner, stating that he was dissatisfied with the outcome of the Ministers' review and applying for a decision in terms of section 47(1) of FOISA (which, in terms of regulation 17 of the EIRs, applies for the purposes of the EIRs as it applies for the purposes of FOISA, subject to minor modification).
7. Mr Edwards' application was made in respect of the Ministers' responses to six of the requests that were made on 14 October 2005. However, as noted above, this decision will solely consider the Ministers' handling of the request for the contents of file IMH/5/1/2.
8. *Decision 044/2009 Mr Rob Edwards and the Scottish Ministers* considered the Ministers' handling of one of these six information requests. Settlement has been reached between Mr Edwards and the Ministers with respect to the remaining four requests, and so Commissioner has not been required to make a decision in respect of these. This decision signifies the completion of the investigations that were prompted by Mr Edwards' application of 12 June 2006.



9. The case was allocated to an investigating officer and the application validated by establishing that Mr Edwards 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 their response to that request.

Investigation

10. On 22 June 2006, the Ministers were notified in writing that an application had been received from Mr Edwards and were invited to comment on the application in terms of section 49(3)(a) of FOISA. The Ministers were asked to provide specified items of information required for the purposes of the investigation, which would initially address Mr Edwards' six requests together.
11. In particular, the investigating officer asked the Ministers to supply a schedule of documents, listing what information had been disclosed and what had been withheld and under which exemption. The investigating officer also asked the Ministers to comment as to whether the information under consideration was environmental information, and the basis for the Ministers' claim that certain information was not held by them in terms of section 3(2)(a)(ii) of FOISA (on the grounds that it was held in confidence, having been supplied by the UK Government).
12. The Ministers responded on 4 August 2006, explaining that they had carefully considered whether Mr Edwards' requests should be treated under FOISA or the EIRs, but that they had concluded that the bulk of the information contained in the relevant files was not environmental. They acknowledged that there was some environmental information within the files, but explained that they had concluded that it would be more appropriate to consider the requests under FOISA rather than the EIRs.
13. The investigation focussed on file IMH/5/1/2 following the issue of *Decision 044/2009*.
14. In discussions with the investigating officer during July 2009, Mr Edwards narrowed the scope of his application to exclude certain information within the file from consideration. This included documents already in the public domain; duplicated documents; names, addresses and contact details of members of the public; and documents relating purely to administrative arrangements (such as meeting arrangements).
15. The investigating officer subsequently undertook a thorough review of the files to identify which documents should be considered, and which could be excluded from consideration in the light of Mr Edwards' comments.
16. On 10 November 2009, the investigating officer contacted the Ministers, inviting them to provide further comments on the application and on the particular information that remained under consideration.



17. The investigating officer also advised the Ministers that, having considered the information which had been withheld from file IMH/5/2/1, the Commissioner was of the opinion that this was environmental information as defined in regulation 2(1) of the EIRs. The Ministers were asked to comment on this point and provide submissions as to whether they considered the information fell within the scope of any of the exceptions contained in the EIRs. The Ministers were also asked if they wished to rely on section 39(2) of FOISA, which allows Scottish public authorities to exempt information from disclosure under FOISA if it is environmental information which the authority is obliged to make available to the public in accordance with the EIRs.
18. In their response, dated 1 March 2010, the Ministers accepted that the information under consideration fell within the definition of environmental information in regulation 2(1) of the EIRs and indicated that they would apply the exemption contained in section 39(2) of FOISA. Having reassessed the remaining withheld information, the Ministers decided to disclose a considerable volume of information to Mr Edwards, i.e. all of that the information contained within 264 of the 297 documents identified by the investigating officer.
19. These documents were subsequently disclosed to Mr Edwards on 9 April 2010. In correspondence with the investigating officer, Mr Edwards confirmed that he was content for these documents to be excluded from consideration in this decision.
20. The Ministers noted that three of the documents identified by the investigating officer were draft versions of documents which had been disclosed to Mr Edwards. These have (with Mr Edwards' agreement) also been excluded from further consideration in this decision.
21. The information under consideration in this decision is that contained in the 30 remaining documents. The Ministers maintained that this was excepted from disclosure in terms of regulations, 10(4)(e) and 10(5)(f) of the EIRs, and their submissions provided details of their reasoning when considering these exceptions and the associated public interest test.
22. Mr Edwards was also invited to provide comments on the case in the light of the Ministers' additional disclosures, and of confirmation of the exceptions applied to the remaining information. Mr Edwards provided his comments on 21 April 2010.

Commissioner's analysis and findings

23. 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 Mr Edwards and the Ministers and is satisfied that no matter of relevance has been overlooked.



24. At this point, the Commissioner would note that he has considered (as he is required to do in any decision) the application of exceptions and the balance of the public interest in relation to the information under consideration in the circumstances that existed at the time when the Ministers notified Mr Edwards of the outcome of their review. The relevant point is June 2006. The Commissioner has disregarded the passage of time and any events after that point in what follows below.

Withheld information and background on Nirex sites

25. The information under consideration is that contained in the 30 documents which the Ministers still wished to withhold, and Mr Edwards still wished to access, at the end of the investigation.
26. These documents (and the contents of file IMH/5/1/2 as a whole) all relate to the discussions and decision making process that led to the disclosure in June 2005 of a short-list of sites that were considered as possible sites for the development of a nuclear waste repository by Nirex.
27. Nirex was established in 1982 to research, develop and operate radioactive waste facilities on behalf of the nuclear industry. In the 1980s, it was asked by the Government to identify possible sites for use as deep geological repositories for radioactive waste. 500 sites were originally identified, and these were later narrowed down to a short list. A site close to Sellafield was selected by Nirex for the establishment of an underground repository. However, Nirex's proposals were rejected by the Government in 1997 following a planning enquiry, leading to the termination of the programme as a whole.
28. The identities of the short-listed sites had never been publicly disclosed prior to June 2005, but a decision was taken to disclose this list following the implementation of FOISA and the EIRs (and the equivalent UK legislation) and the receipt of a number of information requests by UK Government departments and the Scottish Ministers.

Section 39(2) of FOISA – environmental information

29. Environmental information is defined in regulation 2(1) of the EIRs, and this definition is 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 the exceptions contained within regulation 10 and the provisions of regulation 11, and certain other restrictions set out in the EIRs.
30. The exemption in section 39(2) of FOISA provides 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).
31. As noted above, the Ministers were advised that the Commissioner's initial view was that the information contained in file IMH/5/1/2 was environmental information. Although they had initially dealt with Mr Edwards' request solely in terms of FOISA, the Ministers agreed during the investigation that this was environmental information, and indicated that they wished to apply the exemption in section 39(2) of FOISA to all of the information under consideration.



32. Having reviewed the withheld information, the Commissioner is satisfied that this is entirely environmental information. As noted above, this relates to the process leading to disclosure of the list of sites considered as possible repositories for nuclear waste by Nirex.
33. That list of possible sites itself constitutes information which directly relates to the state of the elements of the environment and to measures (including policies, plans and activities) affecting or likely to affect the elements of the environment (such as soil, land, and landscape) or the factors (in particular, of course, radioactive waste) referred to in parts (a) and (b) of the definition in regulation 2. As such, this is clearly environmental information as defined in part (c) of the definition.
34. The Commissioner has also concluded more broadly that the information under consideration revealing discussion and deliberation deliberations about disclosure of this information falls within the scope of part (c) of the definition of environmental information, since it is clear that these deliberations involved environmental considerations, and had regard to the wider context of work ongoing to consider future options for nuclear waste disposal.
35. The Commissioner is therefore satisfied that the information under consideration is entirely environmental information as defined in the EIRs, and so is exempt in terms of section 39(2) of FOISA.
36. This exemption is subject to the public interest test in section 2(1)(b) of FOISA. The Commissioner's view is that, in this case, as there is a separate statutory right of access to environmental information available to Mr Edwards, the public interest in maintaining this exemption and dealing with Mr Edwards' request in line with the requirements of the EIRs outweighs any public interest in disclosure of information under FOISA. In what follows, therefore, the Commissioner will make his decision solely in terms of the EIRs.

Regulation 10(5)(f) (Interests of the person)

37. The Ministers applied the exception in regulation 10(5)(f) to all but five of the 30 documents withheld.
38. Under regulation 10(5)(f), 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 the information where that person (i) was not under, and could not have been 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.
39. Regulation 10(2) of the EIRs provides that this exception must be interpreted in a restrictive way (regulation 10(2)(a)) and that the public authority shall apply a presumption in favour of disclosure (regulation 10(2)(b)). The exception is also subject to the public interest test in regulation 10(1)(b).



40. The Ministers submitted that the information to which this exception was being applied had been provided to them by the UK Government and by Nirex, neither of which were under an obligation to provide it to them. They also maintained that the information was provided in confidence and that consent to disclosure had not been granted. The Ministers maintained that the interests of the UK Government departments and Nirex would be likely to be substantially prejudiced by release.
41. The Ministers also provided a copy of a letter from the UK Government's Department for Energy and Climate Change (DECC), which stated that the communications and documents under consideration had been supplied to the Scottish Ministers in good faith and reflected the open and frank discussions that were being held at the time.
42. The letter indicated that these items were considered sensitive and to relate to ongoing policy development, and that disclosure would have a negative effect on future discussions. It indicated that disclosure could inhibit future discussions and communications, thereby substantially affecting the ability to formulate policy in the UK and Scottish Governments where cross-administration working is essential to produce coherent policies. The DECC also indicated that it did not consent to the information being released.
43. The Commissioner is satisfied that all of the information withheld under regulation 10(5)(f) was provided to the Ministers by third parties, either a UK Government department or Nirex
44. The Commissioner also notes that the withheld information is not (so far as he is aware) publicly available, and that it was not publicly available at the time of the Ministers' review of their handling of Mr Edwards' information request (or, indeed, at the date of Mr Edwards' request).
45. The Commissioner accepts that this information was provided to the Ministers in circumstances where the third parties were not (and could not be put) under any legal obligation to supply it to them. He is therefore satisfied that regulation 10(5)(f)(i) is met in this case.
46. Regulation 10(5)(f)(ii) states that the exception can only apply to information which was not supplied in circumstances such that it could, apart from under the EIRs, be made available. The Commissioner cannot identify any other legal obligation, apart from the EIRs, which would require the disclosure of the withheld information.
47. The Commissioner also notes that the third parties supplying this information have not consented to its disclosure. Consequently, the Commissioner concludes that regulation 10(5)(f)(iii) applies to the withheld information.
48. Since the tests in regulation 10(5)(f)(i), (ii) and (iii) have been satisfied, the Commissioner must go on to consider whether disclosure of the information would, or would be likely to, prejudice substantially the interests of the persons who provided the information..



49. The Ministers submitted that disclosure would be likely to prejudice substantially the interests of the UK Government departments as it would expose internal discussions on a sensitive and controversial subject, with the risk that the policy position of the UK Government at that time could be misunderstood and misrepresented and with the risk that disclosure would re-open a debate which had been concluded. The Ministers went on to comment that the disclosure of the information could have had serious implications for policy on disposal of radioactive waste, which was ongoing and highly sensitive at the time of Mr Edwards' review and that disclosure would prejudice substantially the ability to formulate informed policy on the disposal of radioactive waste and risk potential failure to the policies on both sides of the border.
50. While the political landscape in Scotland may have changed since Mr Edwards made his request, it is important to remember that the Commissioner must consider the position as at June 2006, when the Ministers responded to Mr Edwards' request for review.

Information supplied by the UK Government

51. The Commissioner has noted that most of the information withheld under this exception is contained in UK Government documents, including advice to Ministers, correspondence and minutes of discussions. These documents are all concerned with how UK Government departments should respond to information requests they had received. The discussions focus on proposals for UK Government action, in an area where it alone was responsible for decision-making.
52. The documents under consideration reveal frank advice and discussion between UK Government departments. Nirex and the Scottish Ministers were also involved in this discussion, and kept informed as a matter of courtesy.
53. The Commissioner notes that the UK Government documents under consideration were shared with the Scottish Ministers in the context of cross-governmental cooperation in a policy area that affects the UK as a whole. He considers it clear that this information was shared by the UK Government with the expectation that it would be kept confidential. The letter from DECC confirmed in writing that this expectation remains in place.
54. This letter suggests also that the UK Government would not wish to disclose this information itself should it receive an information request under (UK) Freedom of Information Act 2000 and (UK) Environmental Information Regulations 2004, by which it is bound.
55. The Commissioner accepts that disclosure at the relevant time would have, or would have been likely to prejudice substantially the interests of the UK Government, by revealing internal advice and deliberations on the question of disclosure of the list of possible sites for nuclear waste disposal. The Commissioner accepts that disclosure of this information would at that time have been likely to harm ongoing policy development by inhibiting future communications and information sharing between administrations.



Information supplied by Nirex

56. A small number of the documents withheld under the exception in regulation 10(5)(f) were supplied to the Scottish Ministers by Nirex. The Commissioner would first of all note that Nirex no longer exists as a separate legal entity. Its ownership was transferred to the UK's Nuclear Decommissioning Authority (NDA) in November 2006. Its staff and functions were then integrated into the NDA in April 2007, at which point Nirex ceased trading as a separate entity.
57. At the time when these documents were exchanged, however, Nirex was owned by the nuclear industry. Nirex was taken into Government ownership in April 2005, soon after the exchange of the documents. It remained a company wholly owned by the UK Government at the time of the Scottish Ministers' review of Mr Edwards' information request.
58. The Commissioner has noted that the information supplied to the Scottish Ministers by Nirex primarily comprises legal advice obtained by Nirex and Nirex's comments and proposals in the light of the advice. Although it shared this information with both the UK Government and Scottish Ministers, the Commissioner again considers that it was clear that Nirex expected these communications to remain confidential.
59. The Commissioner is satisfied that disclosure of this information at the relevant time, would have been likely to prejudice substantially Nirex's interests, by undermining the confidentiality of its communications with its legal advisers, and its ability to engage in frank and open discussions with Government on such topics in future.

Overall conclusion on regulation 10(5)(f)

60. Having considered all of the information to which this exception was applied by the Ministers, the Commissioner accepts in all cases that disclosure of the information at the relevant time would have been likely to prejudice substantially the interests of either the UK Government departments or Nirex (as appropriate), the bodies which had supplied the information to the Ministers.
61. The Commissioner has therefore found that the Ministers correctly applied the exception in regulation 10(5)(f) to the information under consideration. He will now go on to consider the balance of public interest in relation to this information.

Public interest test in relation to of regulation 10(5)(f)

62. The exception in regulation 10(5)(f) is subject to the public interest test in regulation 10(1)(b) of the EIRs. Even if an exception has been judged to apply, a Scottish public authority may only refuse a request to make environmental information available if, in all the circumstances, the public interest in making the information available is outweighed by that in maintaining the exception (that is, by withholding the information).



63. The Ministers recognised that there is a public interest in understanding the background to the publication of Nirex site information. However, they submitted that this interest was largely met by the disclosure of information in the course of the investigation. The Ministers maintained that disclosing the information in the remaining documents would add little to public knowledge or understanding of the issues. They argued that there is an overriding public interest in allowing Ministers and officials in the Scottish and UK governments some private space to develop their thinking on the issues and consider options before arriving at a settled view, without their discussions being released into the public domain, with the risk that this would undermine or lead to misunderstanding of their final policy position.
64. With regard to the documents which contain, or refer to, legal advice, the Ministers indicated that they considered that any public interest in seeing this information is outweighed by the public interest in ensuring that legal advisers and their clients can discuss relevant issues, and give and receive legal advice, in confidence.
65. The Ministers also submitted that if the information were disclosed it would seriously damage their relations with the UK Government departments which provided it, making it likely that they would share much less information, particularly on sensitive or controversial issues, which would impair the ability to formulate informed policy on the disposal of radioactive waste.
66. In his submissions, Mr Edwards commented that he was hampered by the fact that he has no substantive knowledge of what the remaining withheld information contained, but he did ask the Commissioner to consider a number of points when assessing the balance of the public interest. The Commissioner has accordingly had regard to all of these points.
67. Mr Edwards first of all noted the passage of time, and observed that the argument that private space is needed becomes weaker as time passes and things change. The Commissioner has taken this point into consideration, noting that the list of sites considered by Nirex as possible locations for nuclear waste disposal was disclosed in June 2005, while the Ministers' notified Mr Edwards of the outcome of their review one year later in June 2006. However, the Commissioner cannot take into consideration the developments since June 2006 that were highlighted by Mr Edwards.
68. Mr Edwards also argued that it should be demonstrated in each case that any loss of private space is a real risk, not an illusory one. He indicated that, from the information already disclosed to him, it appeared that officials were well aware of the implications of the new freedom of information legislation, and so would know that all their communications were potentially releasable.
69. With respect to the Ministers' argument that disclosure of the withheld information would add little to public understanding, Mr Edwards accepted that, if this were the case, it would be hard to argue that there was a public interest in disclosure. He indicated that he would wish to be reassured that this was actually the case. He noted that, following the disclosure of that a substantial number of documents, a few gaps in the understanding of what happened remained, and any undisclosed comment or memo could add to that understanding. He argued that keeping the list of Nirex sites secret for so long was so unjustifiable and politically convenient, that it was important to fully understand how that happened and how it was ended.



70. Mr Edwards indicated that he understood the argument for keeping some legal advice private. However, he noted that in this case the issues presumably dealt with by legal advice had been long since resolved. He suggested that this might provide an argument for releasing some or all of the legal advice.
71. The Commissioner has considered all of the comments made by both Mr Edwards and the Ministers. He agrees with Mr Edwards that there is a considerable public interest in understanding the process by which the decision was taken to publish the list of sites identified by Nirex. While that public interest has been fulfilled to a large extent by the disclosures made by the Ministers during the investigation, he considers that there would be further insights to be gained from disclosure of the remaining information. He considers that further disclosure would go some way to filling the gaps in understanding referred to by Mr Edwards, and that this would be in the public interest.
72. However, the Commissioner recognises that there are substantial public interest considerations in favour of maintaining the exception in this case. Where legal advice is concerned, he has recognised in numerous previous decisions the strong public interest in maintaining the right to confidentiality of communications between legal adviser and client on administration of justice grounds. The Commissioner cannot identify any public interest so strong that it would outweigh this public interest in the legal advice under consideration in this case, even given the age of the advice and the fact that matters may well have been resolved.
73. With respect to the remaining information, the Commissioner has come to the conclusion, as set out above, that disclosure would be likely to substantially prejudice the interests of the third parties which supplied the information. He accepts that this would, in turn, be likely to harm relations between the Scottish Government and those third parties, and inhibit the future flow of information between them, which would not be in the public interest.
74. The Commissioner notes that the issue of nuclear waste disposal is one affecting the whole of the UK, and that it is an issue on which policy makers in UK and Scottish Government work closely together. The Commissioner accepts that there is a significant public interest in ensuring that policy making in this area is supported by the sharing of information and opinions between the two administrations and other relevant organisations (which, at the time of the Ministers' review, included Nirex, notwithstanding the fact that it has ceased to exist in the interim).
75. Although a year had passed since the publication of the list of sites by the time of the Ministers' review, the Commissioner does not consider that the passage of time had significantly diminished the sensitivity of the information under consideration, or the expectation of confidentiality held by the third parties supplying the information at that point.
76. In the circumstances, the Commissioner considers that disclosure of the information by the Ministers in June 2006 would still have been likely to harm relationships between the various organisations involved, and reduced the willingness of these organisations to share information and opinions to inform policy making on the subject of nuclear waste disposal as a result, contrary to the public interest



77. Having considered all of the circumstances of the case, noting that this consideration is based on the circumstances as at June 2006, the Commissioner has concluded that the public interest in maintaining the exception in regulation 10(5)(f) at that time outweighed the public interest in disclosure of the information. Therefore, the Commissioner concluded that the Ministers were entitled to withhold the information contained in the 25 documents withheld under regulation 10(5)(f) of the EIRs.

Regulation 10(4)(e) (Internal communications)

78. 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. The Ministers applied this exception to all of the information withheld in this case.
79. However, the Commissioner has not considered the Ministers' application of the exception in regulation 10(4)(e) to the information which he found the Ministers were entitled to withhold under regulation 10(5)(f). He has only considered the exception in regulation 10(4)(e) in relation to the content of the remaining five documents.
80. As with all of the exceptions contained in regulation 10, a Scottish public authority applying this exception must interpret the exception in a restrictive way (regulation 10(2)(a)) and apply a presumption in favour of disclosure (regulation 10(2)(b)).
81. For information to fall within the scope of this exception, it need only be established that the information is an internal communication.
82. Having considered the relevant information, the Commissioner has found that disclosing the information would involve making available internal Scottish Government communications. As such, he has found that regulation 10(4)(e) does apply to this information.

Consideration of the public interest in relation to regulation 10(4)(e)

83. Having found this information to be subject to the exception in regulation 10(4)(e), the Commissioner is required to consider the public interest test required by regulation 10(1)(b) of the EIRs in relation to this information. As noted above, this specifies that a public authority may only withhold information to which an exception applies where, in all the circumstances, the public interest in making the information available is outweighed by the public interest in maintaining the exception.
84. The Commissioner has considered this test in the light of the submissions from the parties summarised in paragraphs 63 to 70 above.
85. The Commissioner has first of all noted that disclosure of this information would contribute to the public interest by providing additional insights into the process leading to the disclosure of Nirex's list of sites. However, this contribution would be limited in this information, revealing only communications within the Scottish Government about a process which was primarily the responsibility of the UK Government departments.



86. While there would be some public interest in disclosure, the Commissioner accepts that there is a substantial countervailing public interest in non-disclosure. Although these communications were internal to the Scottish Government, they include details of discussions involving UK Government Departments and Nirex. The Commissioner recognises that the content of these communications is informed by the information supplied by the UK Government and Nirex which, the Commissioner considers the Ministers were entitled to withhold under regulation 10(5)(f).
87. The Commissioner accepts that the information communicated in these documents was received by the Scottish Ministers via the same channels and with the same expectations regarding confidentiality as those items considered above in relation to the exception in regulation 10(5)(f) of the EIRs. He recognises again that there is a public interest in such information being available to the Scottish Ministers to inform their own policy development, and to enable them to understand and contribute to decision making by the UK Government. The Commissioner also accepts that disclosure of the content of these communications would have the same harmful effects as were discussed above in relation to the information excepted under regulation 10(5)(f) of FOISA.
88. Therefore, for the same reasons discussed above in relation to the public interest test in relation to regulation 10(5)(f), the Commissioner accepts that the public interest in disclosure was (at the relevant time) outweighed by that in maintaining the exception in regulation in regulation 10(4)(e).
89. The Commissioner therefore finds that the Ministers were entitled to withhold, under regulation 10(4)(e) of the EIRs, the information contained in the five documents in question.

DECISION

The Commissioner finds that the Scottish Ministers (the Ministers) complied with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by Mr Rob Edwards in relation to the matters specified in the application made by Mr Edwards.

In particular, the Commissioner finds that the Ministers complied with the EIRs in withholding the information considered in this decision under the terms of regulations 10(4)(e) and 10(5)(f).



Appeal

Should either Mr Rob Edwards 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
14 June 2010



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.

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.

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.
- (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