

# Decision Notice



Decision 172/2013 Rob Edwards of the Sunday Herald and the Scottish Ministers

Plans to extend the operating lives of nuclear power stations

Reference No: 201201254  
Decision Date: 12 August 2013

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**Rosemary Agnew**  
Scottish Information Commissioner

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



## Summary

On 26 September 2011, Mr Edwards asked the Scottish Ministers for information relating to plans to extend the operating lives of the nuclear power stations at Torness and Hunterston. The Ministers responded on 20 October 2011. They provided some information, but withheld other information under regulation 10(4)(e) of the EIRs (internal communications).

After investigating, the Commissioner found that the exception had been wrongly applied to some of the withheld information, and ordered its disclosure.

## Relevant statutory provisions

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

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (Interpretation) (definitions (a) to (c) of “environmental information”); 5(1) and (2)(b) (Duty to make environmental information available on request); 7(1) (Extension of time); 10(1), (2) and (4)(e) (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

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1. On 26 September 2011, Mr Edwards asked the Scottish Government to provide “unpublished correspondence, reports, memos or other documentation since the start of 2010 relating to plans to extend the operating lives of the nuclear power stations at Torness in East Lothian and Hunterston in North Ayrshire”.
2. The Ministers responded on 20 October 2011, advising Mr Edwards that because of the complex and voluminous information involved, they would require an additional 20 working days to reply, as permitted by regulation 7 of the EIRs.



3. In the event, the Ministers did not reply to Mr Edwards' request until 3 April 2012, meaning that they took around 120 additional working days to respond. In this response, they provided some information, but withheld other information under the exception in regulation 10(4)(e) of the EIRs.
4. On 23 April 2012, Mr Edwards asked the Ministers to review their decision to withhold some information.
5. The Ministers notified Mr Edwards of the outcome of their review on 22 June 2012. The Ministers released one more document, but otherwise upheld their previous decision without modification.
6. On 27 June 2012, Mr Edwards wrote to the Commissioner, stating that he was dissatisfied with the outcome of the Ministers' review and applying to the Commissioner for a decision in terms of section 47(1) of the Freedom of Information (Scotland) Act 2002 (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.
7. The application was 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 its response to that request.

## Investigation

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8. On 5 July 2012, the Ministers were notified in writing that an application had been received from Mr Edwards and were asked to provide the Commissioner with the information withheld from him. The Ministers responded with the information requested and the case was then allocated to an investigating officer.
9. The investigating officer subsequently contacted the Ministers, giving them an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking them to respond to specific questions about the information covered by the request and their reasons for withholding it under regulation 10(4)(e). The Ministers' response addressed these questions.
10. During the investigation, Mr Edwards was invited to provide his views on why disclosure of the withheld information would be in the public interest.



## Commissioner's analysis and findings

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11. 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.

### Section 39(2) of FOISA – environmental information

12. The Commissioner accepts that the information withheld from Mr Edwards, which relates to the possible extension of the operating lives of two nuclear power stations, falls within the definition of environmental information in regulation 2(a), (b) and (c) of the EIRs.
13. 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. This exemption is subject to the public interest test required by section 2(1)(b) of FOISA. In this case, the Commissioner finds that the Ministers were entitled to apply the exemption in section 39(2) of FOISA to the withheld information, given her conclusion that it is properly considered to be environmental information.
14. As there is a separate statutory right of access to environmental information available to Mr Edwards, the Commissioner also accepts that the public interest in maintaining this exemption and dealing with the request in line with the requirements of the EIRs outweighs any public interest in disclosure of the information under FOISA. The Commissioner has consequently considered this case solely in terms of the EIRs.

### Regulation 10(4)(e) – internal communications

15. Under regulation 10(4)(e) of the EIRs, a Scottish public authority may refuse to provide environmental information which comprises internal communications.
16. A Scottish public authority applying this exception must interpret it in a restrictive way (regulation 10(2)(a)) and apply a presumption in favour of disclosure (regulation 10(2)(b)). Even where the exception applies, the information must be made available unless, in all the circumstances of the case, the public interest in making the information available is outweighed by that in maintaining the exception (regulation 10(1)(b)).
17. The Commissioner is satisfied that all the withheld information comprises internal communications exchanged between Scottish Government officials. Accordingly, she is satisfied that the withheld information under consideration comprises internal communications for the purposes of the EIRs and is subject to the exception in regulation 10(4)(e).



*The public interest test*

18. Having agreed that the exception in regulation 10(4)(e) applies, the Commissioner is required to consider the public interest test in regulation 10(1)(b) of the EIRs. As noted above, the test 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.
19. In their submissions, the Ministers acknowledged that there was likely to be significant public interest in the process for extending the life of nuclear power stations, with regard to the implications for the environment, the local areas surrounding these establishments, and future costs or employment issues.
20. The Ministers emphasised that they have no powers to extend the life of nuclear power stations. However, they considered that it was in the public interest for Ministers and their officials to be able to discuss and debate potential issues and questions which they might be required to discuss or negotiate with the UK Government. They argued that disclosure of the internal communications in this case would limit the ability of the Scottish Government to engage in full and frank discussion of factors affecting current or future policy, which would ultimately adversely affect the quality of its decision-making.
21. The Ministers argued that there is a strong public interest in maintaining the integrity of free and frank advice and the articulation of a final, clear, constant and unambiguous policy position where internal discussion and email exchanges relate to issues which constitute effective internal communication on an established policy position; in this case, the Ministers believed the policy to be “clearly and constantly articulated in the public domain, e.g. in the draft Energy Generation Policy Statement<sup>1</sup>”. The Ministers maintained that the public interest was served by ensuring that, where necessary, advice in areas of ongoing policy development can be provided in a non-public arena. The Ministers believed that these principles applied strongly in this case, where the Scottish Government policy on the lifetime extensions of new nuclear power stations has been clearly and publicly set out and published.
22. The Ministers accepted Mr Edwards’ argument that the public has a strong interest in the subject of nuclear power, including consent for any extension to the operating lives of existing nuclear plants. In relation to this aspect of the public interest, the Ministers asserted that they consistently, clearly and publicly articulate the policy position in each area where they have formulated clear policy positions, doing this in an interactive, proactive and public way through publications, speeches, and public or stakeholder engagement.

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<sup>1</sup> Scottish Government Electricity Generation Policy Statement (March 2012): <http://scotland.gov.uk/Topics/Business-Industry/Energy/EGPS2012>



23. In his submission to the Commissioner on the balance of public interest in this case, Mr Edwards commented that the information he had requested on plans for extending the operating lives of the nuclear power stations at Hunterston and Torness, concerns an issue at the heart of Scotland's future energy and economic policy and one which is hotly debated, frequently discussed and sometimes the subject of fierce controversy. Mr Edwards took the view that relatively few public statements have been made by Ministers on this issue, possibly because they regard it as a politically awkward topic. In this context, he considered it was important to ensure that political convenience was not mistaken for public interest. He questioned whether it was possible for the Ministers to show that real, identifiable harm would result from the disclosure of the information they had withheld.
24. Mr Edwards disputed that the release of internal communications would prevent full and frank discussion and affect the quality of decision-making expected by the public. He considered that the public are well aware that Ministers and officials have to "bounce around" ideas on policies before deciding upon their preferred course of action, and they would not be surprised to see this happen. However, if the public were allowed to see the internal debates that have gone on – and if those debates were of good and worthy quality – they might be impressed by the lengths to which politicians have gone to make the best decisions. If, on the other hand, the internal debates were of poor quality and less than worthy, Mr Edwards argued that the public interest would lie in exposing this so that the public could exercise their judgement.
25. Either way, Mr Edwards considered that there was a strong public interest in the disclosure of internal deliberations on extending the working lives of ageing nuclear power stations, especially given heightened concerns following the Fukushima nuclear accident in March 2011.
26. The Commissioner has considered the public interest arguments from both the Ministers and Mr Edwards in relation to the information withheld. She has taken into account the fact that the Ministers have disclosed some information covered by Mr Edwards' request, and have published information about their nuclear energy policy position in public documents such as the Draft Energy Policy Generation Statement. The Commissioner takes the view that this goes some way towards satisfying the public interest in access to information about extending the operational lives of two ageing nuclear power stations. However, she accepts that the withheld information would add more to public understanding of the discussions and deliberations on this issue, and the extent to which Scottish Ministers can be involved in the decision-making process.
27. The first argument put forward by the Ministers, to support their view that disclosure would not be in the public interest, was that disclosure would prevent or deter Ministers and their officials from having full and frank discussion of issues which they then might discuss or negotiate with the UK Government. The Ministers did not explain why disclosure of the withheld information would be likely to have this effect: they simply asserted that such discussions should take place "without fear of disclosure", and that the quality of decision making would be reduced if this private space for discussion were eroded or no longer available.

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28. The Commissioner is disappointed that the Ministers have not sought to justify their fears, in terms of the information withheld in this case. They have not shown whether they consider the information to be particularly sensitive, in content or context. Nor have they explained why disclosure of the information should be “feared”, or what would be the consequences, should their fear be realised. Having considered the information, the Commissioner finds most of it relates to a process by which advice to Ministers was drafted and refined, rather than a discussion of different policy options.
29. The Ministers also argued that it is in the public interest to protect communications on a policy area which was then still under development but is now clearly set out and published. The Commissioner understands the Ministers to be arguing that where finalised policy has been set out in a published document, there is a public interest in protecting the communications that took place while the policy was still under development. Again, the Ministers have not explained why this is their view, apart from expressing a general concern that the fear of disclosure would affect the quality of decision making by deterring officials and Ministers from having full and frank discussions.
30. The Commissioner is aware that the information disclosed to Mr Edwards included an update to the Minister for Energy, Enterprise and Tourism, complete with recommendations, and a draft version of the Ministerial submission which, in its final form, was withheld (document 12). Presumably, these disclosures were not expected to deter officials and Ministers from having full and frank discussions. The Ministers have not explained why disclosure in one instance would inhibit officials but not in another.
31. The Commissioner notes Mr Edwards’ counter-argument that it may be in the public interest for such communications to be disclosed, in order to show the extent to which the finalised policy was the result of careful consideration.
32. In general terms, the Commissioner recognises the public interest in protecting the private space required for policy development, particularly when the policy is at the early stages of development and requires wide-ranging discussions of all options, some of which may later be discarded. However, for the most part, the withheld communications in this case are concerned with fact-checking or refining the language of the advice to the Minister, rather than discussing different policy options. While the Commissioner accepts that this is part of the policy development process, it is less obvious why information relating to this stage of policy development should require protection. The Ministers have not advanced any explanation relating specifically to the information withheld in this case.



33. In relation to the final version of the advice to the Minister (Document 12), the Commissioner finds that, on balance, the public interest lies in disclosure of both the submission to the Minister and the supporting annexes (some of which have already been disclosed). This would enable the public to better understand the issues considered by the Ministers in reaching their published policy position, something which is strongly in the public interest when it comes to the controversial issue of extending the lives of ageing nuclear power stations. Against this, the Commissioner considered the argument that disclosure of the information would inhibit officials when providing advice in future, which would not be in the public interest. However, the Commissioner takes the view that any such inhibition is likely to be limited, given that the information in the final version of the advice represents the end of a long process during which the advice has been discussed and tested.
34. In relation to the draft versions of the advice to the Minister, or suggestions for changes to the language of that advice, the Commissioner considered the public interest arguments for disclosure put forward by Mr Edwards, and the extent to which disclosure of this particular information would, or would not, promote these interests. The Commissioner finds that, on balance, the public interest in protecting the drafting process outweighs the public interest in disclosure of the changes and amendments made to the document in question. In reaching this view, the Commissioner noted that an early draft version of document 12 was provided to Mr Edwards in response to his request. She considered whether this might weaken the argument for protecting the drafting process in the public interest, but concluded that the drafting process would be revealed to a much greater extent if the series of amended drafts was disclosed than has taken place through the disclosure of a single draft document.
35. The Commissioner finds that, for these reasons, the exception in regulation 10(4)(e) should be upheld for the information in documents 3 (part), 5, 6 (part), 7 (part), 8, 9 (part), 10 (part), 11 (part).
36. In relation to most of the other withheld communications, which did not form part of the drafting process, the Commissioner does not accept the Ministers' view that the balance of public interest lies in withholding the information.
37. The Commissioner is mindful that regulation 10(2)(b) requires Scottish public authorities to apply a presumption in favour of disclosure. The Ministers relied on generic arguments to show why disclosure of the information in question would not be in the public interest, and do not appear to have considered this issue specifically in relation to the contents of the documents. Taking into account the requirement to apply a presumption in favour of disclosure, in the circumstances of this case, the Commissioner finds that the public interest in disclosure outweighs the public interest in withholding the information under regulation 10(4)(e), in relation to documents 1, 2, 3 (part), 4, 6 (part), 7 (part), 9 (part). (As noted previously, the Commissioner also requires disclosure of document 12 in full.)





38. In relation to the remaining withheld information in documents 10 and 11, the Commissioner accepts that the public interest lies in maintaining the exception in regulation 10(4)(e). The language in part of document 10 is so noticeably free and frank, that the Commissioner accepts that disclosure may well cause officials to be less open in the way they express views in future, which (in the context of providing views on advice to Ministers) would not be in the public interest. The same reasoning applies to part of document 11, which also contains some information falling outside the scope of Mr Edwards' request. In both cases, the Commissioner finds that the balance of public interest requires the exception to be upheld.
39. The Commissioner will provide the Ministers with a schedule or marked up copies of the documents, showing which information she requires them to disclose to Mr Edwards.

#### **Other comments**

40. The Commissioner cannot avoid commenting on the difficulties encountered in the investigation of this case, which have unnecessarily delayed her decision, and on some other aspects of the Ministers' handling of Mr Edwards' request.
41. When the Ministers first responded to Mr Edwards' request, they told him that, under regulation 7 of the EIRs, a public authority may extend the 20 working days allowed for responding to a request by up to another 20 working days, if the complexity and volume of the information makes it impractical for the authority to respond within the original deadline. The Ministers later told Mr Edwards that they would provide the disclosable information in hard copy, due to its size.
42. When asked to provide the Commissioner with copies of the information sent to Mr Edwards, the Ministers provided some 40 pages. The withheld information in this case amounts to 12 documents. The Commissioner does not accept that the information in this case was either complex or voluminous.
43. The Commissioner finds that the Ministers were wrong to extend the time for responding to Mr Edwards' request under regulation 7 of the EIRs. The information covered by his request cannot fairly be described as either voluminous or complex. In the circumstances, the Commissioner finds that the Ministers failed to comply with regulation 5(2), which requires Scottish public authorities to comply with a request for environmental information as soon as possible, and in any event no later than 20 working days after the date of receipt of the request.
44. It took several attempts, including an information notice under section 50(1)(a) of FOISA, to obtain confirmation of the information provided to, and withheld from, Mr Edward by the Ministers. The Ministers apologised for the length of time taken to resolve this issue. They informed the Commissioner that they had identified a considerable failure in the labelling and filing of documents in this area. They have assured the Commissioner that action has been taken in respect of this. They have reflected on their procedures, and will be putting in place a more stringent, systematic process which will address the lessons learned throughout this case. The Commissioner looks forward to seeing the benefits of these improvements.



## DECISION

The Commissioner finds that the Scottish Ministers (the Ministers) partially failed to comply with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by Mr Rob Edwards.

The Commissioner finds that the Ministers were not entitled to withhold some information under regulation 10(4)(e) of the EIRs, while accepting that other information was correctly withheld under this exception. In failing to provide the information which was wrongly withheld, the Ministers failed to comply with regulation 5(1) of the EIRs.

The Ministers failed to respond to Mr Edwards' request within 20 working days, as required by regulation 5(2) of the EIRs, wrongly extending the time for response by a further 20 working days by virtue of regulation 7 of the EIRs.

The Commissioner requires the Ministers to disclose the information described in the schedule enclosed with this decision by 26 September 2013.

## Appeal

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Should either Mr 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.

**Rosemary Agnew**  
**Scottish Information Commissioner**  
**12 August 2013**



## Appendix

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### Relevant statutory provisions

#### Freedom of Information (Scotland) Act 2002

##### 1 General entitlement

- (1) A person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority.

...

- (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 –

- (a) the provision does not confer absolute exemption; and
- (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;
- (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in paragraph (a);
- (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in paragraphs (a) and (b) as well as measures or activities designed to protect those elements;

...

### 5 Duty to make available environmental information on request

(1) Subject to paragraph (2), a Scottish public authority that holds environmental information shall make it available when requested to do so by any applicant.

(2) The duty under paragraph (1)-

...

(b) is subject to regulations 6 to 12.

...



## 7 Extension of time

- (1) The period of 20 working days referred to in-
  - (a) regulation 5(2)(a);
  - (b) regulation 6(2)(a); and
  - (c) regulation 13(a),

may be extended by a Scottish public authority by a further period of up to 20 working days if the volume and complexity of the information requested makes it impracticable for the authority either to comply with the request within the earlier period or to make a decision to refuse to do so.

...

## 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.

...

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