

# Decision Notice



Decision 012/2012 Mr Tommy Kane and Scottish Water

Whether requests manifestly unreasonable or vexatious

Reference No: 201101345

Decision Date: 19 January 2012

[www.itspublicknowledge.info](http://www.itspublicknowledge.info)

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## Summary

Mr Kane submitted a number of requests to Scottish Water seeking information relating to meetings. Scottish Water released some information but withheld the remaining information (insofar as held) under sections 30, 33 and 36 of FOISA. It also identified certain information as being environmental information under the EIRs, withholding it under regulation 10(5)(e). Mr Kane requested a review but Scottish Water refused on the grounds that it considered his requests for review to be vexatious. Mr Kane remained dissatisfied with the response and applied to the Commissioner for a decision.

During the investigation, Scottish Water was asked to comment on whether any of the requested information could be considered environmental, with the result that the requests should have been dealt with under the EIRs. Scottish Water did not agree, while advising that should the Commissioner take a contrary view it would wish to rely on regulation 10(4)(b) of the EIRs on the basis that Mr Kane's requests were manifestly unreasonable.

Following an investigation, the Commissioner concluded that at least some of the information requested was environmental information and was therefore subject to the EIRs. He found that Scottish Water had failed to deal with Mr Kane's request for information in accordance the EIRs, and also that Scottish Water was not entitled to refuse to comply with Mr Kane's requests under either regulation 10(4)(b) of the EIRs (as manifestly unreasonable) or section 14(1) of FOISA (as vexatious). He required Scottish Water to consider what relevant recorded information it held at the time it received Mr Kane's requests and make it available, unless it considered itself entitled under any other relevant provision of FOISA or the EIRs to refuse to do so.

## Relevant statutory provisions and other sources

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 14(1) (Vexatious or repeated requests).

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (definition of "environmental information"); 5(1) and (2)(b) (Duty to make available environmental information on request); 10(1), (2) and (4)(b) (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 21 January 2011 Mr Kane wrote to Scottish Water requesting specific information. There were five emails, containing in total 48 numbered requests. The majority of these referred to specified meetings and sought (in relation to each, with minor variations) the information in “any pre-meeting briefing paper, minute or note from the meeting and/or any post-meeting paper/analysis with regard to this meeting”. Two requests sought a specific paper in addition, while two others sought information held by Scottish Water in respect of (respectively) the Scottish Futures Trust (SFT) and the Independent Budget Review (IBR). There were two requests relating to Scottish Water’s dealings with Rothschilds, one of these seeking correspondence with Rothschilds over a specified period. Finally, Mr Kane asked to be provided with the membership and terms of reference of, and any papers produced by or for, the Campbeltown steering group.
2. Scottish Water responded to Mr Kane on 18 February 2011 and on 21 February 2011. He was provided with some information and given notice that certain other information was not held by Scottish Water. Scottish Water withheld the remainder of the information he had requested under various exemptions in FOISA, with the exception of that relating to the Campbeltown steering group (which it considered to be environmental information and withheld under regulation 10(5)(e) of the EIRs).
3. On 14 March 2011 Mr Kane wrote to Scottish Water, separately in respect of each of the 21 January emails, in each case requesting a review of its decisions.
4. Scottish Water notified Mr Kane on 15 April 2011 that in terms of section 21(8) of FOISA it was not obliged to carry out a review, given that it now considered his requests for review to be vexatious.
5. On 13 July 2011 Mr Kane wrote to the Commissioner, stating that he was dissatisfied with the outcome of Scottish Water’s review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA. By virtue of regulation 17 of the EIRs, Part 4 of FOISA applies to the enforcement of the EIRs as it applies to the enforcement of FOISA, subject to certain specified modifications.
6. The application was validated by establishing that Mr Kane had made requests for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its responses to those requests. The case was then allocated to an investigating officer.



## Investigation

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7. On 26 July 2011, Scottish Water was notified in writing that an application had been received from Mr Kane and given an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA). It was asked to respond to specific questions, particularly in relation to its reasons for considering Mr Kane's requests to be vexatious and whether, given the nature of the information sought, it should have dealt with the requests under the EIRs.
8. Scottish Water responded on 18 August 2011, explaining that it did not consider the information requested by Mr Kane to be environmental information and indicating that consequently it wished the Commissioner to consider the request under FOISA rather than the EIRs. In this connection, it referred to submissions provided in the case of another application to the Commissioner, in respect of which the Commissioner has now published *Decision 188/2011 Ms Morna Simpson and Scottish Water*<sup>1</sup>. It did not consider section 39(2) of FOISA to be appropriate in this case, but advised that if the Commissioner did consider the EIRs to apply then it would wish to rely on regulation 10(4)(b). Its primary argument, however, was that the requests were vexatious and that therefore, in terms of section 14(1) of FOISA, it was not obliged to comply with them.
9. The submissions received from Scottish Water and Mr Kane, insofar as relevant, will be considered fully in the Commissioner's analysis and findings below.

## Commissioner's analysis and findings

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

### Does the request fall to be decided under the EIRs or FOISA?

11. The Commissioner considered the relationship between FOISA and EIRs at length in *Decision 218/2007 Professor A D Hawkins and Transport Scotland*<sup>2</sup>. Broadly, in the light of that decision, his general position on the interaction between the two regimes is as follows:
  - a. The definition of what constitutes environmental information should not be viewed narrowly.
  - b. There are two separate statutory frameworks for access to environmental information and an authority is required to consider any request for environmental information under both FOISA and the EIRs.
  - c. Any request for environmental information therefore **must** be dealt with under the EIRs.

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<sup>1</sup> <http://www.itspublicknowledge.info/applicationsanddecisions/Decisions/2011/201100850.asp>

<sup>2</sup> <http://www.itspublicknowledge.info/applicationsanddecisions/Decisions/2007/200600654.asp>



- d. In responding to a request for environmental information under FOISA, an authority may claim the exemption in section 39(2).
  - e. If the authority does not choose to claim the section 39(2) exemption, it must deal with the request fully under FOISA, by providing the information, withholding it under another exemption in Part 2, or claiming that it is not obliged to comply with the request by virtue of another provision in Part 1 (or a combination of these).
  - f. The Commissioner is entitled (and indeed obliged), where he considers a request for environmental information has not been dealt with under the EIRs, to consider how it should have been dealt with under that regime.
12. Given the subject matter of some of the requests, the Commissioner found it appropriate to consider whether the information requested by Mr Kane should properly be regarded as environmental information and therefore subject to the EIRs. In response to a request for comments on this point, Scottish Water took the view that the information it held relative to Mr Kane's requests did not satisfy the definition of environmental information under the EIRs.
13. In maintaining this position, Scottish Water relied on the submissions it had made during the investigation which had led to Decision 188/2011. In these, Scottish Water had focused on the question of remoteness, contending that for information to be environmental it had to be sufficiently connected to the environment. If there was only a minimal connection, the information could not be environmental. It suggested that the Commissioner was stretching the definition to cover information which could not reasonably be considered environmental: in determining whether information was environmental, it argued, only the information itself (at a very specific level) was relevant and not any wider context in which it was held. It did not believe the concept of "artificiality" (in the sense of artificially separating information from its context in determining whether that information was environmental) to have any foundation in law. In conclusion, Scottish Water did not believe any of the factors in the definition of environmental information to be triggered in this case.
14. The Commissioner has considered Scottish Water's arguments carefully. He considered very similar arguments from Scottish Water in *Decision 166/2011 Unison and Scottish Water*<sup>3</sup> and does not find it necessary to repeat his analysis at length here. For the reasons set out in that decision, he would remain of the view that it is wholly artificial to ignore the context in which information is to be found in determining whether that information is environmental – a position he believes to be supported by the courts. On the other hand, he acknowledges (as he did in that earlier decision) that information will not necessarily be environmental simply because it had a slight or tangential association with the state of the elements of the environment.

<sup>3</sup> <http://www.itspublicknowledge.info/applicationsanddecisions/Decisions/2011/200701447.asp>



15. It appears that some of the information in the documents specified in the requests (and which Scottish Water holds) could well be considered environmental, in accordance with the definition in regulation 2(1) of the EIRs (which is set out in full in the Appendix – note in particular paragraphs (a), (b), (c) and (f)). The information appears to relate either to the future governance of public functions (i.e. those for which Scottish Water is currently responsible) which could have a significant impact on the elements of the environment, or to specific issues in the operational management of these functions. Without having sight of the information held by Scottish Water and falling within the scope of Mr Kane's requests, the Commissioner cannot come to a definitive view as to whether the EIRs apply in each case.
16. The Commissioner also notes that, in its initial response to Mr Kane of 18 February 2011, Scottish Water withheld information in "papers produced by or for the Campbeltown Steering group" under regulation 10(5)(e) of the EIRs, on the basis that disclosure would prejudice substantially the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest. The response to Mr Kane's request for review issued by Scottish Water on 15 April 2011, however, fails to make any reference to this information or to the EIRs.
17. In the circumstances, the Commissioner finds it reasonable to conclude that some of the information requested in this case should, at least in part, properly be considered to be environmental information. Given that Scottish Water failed to deal with it as such, the Commissioner also finds that Scottish Water failed (to the extent that the information was environmental) to deal with Mr Kane's requests for that information in accordance with regulation 5(1) of the EIRs.
18. As indicated above, the Commissioner is entitled (and indeed obliged), where he considers a request for environmental information has not been dealt with under the EIRs, to consider how it should have been dealt with under that regime. In the circumstances, noting that Scottish Water does not in this case wish to rely upon the exemption in section 39(2) of FOISA, the Commissioner has found it necessary to consider how Scottish Water should have dealt with Mr Kane's requests under both the EIRs and FOISA.

#### **Are the requests vexatious or manifestly unreasonable?**

19. In its review decision, Scottish Water contended that Mr Kane's requests were vexatious in the circumstances, and therefore (in terms of section 14(1) of FOISA) it was refusing to comply with them. In its submissions to the Commissioner, Scottish Water advised that it would argue that the requests were manifestly unreasonable for the purposes of regulation 10(4)(b) of the EIRs, should the Commissioner consider the EIRs to apply.
20. (Under the exception in regulation 10(4)(b) of the EIRs, a Scottish public authority may refuse to make environmental information available to the extent that the request for information is manifestly unreasonable. If it finds that the request is manifestly unreasonable, it is still required to make the information available unless, in all the circumstances, the public interest in making it available is outweighed by that in maintaining the exception. In considering whether the exception applies, it must interpret it in a restrictive way and apply a presumption in favour of disclosure.)





21. In the briefing<sup>4</sup> on both section 14(1) of FOISA and regulation 10(4)(b) the Commissioner explains his approach is that a request (which may be the latest in a series of requests) is vexatious or manifestly unreasonable where it would impose a significant burden on the public authority *and*:
- it does not have a serious purpose or value; and/or
  - it is designed to cause disruption or annoyance to the public authority; and/or
  - it has the effect of harassing the public authority; and/or
  - it would otherwise, in the opinion of a reasonable person, be considered to be manifestly unreasonable or disproportionate.
22. However, there may be circumstances where the burden of responding alone justifies deeming a request to be vexatious or manifestly unreasonable, even if ordinarily the Commissioner will expect one or more of these listed criteria to be present in addition. Furthermore, in any given case, one or more of the other listed criteria may be of such overwhelming significance that it would be appropriate to consider the request manifestly unreasonable, even in the absence of a significant burden.

#### *Scottish Water's submissions*

23. During the investigation, Scottish Water commented on the consequences of Mr Kane's use of freedom of information legislation for its employees, who it claimed were being diverted away from its core statutory activities.
24. In particular, Scottish Water submitted that it was necessary to look at the wider context of Mr Kane's history of requesting information, which it indicated had started in 2008. Having suggested Mr Kane's requests amounted to 134 in 2009 alone, Scottish Water contended that dealing with these had spanned over months (due to the work involved in processing them) further arguing that as it had limited resources (which required to be budgeted carefully in order to delivery its statutory functions), placing a significant burden in terms of its ability to accommodate such requests, both financially and in terms of its human resources.
25. Scottish Water submitted further that the volume and nature of the 2009 requests meant that the teams involved in dealing with them had been "overwhelmed and their service delivery materially impacted". In this connection, it commented that it had taken one team 62 hours of recorded time to retrieve and collate the requested information, with further unrecorded time also being involved, combining to put a strain on Scottish Water's operations. Those affected by the requests were concerned about the disruption to their jobs and their ability to deliver services to customers. Scottish Water contended that while this related to events in the past, it was entitled to take them into account in relation to its approach here: it noted that past experience led it to conclude that disclosure of the information would be likely to lead to further requests and workload, thereby disrupting its ongoing activities. It considered Mr Kane to have unrealistic expectations as to the level and extent of information it held.

<sup>4</sup> <http://www.itspublicknowledge.info/nmsruntime/saveasdialog.asp?IID=2513&SID=2591>



26. Scottish Water argued that even if they were not intended as such, the requests under consideration here also had the effect of harassing Scottish Water staff, for the reasons set out above. This, it submitted, was how its staff felt following years of dealing with his requests. It explained that ordinarily it would use “the other exemptions” to deal with the requests (without specifying what these other exemptions might be), on a case by case basis, but that this approach was not considered appropriate here. It further explained that in terms of the work and burden imposed here, and in the absence of being able to aggregate the total cost of requests, the only ground on which it could challenge the ongoing burden was on the basis of that the requests were vexatious or manifestly unreasonable.
27. Scottish Water also indicated that it did not accept that a “significant burden” need be present for the requests to be vexatious or manifestly unreasonable, pointing out that its approach here was consistent with the Information Rights Tribunal’s decision in *Michael Jacobs and the Information Commissioner EA/2010/0041*<sup>5</sup> – namely the request should be considered in the context of the circumstances in which it was made and not, as the Commissioner indicated in his briefing, “significant burden” plus one of four other factors.
28. In Scottish Water’s view, the requests under consideration here (when viewed cumulatively with Mr Kane’s previous requests) did impose a significant burden, although it also observed that this pattern “halted in 2009 as a result of the Commissioner’s involvement in the matter” (without explaining further what it meant by this statement). Scottish Water went on to contend that the burden “has been revived but actioned [by Mr Kane] through a represented and staggered approach.” Scottish Water invited the Commissioner to extend what it referred to as “his own significant burden concept” to cover what it termed “significant burden over a prolonged period”.

#### *Mr Kane’s submissions*

29. Mr Kane challenged Scottish Water’s characterisation of his requests as vexatious. He did not believe his previous history of making requests to be relevant. In addition, he denied that he was taking a “scatter gun” approach (as Scottish Water had submitted in responding to his request for review), just because his requests involved a number of areas of interest and departments within Scottish Water. On the contrary, he explained that the areas on which he had sought information were based on previous research. He had been researching the Scottish Water Industry for several years.
30. Mr Kane went on to explain that his research had considered Scottish Water’s operational and governance model, including the policy development process. The knowledge he had acquired of governance processes and specific areas of operation had informed his selection of further areas in respect of which he had sought information. In other words, the choice of these areas was quite deliberate: it also had a genuine purpose founded in his academic research, which he believed he could establish was serious and diligent.

<sup>5</sup> [http://www.informationtribunal.gov.uk/DBFiles/Decision/i426/Decision%20&%20PTA%20\(w\).pdf](http://www.informationtribunal.gov.uk/DBFiles/Decision/i426/Decision%20&%20PTA%20(w).pdf)





*The Commissioner's findings*

31. The Commissioner's general approach to the question of whether a request is vexatious or manifestly unreasonably is to consider the extent to which it imposes a significant burden on the public authority. As indicated above, this does not exclude the possibility that, in any given case, one or more of the other listed criteria (see above) may be of such overwhelming significance that it would be appropriate to consider the request manifestly unreasonable even in the absence of a significant burden. In this case, he will consider first whether a significant burden could be said to have been created by Mr Kane's requests.
32. In the Commissioner's briefing on section 14(1) and regulation 10(4)(b) of the EIRs (see above) he indicates that a request will impose a significant burden on a public authority where dealing with it would require a disproportionate amount of time and the diversion of an unreasonable proportion of its financial and human resources away from its core operations.
33. Having considered Scottish Water's submissions carefully, along with the wording of the requests under consideration here, the Commissioner does not accept that the requests in this instance can be construed as involving a significant burden. As Scottish Water makes clear in its submission the authority responded to the 48 requests made in January 2011. It was able to do so within the 20 day statutory timescale: in so doing, it provided the information requested in 12 instances and indicated that it did not hold any information with regard to 25 of those requests. In its own words "those actual requests would be insignificant" in terms of burden.
34. Scottish Water's case, in respect of burden, is that the entire history of the applicant's requests to the authority have to be taken into account and that the Commissioner should extend the concept to consider "significant burden over a prolonged period". It notes that since 2008 the applicant has submitted at least 317 requests for information. It claims that by adopting a "conservative" average amount of £300 per request, it has cost over £95,000 to deal with these. The Commissioner has not been provided with information regarding the nature of all previous requests, to accept this as a reasonable estimate. In this case, as indicated earlier, 25 of the requests were dealt with by simply indicating that the information was not held: by Scottish Water's reckoning, this should be taken to have cost £7,500, a figure which the Commissioner does not find plausible. Furthermore the Commissioner has not been given any information as to whether the authority could have mitigated the demand on its resources by the charging of fees, nor has he been provided with information as to whether, or how often, the cost of responding to any single request was so excessive as to warrant the issue of a notice under section 12(1) of FOISA.
35. On the basis of the authority's submissions on this point, the Commissioner does not accept that, on their own, the requests made on 21 January were significantly burdensome. Furthermore, although the number of requests over the period of years is not insignificant, given the considerable time which has elapsed between the 2009 and 2011 requests he is not persuaded that he should conclude that the 2011 requests were significantly burdensome by taking them together with those previous requests.



36. In any case, the authority has argued that it is not necessary to show that the requests, singly or cumulatively, are burdensome before considering whether some of the other grounds which might establish that a request is vexatious or manifestly unreasonable. In particular Scottish Water argued that Mr Kane's requests were disruptive and had the effect of harassing the authority's employees.
37. In respect of the requests at issue here, made in January 2011, the Commissioner considers that the requests are all specific and well formulated so as to identify clearly the information being sought. Officers associated with the meeting in question are identified in a number of cases and it would seem reasonable to conclude that these are all cases where the relevant records (which would appear to relate to matters of some significance to Scottish Water's governance and operations) could reasonably be expected to be relatively straightforward to identify and locate, if held. Certainly, Scottish Water has made no suggestion to the contrary – and appeared to have no difficulty identifying which information it held and applying exemptions to elements of that information when dealing with the requests initially (indeed, a considerable quantity of the requested information was provided at that stage).
38. The authority's claim appears to rest more on the past history of the disruptive nature of requests, as well as anticipating the future impact of further requests of this kind from Mr Kane. Much is made of the disruptive effect of requests made in 2009, which are variously described as having overwhelmed the teams which dealt with them and having placed a strain on Scottish Water's operations. However, it is not remotely the case that such an effect flows from responding to the requests at issue here and it is not reasonable to characterise the current requests (to which Scottish Water could readily respond) as being vexatious or manifestly unreasonable, because of the claimed effect of previous requests some time in the past. The Commissioner does not find that the 2011 requests have either the effect or the intent to disrupt the authority.
39. The Commissioner is also unable to accept that Mr Kane's requests had the effect of harassing the public authority to the extent as claimed by Scottish Water. Staff have been described by Scottish Water as being "concerned" about the disruption to their other duties caused by dealing with the applicant's requests, being "annoyed" as a consequence, and feeling "harassed" because requests continue to be received from him despite a substantial amount of information being provided to him over previous years. Whether or not concern or annoyance might be considered reasonable reactions to the demands of particular requests for information (on which the Commissioner does not find it necessary to comment at present), the Commissioner does not believe reactions of this kind can reasonably be said to evidence harassment of the authority or of particular officers within it.



40. The Commissioner must also conclude, looking at the situation objectively, that it is not reasonable to find that an authority or its employees have been harassed simply because an applicant has been provided with a substantial amount of information but continues to seek more. Scottish Water has asserted that Mr Kane has an “unrealistic expectation” as to the level and extent of information it holds, and also that it is “not appropriate” in this case to deal with these requests on a case-by-case basis using exemptions, but neither of these statements has been substantiated. While the Commissioner acknowledges that there may be a relatively small number of people within Scottish Water with the necessary knowledge and expertise to deal with requests of this nature, he does not consider that to be a particularly unusual situation for an authority presented with a request for information.
41. In all the circumstances, therefore, the Commissioner does not accept that a reasonable person would conclude from Scottish Water’s submissions that the authority or its employees had been harassed by Mr Kane’s requests.
42. Scottish Water did not argue that Mr Kane’s requests lacked serious purpose or value, were *designed* to cause disruption or annoyance, or would otherwise, in the opinion of a reasonable person, be considered manifestly unreasonable or disproportionate. Mr Kane, on the other hand, has provided arguments as to why his requests should be considered to have serious purpose or value. On balance, having considered these arguments, the Commissioner is persuaded that this would appear to be the case. On the evidence presented to him, he has no basis for considering the requests to have been designed to cause disruption or annoyance, or otherwise manifestly unreasonable or disproportionate.
43. However Scottish Water did not only draw upon past experience, but also anticipated the supposed effect of Mr Kane making future requests in coming to a view that these requests were vexatious or manifestly unreasonable. Given the nature of Mr Kane’s research, the Commissioner accepts that it is possible, indeed likely, that Mr Kane will make future requests. He acknowledges the possibility that requests of this kind might become vexatious or manifestly unreasonable at some point in the future. However, given the gap between the 2009 and 2011 requests and given that the Commissioner has not found that these particular requests placed a significant burden upon the authority, and that they did not have the effect or intent of harassing or disrupting the authority, then he has no reason to believe that a pattern of behaviour has been established to allow him or the authority to come to a view as to the effect or purpose of future requests.
44. Scottish Water’s response to Mr Kane’s requirement for review pointed out that it had already provided substantial amount of information to him, incurring “staggering costs” in doing so. It had sought to manage the situation by meeting with him in an effort to “reach a mutually acceptable yet pragmatic outcome in respect of your stream of requests.” In its handling of these particular requests, the authority appears to have lost patience with the applicant by declaring that “it is inappropriate for Scottish Water to continue to comply with your requests for information and requests for review.”



45. In effect, the authority was giving notice that these and any future requests made by Mr Kane to Scottish Water were to be regarded as vexatious or manifestly unreasonable and would not be complied with. The Commissioner cannot support this position, which has the effect of regarding the applicant, not the requests, as vexatious, since it indicates a refusal to comply with *any* future request without regard to its subject matter, how readily it could be responded to, or its actual burden or impact on the authority.
46. In all the circumstances, therefore, the Commissioner is not satisfied that Scottish Water was entitled to apply the exemption at section 14(1) or the exception in regulation 10(4)(b) of the EIRs to Mr Kane's requests. While noting Scottish Water's arguments in relation to the requirement for a significant burden, and having made his own position on this point clear above, he believes that he would have reached the same conclusion whether a significant burden had been required or not. For the reasons set out in relation to these factors, assuming a significant burden were not required, he does not consider that he could have found the requests to be vexatious or manifestly unreasonable on the basis of any of the other relevant factors.
47. Having reached this conclusion, the Commissioner is not required to consider the public interest test in regulation 10(1)(b) of the EIRs. He must find that Scottish Water was not entitled to refuse to make the requested information available under the exception claimed.

## Conclusions

48. For the reasons set out above, the Commissioner finds that Scottish Water was not entitled to refuse to comply with Mr Kane's requests under section 14(1) of FOISA of the EIRs. He also finds that Scottish Water was incorrect in its application of regulation 10(4)(b) to Mr Kane's requests.
49. Scottish Water is now required to consider all recorded information it held at the time it received Mr Kane's requests and which fell within the scope of those requests. Any relevant information held should then be made available to Mr Kane, unless Scottish Water considers itself entitled under any relevant provision of FOISA (other than in terms of section 14(1)) or the EIRs (i.e. other than under regulation 10(4)(b)) to refuse to do so.



## DECISION

The Commissioner finds that by Scottish Water failed to deal with Mr Kane's requests in accordance with Part 1 (and in particular section 1(1)) of the Freedom of Information (Scotland) Act 2002, as he does not accept that it was entitled to refuse to comply with the requests under section 14(1) of FOISA.

The Commissioner also finds that Scottish Water failed to comply with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in dealing with Mr Kane's requests for information. In particular by failing to identify any of the information requested as environmental information (as defined in regulation 2(1)) and deal with the requests accordingly under the EIRs, it failed to comply with regulation 5(1) of the EIRs. He also finds that it was not entitled to refuse to comply with the requests under regulation 10(4)(b) of the EIRs.

The Commissioner therefore requires Scottish Water to respond to Mr Kane in accordance with the requirements of the FOISA (other than in terms of section 14(1)) and/or the EIRs (other than in terms of regulation 10(4)(b)) by 5 March 2012.

## Appeal

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Should either Mr Kane or Scottish Water wish to appeal against this decision, there is an appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days after the date of intimation of this decision notice.

**Kevin Dunion**  
**Scottish Information Commissioner**  
**19 January 2012**



## 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.

...

##### 14 Vexatious or repeated requests

- (1) Section 1(1) does not oblige a Scottish public authority to comply with a request for information if the request is vexatious.

...

#### The Environmental Information (Scotland) Regulations 2004

##### 2 Interpretation

- (1) In these Regulations –

...

- (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;

...

- (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

...

(b) the request for information is manifestly unreasonable;

...