

# Decision Notice

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## **Decision 039/2016: Mr Tommy Kane and the Scottish Ministers**

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### **Reports etc. concerning fracking**

Reference No: 201501290

Decision Date: 16 February 2016



Scottish Information  
Commissioner

## Summary

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On 23 January 2015, Mr Kane asked the Scottish Ministers (the Ministers) for information shared privately within the Scottish Government concerning fracking. The Ministers disclosed some information, but withheld the remainder under the exception in regulation 10(4)(e) of the EIRs.

The Commissioner accepted that the information was excepted from disclosure; it comprised internal communications and the public interest favoured maintaining the exception.

## Relevant statutory provisions

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

## Background

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1. On 23 January 2015, Mr Kane made a request for information to the Ministers. The information requested was:  
  
*“A copy of any report, analysis or memorandum produced by Scottish Government officials and/or by a consultancy contracted by the Scottish Government about the issue of fracking that has not been made public but which has been shared privately within the Scottish Government. This should incorporate the period from 8 May 2011 to 23 January 2015”.*  
  
Mr Kane also requested other information that is not the subject of this decision notice.
2. The Ministers responded on 31 March 2015. The Ministers disclosed some information to Mr Kane, but withheld the remainder under the exception in regulation 10(4)(e) of the EIRs. This was on the basis that the information comprised internal communications and the public interest favoured maintaining the exception.
3. On 29 April 2015, Mr Kane wrote to the Ministers requesting a review of their decision. Mr Kane considered there was a great deal of public interest in discussions that had taken place in view of the public concern about the potential for fracking in Scotland.
4. The Ministers notified Mr Kane of the outcome of their review on 12 June 2015. The Ministers disclosed some additional information to Mr Kane, but confirmed their decision to withhold the remainder under the exception in regulation 10(4)(e) of the EIRs.
5. On 8 July 2015, Mr Kane wrote to the Commissioner. Mr Kane applied 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 specified modifications. Mr Kane stated he was dissatisfied with the outcome of the Ministers’ review as he considered the disclosure of the information was very much in the public interest.

## Investigation

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6. The application was accepted as valid. The Commissioner confirmed that Mr Kane made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to her for a decision.
7. On 19 August 2015, the Ministers were notified in writing that Mr Kane had made a valid application. The Ministers were asked to send the Commissioner the information withheld from him. The Ministers provided the information and the case was allocated to an investigating officer.
8. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Ministers were invited to comment on this application (and answer specific questions) including justifying their reliance on any provisions of the EIRs they considered applicable to the information requested.

## Commissioner's analysis and findings

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

### Application of the EIRs

10. It is clear from the Ministers' correspondence with both Mr Kane and the Commissioner, and from the information itself, that the information sought by Mr Kane is properly considered to be environmental information as defined in regulation 2(1) of the EIRs. Mr Kane made no comment on the Ministers' application of the EIRs in this case and the Commissioner will consider the request in what follows solely in terms of the EIRs.

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

11. 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.
12. As with all exceptions under regulation 10, 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 of the information (regulation 10(2)(b)). Even where the exception applies, the information must be disclosed 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)).
13. The Ministers explained that all of the withheld information constituted internal correspondence between Scottish Government officials and Ministers and therefore it comprised internal communications for the purposes of regulation 10(4)(e).
14. Having considered the information withheld by the Ministers, the Commissioner is satisfied that all of the withheld information comprises internal communications and is, therefore, subject to the exception in regulation 10(4)(e). She must therefore go on to consider whether, in all the circumstances, the public interest in making the information available is outweighed by the public interest in maintaining the exception.

## *The public interest test*

### Mr Kane's submissions

15. Mr Kane stated that there was deep public concern and unease about the potential for fracking across Central Scotland to have a detrimental impact on the public health of people and communities. For that reason, he considered the public interest was better served by disclosure of the information.
16. Additionally, Mr Kane submitted that the public interest was much better served by open and transparent policy making, as was confidence in policy making and policy makers. He considered this was especially the case when the policies being discussed were contentious and controversial with significant public and social concerns over public health, house prices and the wider environment.

### The Ministers' submissions

17. The Ministers stated that they recognised there was a public interest in the discussions between Ministers and officials in relation to fracking in order to promote openness and transparency and help inform the public debate. They considered that the information previously disclosed to Mr Kane demonstrated this.
18. The Ministers explained that they are committed to a full public consultation on the issue of unconventional oil and gas extraction following a programme of research work, with the findings of the research informing the public consultation.
19. The Ministers stated that the moratorium on granting consents for unconventional oil and gas developments (announced in January 2015<sup>1</sup>) ensures none will take place while the research and public consultation is undertaken. In the Ministers' view, there was little value in disclosing the withheld information given that a public consultation will take place following the research work and given that the moratorium will remain in place during this time. The Ministers pointed out that the withheld information may well be superseded by the results of the coming research and, in their view, there was a greater public interest in ensuring the consultation is based on up to date information and evidence.
20. The Ministers also considered there was a greater public interest in high quality policy and decision making and in the properly considered implementation and development of policies and decisions. In their view, if the withheld information was disclosed into the public domain in advance of the development of a finalised policy, there was a risk that policy formulation and decisions would be further complicated and potentially jeopardised. In the Ministers' view, this would not be in the public interest.
21. The Ministers stated that the withheld information related to early discussions about the implementation and development of policies and decisions. In their view, at this stage, Ministers and officials needed to be able to consider all available options and to debate these rigorously and with candour. They considered that officials' candour in providing similar advice on sensitive subjects would be affected by their assessment of whether the advice would be disclosed in the near future leading to advice being less specific and frank which would not be in the public interest.
22. On balance, the Ministers considered the public interest in disclosure of the withheld information was outweighed by that in withholding it. This was in order to safeguard the

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<sup>1</sup> <http://news.scotland.gov.uk/News/Moratorium-called-on-fracking-1555.aspx>

private space for officials to provide free and frank advice to Ministers whilst the policy position was still being developed and further consultation was being carried out.

### The Commissioner's view

23. In coming to a decision on the public interest, the Commissioner is required to consider the position as at the date the Ministers carried out their review, not at the time at which she is asked to make her decision. Public interest arguments may change over time.
24. The Commissioner has considered carefully the submissions made by both Mr Kane and the Ministers alongside the withheld information. The Commissioner recognises the public interest in transparency and accountability in the decision making process of public authorities and in understanding how particular decisions are reached.
25. The Commissioner also accepts that there is a public interest in ensuring that Ministers and officials have a private space within which they can discuss options and issues in detail without fear that such discussions will be disclosed. The Commissioner accepts that good decision making relies on the free and frank provision of advice and views, in order that all options can be discussed and that the policy making that ensues from such discussions is fully informed.
26. Additionally, the Commissioner recognises that the information in this case concerns the exploration of the early phases of policy development and consideration of options. In the Commissioner's view, these matters have been overtaken by the moratorium on fracking and the decision to carry out further research work followed by a public consultation.
27. Furthermore, the Commissioner agrees with the Ministers there is a likelihood that the consideration of policy options identified in the consultation work would be side-tracked by a debate on the matters raised in the earlier policy considerations. The Commissioner considers that the Ministers should be able to formulate policy properly without being drawn into a public debate on matters which may never form part of any finalised policy.
28. In the particular circumstances of this case, the Commissioner concludes, on balance, that the public interest in making this information available is outweighed by that in maintaining the exception in regulation 10(4)(e) of the EIRs. Therefore, she considers the Ministers to have been justified in withholding the information under that exception.

## **Decision**

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The Commissioner finds that the Scottish Ministers complied with the Environmental Information (Scotland) Regulations 2004 in responding to the information request made by Mr Kane.

## **Appeal**

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Should either Mr Kane or the Scottish Ministers wish to appeal against this decision, they have the right to appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days after the date of intimation of this decision.

**Rosemary Agnew**  
**Scottish Information Commissioner**

**16 February 2016**

### 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

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- (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.

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