

Decision Notice

Decision 052/2016: Mr Tommy Kane and the Scottish Ministers

Contact with the petrochemical company, Ineos

Reference No: 201501214

Decision Date: 3 March 2016



Scottish Information
Commissioner

Summary

On 23 January 2015, Mr Kane asked the Scottish Ministers for information about their contact with the petrochemical company, Ineos. The Ministers disclosed some information, but withheld the remainder. Mr Kane requested a review. During the review the Ministers disclosed further information and withheld the remainder under regulation 10(4)(e) of the EIRs (Internal communications). Mr Kane remained dissatisfied and applied to the Commissioner for a decision.

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

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (paragraphs (a) and (c) of definition of "environmental information"); 5(1) and (2) (Duty to make available environmental information 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

1. On 23 January 2015, Mr Kane made a request for information to the Ministers. He asked for:
 1. *Any correspondence, including e-mail, social media, letter, text message or voicemail, between Fergus Ewing MSP or any Scottish Government Minister with Ineos owner Jim Ratcliff discussing the Fracking industry, and/or Fracking exploration licences in Scotland and/or the new Ethylene Cracker Terminal at Ineos in Grangemouth. (Part 1)*
 2. *Any correspondence, including e-mail, social media, letter, text message or voicemail, between Fergus Ewing MSP or any other Scottish Government Minister with an Ineos employee, including [list of named individuals] and anyone else from Ineos discussing the Fracking industry and/or Fracking exploration licences in Scotland and/or the new Ethylene Cracker Terminal at Ineos in Grangemouth. (Part 2)*
 3. *A list of all meetings that have taken place between any Scottish Government Minister and/or Scottish Government Official with any manager/owner of Ineos. (Part 3)*
 4. *A copy of any pre-briefing notes, agendas of and/or minutes from any meeting that has taken place between any Scottish Government Minister and/or Scottish Government Official with any manager/owner of Ineos. (Part 4)*

Mr Kane stipulated that he wanted information covering the period from 1 March 2013 to 23 January 2015.

2. The Ministers responded on 13 March 2015. They:
 - (i) told Mr Kane they did not hold any information in respect of part 1 of his request;
 - (ii) disclosed one letter from Ineos to the First Minister in response to part 2; and

- (iii) disclosed some information in a redacted form in response to parts 3 and 4.
- 3. On 23 March 2015, Mr Kane wrote to the Ministers requesting a review of their decision. He considered the Ministers should hold more information in respect of parts 1 and 2 of his request. He was also unhappy that the Ministers had withheld information.
- 4. The Ministers notified Mr Kane of the outcome of their review on 8 June 2015. They:
 - (i) stated that they were now handling his request under the EIRs;
 - (ii) confirmed that they held no information in respect of part 1 of his request;
 - (iii) confirmed that they had disclosed all the information they held in respect of parts 2 and 3 of his request; and
 - (iv) disclosed additional information in respect of part 4 of his request. The Ministers told Mr Kane they were withholding some of the information under regulation 10(4)(e) of the EIRs (Internal communications). They also withheld the names and contact details of some third parties under regulation 11(2) (Personal data) of the EIRs.
- 5. On 24 June 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.
- 6. Mr Kane stated he was dissatisfied with the outcome of the Ministers' review. He thought that the Ministers should hold more information in respect of parts 1 and 2 of his request. He also disagreed with the application of regulation 10(4)(e) in respect of part 4 of his request. Mr Kane did not raise any dissatisfaction with the way the Ministers had responded to part 3 of his request or with their application of regulation 11(2) so these matters do not form part of this decision.

Investigation

- 7. 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.
- 8. On 22 July 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.
- 9. 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.
- 10. The Ministers provided submissions to the investigating officer. During the investigation, the Ministers were asked to provide further submissions in respect of the searches they had carried out and their application of regulation 10(4)(e). The Ministers provided these.

Commissioner's analysis and findings

11. 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.
12. The Commissioner will firstly consider whether or not the Ministers hold further information falling within the scope of parts 1 and 2 of Mr Kane's request.

Do the Ministers hold further information?

13. Mr Kane expressed his concern that there appeared to be such a dearth of correspondence between the Government and Ineos given the prominence of the threat of closure to Grangemouth and Ineos' "clear intention" to conduct fracking in Scotland. He took the view that further information should be held by the Ministers.
14. The investigating officer asked the Ministers to explain the searches they had carried out to identify and locate what information they held within the scope of Mr Kane's request.
15. The Ministers explained that they had completed an initial search of the Scottish Government corporate information system (eRDM) to identify any documents which would potentially fall within the scope of the request within the relevant dates. This initial search was completed with the word "Ineos" in the keywords. A line-by-line search was undertaken of specific folders on the system which contained documents about Scottish Government interactions with Ineos.
16. Searches were not limited to the corporate information system. A request to search for information was sent to all relevant officials within the Energy and Climate Change Directorate (which is responsible for policy on unconventional oil and gas), the Resilience Division, the Environment Directorate and the Planning and Architecture Directorate. These were identified as the areas where officials may have retained information locally outwith the objective (eRDM) folders during the period of the request. They included all those who would have been likely to have seen any correspondence with Ineos falling within the scope of Mr Kane's request. The Ministers provided the investigating officer with a copy of the requests which were circulated and identified where all nil responses were received.
17. The Ministers told the Commissioner that, at review stage, they had carried out further searches of the eRDM files using a range of keywords: no additional information was identified within the scope of the request.
18. During the investigation, the investigating officer asked the Ministers to carry out further searches specifying the search terms that the Ministers should consider using, such as "Ethylene Cracker Terminal" and/or "Ethylene Cracker". The Ministers carried out these searches, but no additional information was identified.
19. The Ministers told the investigating officer that they had re-run their original searches, but had found no further information within the scope of the request. They commented that the use of individual search terms at both request and review stage, such as "Ineos" and "fracking", had returned a voluminous number of documents. These documents included a significant number which were not within the scope of Mr Kane's request, a reflection of the fact that Scottish Government engagement on these matters has been on-going for a number of years and involved a large number of policy areas.

20. The Commissioner has carefully considered all of the submissions provided to her. She notes the specific terms of Mr Kane's request and also the Ministers' explanation that, while they hold other related information, it did not fall within the terms of that request.
21. The Commissioner is satisfied that the Ministers carried out adequate, proportionate searches for the information falling within the scope of Mr Kane's request and that any information relevant to the request would have been identified using the searches described by the Ministers. The Commissioner is satisfied that the Ministers do not hold any further information falling within the scope of the request.

Application of the EIRs

22. The Ministers initially responded to the request under the Freedom of Information (Scotland) Act 2002, but concluded, on review, that the information was environmental.
23. It is clear from the subject of Mr Kane's request that any information falling within the scope of the request would be environmental information, as defined in regulation 2(1) of the EIRs. Mr Kane made no suggestion to the contrary. The information in question relates to communications concerning fracking and is covered by paragraphs (a) and (c) of the definition of environmental information in regulation 2(1) of the EIRs. These are set out in Appendix 1.

Regulation 5(1) of the EIRs

24. Regulation 5(1) of the EIRs (subject to the various qualifications in regulations 6 to 12) requires a Scottish public authority which holds environmental information to make it available when requested to do so by any applicant.
25. Under the EIRs, a public authority may refuse to make environmental information available if one or more of the exceptions in regulation 10 apply and, in all the circumstances of the case, the public interest in maintaining the exception or exceptions outweighs the public interest in making the information available (regulation 10(1)). The exceptions must be interpreted in a restrictive way and the public authority must apply a presumption in favour of disclosure (regulation 10(2)).

Regulation 10(4)(e) – internal communications

26. The Ministers applied the exception in regulation 10(4)(e) of the EIRs to the information withheld from Mr Kane.
27. Under regulation 10(4)(e), a Scottish public authority may refuse to make environmental information available to the extent that the request involves making available internal communications. For information to fall within the scope of the exception, it need only be established that the information is an internal communication.
28. The documents which fall within the scope of the request are Scottish Government Ministerial briefings prepared by Scottish Government officials. The Commissioner is satisfied that all the information to which the Ministers have applied this exception can be described as internal communications and, therefore, that the exception in regulation 10(4)(e) of the EIRs was correctly applied by the Ministers.

The public interest test: Mr Kane's submissions

29. Mr Kane submitted that disclosure of the information was in the wider public interest. He stated that there was a "huge public interest" in the geographical areas likely to be impacted by fracking
30. He argued that, unless the Scottish Government was open and transparent, public confidence in its intention to protect communities from fracking activities would be undermined.

The public interest test: the Ministers' submissions

31. The Ministers recognised the public interest in disclosing information as part of open, transparent and accountable government as well as to inform public debate. They also acknowledged the public interest in relation to the operations of Ineos.
32. However, they argued that it was essential for them to be able to provide briefings (and communicate in confidence, where necessary) about external stakeholders on a range of issues. This included issues of an operational or financial nature. It was essential for officials to be able to impart information to Ministers to enable them to understand, and be aware of, developments or issues that may potentially be discussed at meetings.
33. The Ministers stated that disclosing the briefing information in full would be likely to undermine trust in the Scottish Government, substantially inhibiting relationships and communications on this type of issue in the future. Companies would be reluctant to provide information or their full and frank views either in writing or at meetings if they believed that the information was likely to be made public. This was particularly the case where discussions relate to sensitive or controversial issues.
34. The Ministers argued that there was a greater public interest in allowing Ministers and officials a private space within which to communicate and share information as part of the process of exploring and refining their position on Ineos' operations until the Scottish Government could adopt a position. This was important given:
 - (i) the importance of Grangemouth as a national asset;
 - (ii) the ongoing work of the Scottish Government to build and maintain a positive relationship with Ineos and other related petrochemical companies; and
 - (iii) the potential impact on the local and national economy if Grangemouth were to close.
35. The Ministers did not consider it to be in the public interest to damage their relationship with important stakeholders or to put them off exploring options which would ultimately significantly benefit the Scottish economy. They felt such issues would be likely to affect more than just Ineos, given Grangemouth's importance to the Scottish economy. They submitted that it was in the public interest to ensure that issues for discussion were supported as robustly as possible and that sufficient research was sought and undertaken.

The public interest test: the Commissioner's view

36. The Commissioner has considered the public interest arguments put forward by the Ministers and by Mr Kane. She accepts that there is a clear public interest in the contact between the Ministers and Ineos, particularly on a matter such as fracking. She also recognises the need for Ministers and officials to have a private space within which to communicate and share information.

37. 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 looked at and the position adopted as a result of such discussions is fully informed. She considers that disclosing some of the information could cause the harm claimed by the Ministers and that it would not be in the public interest to disclose this information.
38. However, the Commissioner is not satisfied, on the basis of the evidence before her, that disclosing *all* of the withheld information in this case would result in such harm.
39. Parts of documents 1, 6 and 14 consist of factual and background information, some of which is already in the public domain. Given that officials were providing Ministers with information of a factual nature which is already public knowledge, the Commissioner does not accept that the information has the sensitivity claimed by the Ministers.
40. The Commissioner is therefore is satisfied in all the circumstances that, in relation to the information referred to in paragraph 39, the public interest in making this factual information available is not outweighed by that in maintaining the exception in regulation 10(4)(e). She requires the Ministers to disclose this information to Mr Kane. The Commissioner will write separately to the Ministers to specify the information which is to be disclosed.
41. The Commissioner is satisfied that the public interest in making the remainder of the information available is outweighed by that in maintaining the exception given the adverse effect disclosure could have on information sharing and on relationships with bodies such as Ineos. Accordingly, the Commissioner accepts that the Ministers correctly withheld this information from Mr Kane under regulation 10(4)(e) of the EIRs.

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 Kane.

The Commissioner finds that

- (i) the Ministers located all of the information which fell within the scope of Mr Kane's request.
- (ii) the exception in regulation 10(4)(e) of the EIRs applied to most of the information withheld by the Ministers.
- (iii) in failing to disclose the information which was wrongly withheld under regulation 10(4)(e), the Ministers failed to comply with regulation 5(1) of the EIRs.

The Commissioner requires the Ministers to disclose the information which was wrongly withheld (as described in a separate letter to the Ministers) by **20 April 2016**.

Appeal

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

Enforcement

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

Rosemary Agnew
Scottish Information Commissioner

3 March 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;

...

(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)-

(a) shall be complied with as soon as possible and in any event no later than 20 working days after the date of receipt of the request; and

(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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