

# Decision Notice



Decision 174/2011 Mr Tommy Kane and the Scottish Ministers

Water industry

Reference No: 201100713

Decision Date: 18 August 2011

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

**Kevin Dunion**

Scottish Information Commissioner

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



## Summary

Mr Kane made three requests to the Scottish Ministers (the Ministers), seeking various items of information relating to the Scottish water industry. In each case, the Ministers responded by indicating that they held no information falling within the scope of the request. Following a review of each decision, Mr Kane remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, while accepting that the requested information was not held by the Ministers, the Commissioner found that the Ministers had failed to identify the information Mr Kane was seeking as environmental information and thereafter deal with his requests in accordance with the EIRs. He also identified a failure to provide reasonable advice and assistance in respect of one of the requests.

## Relevant statutory provisions and other sources

---

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

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 available environmental information on request); 9(1) and (3) (Duty to provide advice and assistance) and 10(1), (2) and (4)(a) (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

---

### Request 1

1. On 16 November 2011, Mr Kane wrote to the Ministers requesting a list of all consultants/advisers contracted/hired by the Water Division of the Scottish Executive/Scottish Government in 2007, 2008, 2009 and 2010, up until 11 November.
2. The Ministers responded on 13 January 2011, confirming that they held no information falling within the scope of the request.



3. On 10 March 2011, Mr Kane wrote to the Ministers requesting a review of their decision. He expressed surprise that the Water Division had used no consultants or advisers over the relevant period.
4. The Ministers notified Mr Kane of the outcome of their review on 8 April 2011, upholding their original decision that no information was held.

### **Request 2**

5. On 12 January 2011, Mr Kane requested from the Ministers a list of meetings between any official or Minister and the Centre for Public Policy and the Regions (the CPPR), in relation to Scottish Water and any other element of water and wastewater services in Scotland, together with any note or minute from any of these meetings. He also requested correspondence between officials or Ministers and any person from the CPPR in relation to these matters.
6. The Ministers responded on 13 January 2011, requesting clarification as to the timeframe covered by Mr Kane's request. On 14 January 2011, Mr Kane confirmed, as suggested by the Ministers, that the request should cover the last two years.
7. On 11 February 2011, the Ministers responded, indicating that the information requested was not held.
8. Mr Kane was dissatisfied with the response and, on 10 March 2011, wrote to the Ministers requiring that a review be conducted. In particular, Mr Kane questioned why the Ministers would seek clarification (and suggest the last two years as a suitable search period) if there was no information held.
9. On 8 April 2011, the Ministers issued the outcome of the review to Mr Kane, confirming that no information was held within the two year time period specified and advising Mr Kane that he could submit a new request which described the information he was interested within another time period.

### **Request 3**

10. On 10 January 2011, Mr Kane wrote to the Ministers seeking the following information, all relating to contact between the Ministers and the contractor Veolia:
  - a) a list of meetings in the period 1 April 2007 to 15 December 2010;
  - b) any note or minute taken at any such meeting;
  - c) any correspondence relating to Veolia taking control of Stirling Water from Thames Water in November 2007 (including emails, letters and reports);
  - d) any correspondence in relation to the Seafield sewage spill of April 2007;
  - e) any correspondence in relation to the development of a "Scottish Centre of Expertise" as outlined in the draft consultation "Building an Hydro Future";
  - f) any correspondence discussing Scotland potentially hosting the World Water Forum in 2015 (including emails, letters and reports)



- g) any other correspondence in relation to any other part of the consultation “Building a Hydro Future”.
11. Having obtained confirmation from Mr Kane that the information he was seeking under points a) and b) above was only that relating to the water industry in Scotland, the Ministers responded on 11 February 2011. Once again, they gave Mr Kane notice that they held no information falling within the scope of the request.
  12. Mr Kane did not accept there had been no contact with Veolia as per his request for information, and accordingly requested a review on 10 March 2011.
  13. On 8 April 2011, the Ministers responded, upholding their position that they held no information falling within the scope of request 3.
  14. On 13 April 2011, with regard to all of requests 1, 2 and 3, Mr Kane wrote to the Commissioner, stating that he was dissatisfied with the outcome of the Ministers’ reviews and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
  15. 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

---

16. On 5 May 2011, the Ministers were notified in writing that an application had been received from Mr Kane, given an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asked to respond to specific questions. In particular, the Ministers were asked to provide detailed explanations of any searches carried out in respect of each of Mr Kane’s three requests. They were also asked to comment on whether they considered any parts of the three requests to constitute requests for environmental information under the EIRs and, in this connection, to confirm whether they wished to apply the exemption under section 39(2) of FOISA to any information identified as being environmental information (and to identify, with reasons, any relevant exceptions in the EIRs).
17. The Ministers responded on 23 May 2011, with detailed explanations of the searches and other enquiries conducted in respect of the three requests. They also confirmed that they considered all three requests to be for environmental information in their entirety, and that they wished to rely upon the exemption under section 39(2) of FOISA and the exception in regulation 10(4)(a) of FOISA in respect of all of the information requested.
18. During the investigation, Mr Kane also supplied the investigating officer with a copy of a diary entry relative to request 3 and the Ministers provided further submissions relating to this information (on 7 July 2011).



19. The relevant submissions provided by Mr Kane and the Ministers will be considered fully in the Commissioner's analysis and findings below.

## Commissioner's analysis and findings

---

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

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

21. In this case, the Ministers have applied the exemption in section 39(2) of FOISA, on the basis that the information requested by Mr Kane is environmental information. For this exemption to apply, any information requested would require to be environmental information as defined in regulation 2(1) of the EIRs (the relevant parts of which is reproduced in the Appendix below). The Commissioner has set out his thinking on the relationship between FOISA and the EIRs in some detail in *Decision 218/2007 Professor A D Hawkins and Transport Scotland* and need not repeat it here.
22. Mr Kane's requests all seek information concerning the water industry in Scotland. While it does not necessarily follow that all information requested about this industry will be environmental information, the Commissioner has considered the terms of the requests and agrees with the Ministers that any information held by the Ministers and falling within the scope of these particular requests would fall within paragraph (c) of the definition of environmental information contained in regulation 2(1) of the EIRs. In other words, it would be information on measures affecting or likely to affect the elements and factors referred to in paragraphs (a) and (b) of the definition. As he is satisfied that the Ministers were correct in reaching this conclusion, he is also satisfied that the information would be exempt under section 39(2) of FOISA.
23. This exemption is subject to the public interest test in section 2(1)(b) of FOISA. As there is a separate statutory right of access to environmental information available to the applicant in this case, the Commissioner accepts that the public interest in maintaining this exemption and in dealing with the request in line with the requirements of the EIRs outweighs any public interest in disclosure of the information under FOISA. Consequently, the Commissioner accepts that the Ministers were entitled to withhold the requested information under section 39(2) of FOISA and thereafter deal with the request under the EIRs. Unfortunately, they failed to reach this conclusion in the course of dealing with Mr Kane's requests, and consequently the Commissioner finds that they failed to deal with the request in accordance with regulation 5(1) of the EIRs.
24. The requested information being properly withheld under section 39(2) of FOISA, the Commissioner has proceeded to consider this case in what follows solely in terms of the EIRs.



25. In his application to the Commissioner, Mr Kane complained that he would expect the information he had requested to be held by the Ministers given what he was asking for, the nature of the water industry and the role of the Ministers in relation to it. He also had a copy of diary entries which led him to believe that meetings of the kind described in his request 3 had taken place.
26. The Ministers continued to assert that no information whatsoever was held, relying upon regulation 10(4)(a) of the EIRs.

### **Regulation 10(4)(a) of the EIRs – information not held**

27. Regulation 10(4)(a) of the EIRs states that a Scottish public authority may refuse to make environmental information available to the extent that it does not hold that information when an applicant's request is received.

#### *Request 1*

28. In their review decision letter, the Ministers noted the timeframe specified in Mr Kane's request and concluded that a search for the information had not identified any information within the scope of Mr Kane's request. However, in his request for review and his application to the Commissioner, Mr Kane expressed his surprise at this lack of information, given what he described as the complex and arduous task faced by the Ministers' Water Division team.
29. The Ministers detailed the searches which had been carried out for information relating to consultants, explaining that the water industry team were unaware of any consultants having been contracted regarding the issues Mr Kane raised in his request. They advised that a search was conducted on the accounting system (known as "SEAS") for use of certain cost centre codes on the account codes relating to consultancy and consultants' fees. The Ministers confirmed that there had no returns on the search. Finance staff were also asked to search for consultancy cost codes used by the extended Water Division within the time period, with no returns recorded. It was also (the Ministers advised) verbally re-confirmed with all water team members that they had no recollection of contracting/hiring consultants during the specified period.
30. When asked by the investigating officer if the Ministers would be expected to hold the information in question, the Ministers explained that it is for another public body to manage the process in question (i.e. Scottish Water). Ministers and civil servants were not involved in this process, and consequently there was no requirement for the Ministers to hold this information. The Ministers also explained that neither Ministers nor civil servants regularly met with any of Scottish Water's suppliers for any purpose.
31. Having considered all the submissions made by Mr Kane and the Ministers, the Commissioner is satisfied that the Ministers carried out adequate searches to ascertain what relevant information they held. In all the circumstances, therefore, he accepts that the Ministers (in holding no relevant information) were entitled to claim that regulation 10(4)(a) of the EIRs applied to Mr Kane's request 1.



*Request 2*

32. Mr Kane explained in his application to the Commissioner that the CCPR was a regular commentator on the Scottish water industry and that he had good reason to believe that some members of the Scottish Government had been in contact with the CPPR in relation to the industry. Consequently, he did not accept that there would be no information held.
33. During the investigation, the Ministers detailed the three searches which had been conducted of its electronic records system (eRDM) relative to request 2, listing the search terms deployed during these searches. The Commissioner notes that these terms tended to be phrases rather than single words. The Ministers explained that where phrases had been used, only one part of the phrase would require to be located for relevant information to be returned in the results. For this reason, it was not considered necessary to run searches individually as well as combined. The Ministers also advised that their water industry team had been asked to identify any information they might hold which would not be on eRDM, but no information was identified as a result of these enquiries.
34. In addition, Mr Kane was dissatisfied with the Ministers' request for clarification – and related advice – in relation to this request. Given that the Ministers had suggested that he narrow the scope of the request to the last two years, he had expected information to be held for that period.
35. In their submissions to the Commissioner, the Ministers indicated that the CPPR had been in existence for some considerable time, and the civil servant dealing with the request had supposed, given that the CPPR had just issued a report on Scottish Water, that Mr Kane's interest was in relation to that report. In order to prevent the cost exceeding the cost limit due to an unlimited timescale (where most of that period would not be of interest to the requester), it was considered that limiting the time period to two years might cover Mr Kane's area of interest. The Ministers confirmed that no searches had been undertaken prior to suggesting the two-year period to Mr Kane, so they did not know prior to giving the advice whether any relevant information would be held.
36. This does not appear to have been a case where the request was formulated in too general a manner and the authority required further particulars in order to process it. Rather, from the Ministers' submissions, it appears that certain assumptions were made by the Ministers as to what information the applicant required – and, in addition, it appears to have been apprehended that the cost of dealing with the broader request would exceed the statutory fees limit (albeit one that applies under FOISA and not under the EIRs). Unfortunately, none of this was explained to Mr Kane.
37. It does not fall within the Commissioner's remit in this case to consider whether the Ministers were justified in seeking clarification from Mr Kane. However, on the basis of his request for review and application to the Commissioner, it is pertinent for the Commissioner to consider the Ministers' handling of the request for clarification, in the light of their duty to provide advice and assistance under regulation 9(1) of the EIRs.



38. In this context, it is relevant to consider the Scottish Ministers' Code of Practice on the discharge of functions by Scottish public authorities under FOISA and the EIRs, particularly paragraph 1.9. This recommends that in cases where the cost of responding to the request would exceed the FOISA cost limit or engage the comparable provisions of the EIRs (on manifestly unreasonable requests), "the authority may again consider what information could be provided below the cost limit, and suggest how the applicant may wish to narrow the scope of the request accordingly". Here, the Commissioner notes in particular the use of the words "how" and "accordingly". Taking account of these provisions, the Commissioner cannot accept that the duty to provide advice and assistance was met in this case, in the absence of any explanation of the context in which clarification was being sought from the applicant.
39. That said, Mr Kane did reduce the scope of his request to the two years in question, and consequently the Commissioner can only consider the adequacy of the searches undertaken by the Ministers for information held in respect of that period. Having considered the Ministers' submissions on this point, he is satisfied that the relevant searches and other enquiries were adequate in the circumstances, and consequently the Ministers were entitled to claim the exception in regulation 10(4)(a) of FOISA in respect of request 2 (on the basis that no relevant information was held).

### *Request 3*

40. With regard to his third request, Mr Kane explained his understanding of Veolia's role within the Scottish water industry, involving very substantial contracts for water and wastewater service works. While acknowledging that these had been let by Scottish Water, he submitted that all of this activity was overseen by the Scottish Government. On this basis, Mr Kane stated that he would be concerned if the Ministers had not (as appeared to be the case) been in contact with Veolia.
41. Also, with regard to the first question in request 3, Mr Kane supplied the investigating officer with a copy of a diary entry for a senior civil servant dated 5 February 2009, which referred to a meeting with Veolia (within the time period he had specified in his request). In this regard, the investigating officer asked the Ministers whether the record of this diary entry would fall within the scope of Mr Kane's request and, if so, why it had not been supplied to Mr Kane when responding to his request. They were also asked whether there was any further information held in respect of the meeting in question.
42. With regard to the diary entry described above, the Ministers explained that the relevant diary entries had not been retained. The senior civil servant involved had no recollection of the meeting in question having taken place, while its searches had confirmed that no information on the meeting was held on eRDM. They described the nine searches carried out in respect of request 3, employing a number of search terms, which were similar in nature to those described in paragraph 33 above.





43. The Ministers also confirmed that none of the water industry team were aware of the meeting having taken place, and that none of them held any notes in reference to it, whether in hard copy or electronically. They also suggested that the existence of a diary entry did not necessarily mean that the meeting had taken place, and supposed that (for reasons which could not be established) this particular meeting had failed to take place.
44. Mr Kane also asserted that Veolia had close links with the World Water Council and explained his understanding of a bidding process (involving the Scottish Government and the World Water Council) to host the World Water Forum in 2015. He contended that it would make sense for the Scottish Government to have had some contact with Veolia, given this bidding process and the magnitude of what was involved. The Ministers commented during the investigation that neither Ministers nor civil servants regularly met with any of Scottish Water's suppliers (such as Veolia) for any purpose. The Commissioner notes that this statement does not preclude the possibility that on a non-regular basis, for specific reasons, meetings could have been held with those suppliers.
45. It is not disputed by the Ministers that a diary entry was created in respect of a meeting involving a representative of the Ministers and Veolia, which was to have been held on 5 February 2009. The Commissioner accepts, however, as the Ministers have submitted, that it does not necessarily follow from the existence of a diary entry that the meeting to which that entry refers ever took place. In this case, the Commissioner has considered the Ministers' submissions on request 3 and accepts that they took adequate steps in the circumstances to satisfy themselves that no relevant information was held. Consequently, they were entitled to claim that regulation 10(4)(a) of the EIRs applied to Mr Kane's request 3. In the circumstances, it can only be a matter of conjecture what happened to the meeting scheduled for 5 February 2009.

#### *Public Interest Test*

46. The exception in regulation 10(4)(a) is subject to the public interest test in regulation 10(1)(b) of the EIRs. Therefore, a public authority may only refuse to make available information to which the 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. In this case, the Commissioner is satisfied that no information can be identified as being held by the Ministers at the time his request was received, and consequently he does not consider there to be any conceivable public interest in requiring that further information be made available.
47. Having considered all the submissions made by the Ministers, therefore, the Commissioner is satisfied that the Ministers were entitled to withhold the information requested by Mr Kane under regulation 10(4)(a) of the EIRs.



## DECISION

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

The Commissioner finds that by failing to identify the requested information as environmental information (as defined in regulation 2(1)) and deal with the request accordingly under the EIRs, the Ministers failed to comply with regulation 5(1) of the EIRs. He also finds that they failed to provide Mr Kane with reasonable advice and assistance in relation to request 2, as required by regulation 9(1) of the EIRs.

However, the Commissioner finds that the Ministers were entitled to refuse Mr Kane's three requests under regulation 10(4)(a) of the EIRs, on the basis that they did not hold the information requested.

## Appeal

---

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

**Margaret Keyse**  
**Head of Enforcement**  
**18 August 2011**



## Appendix

---

### Relevant statutory provisions

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

##### 1 General entitlement

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

...

- (6) This section is subject to sections 2, 9, 12 and 14.

##### 2 Effect of exemptions

- (1) To information which is exempt information by virtue of any provision of Part 2, section 1 applies only to the extent that –

...

- (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

...

##### 39 Health, safety and the environment

...

- (2) Information is exempt information if a Scottish public authority-
- (a) is obliged by regulations under section 62 to make it available to the public in accordance with the regulations; or
- (b) would be so obliged but for any exemption contained in the regulations.

...



## 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.

...



**9 Duty to provide advice and assistance**

- (1) A Scottish public authority shall provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to applicants and prospective applicants.

...

- (3) To the extent that a Scottish public authority conforms to a code of practice under regulation 18 in relation to the provision of advice and assistance in a particular case, it shall be taken to have complied with the duty imposed by paragraph (1) in relation to that case.

...

**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
- (a) it does not hold that information when an applicant's request is received;

...