Decision Notice

Decision 153/2011 Mr Tommy Kane and the Scottish Ministers

Whether requests manifestly unreasonable

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Decision 153/2011
Mr Tommy Kane
and the Scottish Ministers

Summary

Mr Kane made a number of requests to the Scottish Ministers (the Ministers) for information relative to the Water Industry Team of the Scottish Government. The Ministers responded by stating that they considered the requests to be vexatious in terms of section 14(1) of FOISA. Following a review, Mr Kane remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, in the course of which the Ministers accepted that Mr Kane's information requests should have been dealt with under the Environmental Information (Scotland) Regulations 2004 (EIRs), they argued that the requests were manifestly unreasonable in terms of regulation 10(4)(b) of the EIRs. The Commissioner did not accept this and required the Ministers to respond to the requests in some other way which was compliant with the EIRs.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and 1(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) (definitions (a) to (c) of "environmental information"); 5(1) and (2)(b) (Duty to make available environmental information on request); 7(1) (Extension of Time); 9(1) and (2) (Duty to provide advice and assistance) and 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

1. On 23 February 2011, Mr Kane sent four separate emails to the Ministers, each requesting information relating to the activities of members of the Scottish Government's Water Industry Team. In each case, he requested pre-meeting notes, briefings or advice, minutes or notes from the meetings, and any post meeting papers, notes or analysis in relation to certain specified meetings. He listed a total of 38 meetings.

2. On 25 February 2011, Mr Kane sent a further four emails to the Ministers, three requesting information in the same terms as set out in the preceding paragraph, in respect of a further 18 meetings. The fourth email contained a further six requests for information, all related to the activities of the Water Industry Team.

3. The Ministers responded on 7 March 2011, stating that they considered Mr Kane's requests to be vexatious in terms of section 14(1) of FOISA (and consequently that they were not obliged to comply with the requests). The Ministers considered that the eight emails had contained 62 separate requests, asking for a wide range of information relating to as many meetings, all of which had to be responded to by 25 March 2011. They further stated that the number and the breadth of the requests had led them to conclude that they were manifestly unreasonable and disproportionate, and were designed to cause disruption or annoyance or at least have the effect of harassing the Scottish Government.

4. On 13 March 2011, Mr Kane wrote to the Ministers requesting a review of their decision. He did not accept that his requests should have been dealt with collectively. He highlighted what he considered to be the importance of the information he had requested and challenged the Ministers' reasons for considering the requests to be vexatious.

5. The Ministers notified Mr Kane of the outcome of their review on 8 April 2011. They upheld their original decision in full, confirming their view that the requests were vexatious for the reasons given earlier.

6. On 13 April 2011 Mr Kane wrote to the Commissioner, stating that he was dissatisfied with the outcome of the Ministers' review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA. By virtue of regulation 17 of the EIRs, Part 4 of FOISA applies to the enforcement of the EIRs as it applies to the enforcement of FOISA, subject to certain specified modifications.

7. The application was validated by establishing that Mr 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 response to those requests. The case was then allocated to an investigating officer.

Investigation

8. On 26 April 2011, the investigating officer notified the Ministers in writing that an application had been received from Mr Kane, giving them an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking them to respond to specific questions. In particular, the Ministers were asked about their interpretation of the requests, their reasons for considering them to be vexatious and whether they should have dealt with the requests under the EIRs.

9. The Ministers responded on 3 June 2011, confirming that they considered the information requested to be environmental information and therefore accepting that the requests should have been dealt with under the EIRs. The Ministers advised that they were relying upon the exemption in section 39(2) of FOISA and the exception in regulation 10(4)(b) of the EIRs to refuse to make the information available, with arguments and evidence in support of their position.

10. The relevant submissions obtained from Mr Kane and the Ministers will be considered fully in the Commissioner's analysis and findings below.

Commissioner's analysis and findings

11. 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

12. The Commissioner set out his thinking on the relationship between FOISA and the EIRs in detail in *Decision 218/2007 Professor A D Hawkins and Transport Scotland*[1] and need not repeat it in full here.

13. In their submissions to the Commissioner, the Ministers acknowledged that Mr Kane's requests should have been dealt with under the EIRs and stated that they wished to rely on the exemption in section 39(2) of FOISA in relation to all the information requested. For this exemption to apply, any information requested would require to be environmental information as defined in regulation 2(1) of the EIRs. The Ministers considered the information to be environmental information because it related to communications regarding the Scottish water industry and therefore had environmental implications.

14. While the Commissioner would not accept unequivocally that information relative to the activities of the Water Industry Team of the Scottish Government would always fall within the definition of environmental information, he accepts that the information requested by Mr Kane in this case is environmental for the purposes of the EIRs. Having considered the terms of the requests and the Ministers' submissions on this point, the Commissioner accepts in this case that information falling within the scope of these requests would fall within paragraph (c) of the definition of environmental information contained in regulation 2(1) of the EIRs, being information on measures affecting or likely to affect the elements and factors referred to in paragraphs (a) and (b) of the definition.

[1] http://www.itspublicknowledge.info/applicationsanddecisions/Decisions/2007/200600654.asp

15. In this case, therefore, the Commissioner accepts that the Ministers were entitled to apply the exemption in section 39(2) of FOISA to the withheld information, given his conclusion that it is properly considered to be environmental information. This exemption is subject to the public interest test in section 2(1)(b) of FOISA.

16. 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 dealing with the request in line with the requirements of the EIRs outweighs any public interest in disclosure of the information under FOISA. He has consequently proceeded to consider this case in what follows solely in terms of the EIRs.

17. While the Commissioner is pleased to note that the Ministers arrived at the view that the information was environmental in the course of the investigation, he must also note that they did not do so (and act accordingly under the EIRs) when dealing with Mr Kane's information requests or his requirement for review. In failing to do this, he considers that the Ministers failed to comply with regulation 5(1) of the EIRs.

Regulation 10(4)(b) of the EIRs

18. Regulation 5(1) of the EIRs creates a duty on public authorities to make environmental information available upon request. However, a Scottish public authority may refuse a request to make environmental information available to the extent that the request for information is manifestly unreasonable (regulation 10(4)(b)). The Ministers submitted that this exception applied to Mr Kane's requests.

19. In terms of regulation 10(2) of the EIRs, the Scottish public authority applying regulation 10(4)(b) must interpret the exception in a restrictive way and must apply a presumption in favour of disclosure. The exception is subject to the public interest test in regulation 10(1)(b).

20. There is no definition of "manifestly unreasonable" in the EIRs, or in Directive 2003/4/EC, from which they are derived. The Commissioner's opinion is that "manifestly" implies that a request should be obviously or clearly unreasonable, in which connection he notes the opinion of the Information Tribunal in *Dr Kaye Little v Information Commissioner and Welsh Assembly Government (EA/2010/0072)*[2], which considered regulation 12(4)(b) of the Environmental Information Regulations 2004:

From the ordinary meaning of the words "manifestly unreasonable", it is clear that the expression means something more than just "unreasonable". The word "manifestly" imports a quality of obviousness. What is in issue, therefore, is a request that is plainly or clearly unreasonable. It is a more stringent test than simply "unreasonable".

21. Whether a request is manifestly unreasonable must depend on the facts of each case. The exception may apply where it can be demonstrated that a request is vexatious, or where compliance would incur unreasonable costs for the public authority or an unreasonable diversion of public resources.

[2] http://www.informationtribunal.gov.uk/DBFiles/Decision/i475/[2010]UKFTT_EA20100072_(GRC)_20101230.pdf

22. In *Decision 024/2010 Mr N and the Scottish Ministers*[3], the Commissioner stated that he was likely to take into account the same kinds of considerations in deciding whether a request was manifestly unreasonable under the EIRs as he would in reaching a decision as to whether a request was vexatious in terms of section 14(1) of FOISA. It does not follow, however, that a request is only manifestly unreasonable under the EIRs if it is vexatious under FOISA, although in this case the focus of the Minister's responses to Mr Kane (and their submissions to the Commissioner) appears to be to the effect that Mr Kane's requests should be considered vexatious, by virtue of the burden of compliance and its effects on those who would be required to comply: the Ministers (see below) specifically exclude the cost of compliance from their reasoning in this case.

23. The Commissioner's general approach is that a request (which may be the latest in a series of requests) is vexatious where it would impose a significant burden on the public authority and:

a. it does not have a serious purpose or value; and/or

b. it is designed to cause disruption or annoyance to the public authority; and/or

c. it has the effect of harassing the public authority; and/or

d. it would otherwise, in the opinion of a reasonable person, be considered to be manifestly unreasonable or disproportionate.[4]

24. It is not necessary for all the above criteria to be met. Some arguments may naturally fall under more than one heading. Also, although there may be circumstances where the burden of responding alone justifies deeming a request to be manifestly unreasonable, ordinarily the Commissioner will expect one or more of the other listed criteria to be present in addition. In this respect the Commissioner acknowledges the relevance of *The Aarhus Convention: An Implementation Guide*[5], which states at page 57:

Although the Convention does not give direct guidance on how to define "manifestly unreasonable", it does hold it as a higher standard than the volume and complexity referred to in article 4, paragraph 2. Under that paragraph, the volume and complexity of an information request may justify an extension of the one-month time limit to two months. This implies that volume and complexity alone do not make a request "manifestly unreasonable" as envisioned in paragraph 3(b).

[3] http://www.itspublicknowledge.info/applicationsanddecisions/Decisions/2010/200900461.asp
[4] See the Commissioner's briefing on vexatious or repeated requests at http://www.itspublicknowledge.info/nmsruntime/saveasdialog.asp?lID=2513&sID=2591
[5] http://www.unece.org/env/pp/acig.pdf

25. The Commissioner has recognised that, in many cases, the vexatious nature of a request will only emerge after considering the request within its context and background, and in this connection the applicant's past dealings with the public authority may be relevant. Even if the request appears reasonable in isolation, it may be vexatious where it demonstrates a continuation of a certain pattern of behaviour or represents a significant burden when considered collectively with other communications. In this connection, the fact that the request under consideration deals with the same subject matter as a previous request or requests may be relevant. The Commissioner accepts that these factors could also apply to consideration of whether a request was manifestly unreasonable in terms of regulation 10(4)(b).

The Minister's submissions

26. The Ministers submitted that Mr Kane has submitted numerous FOI/EIR requests over the past few years with regard to his interest in the water industry in Scotland. He had received a considerable amount of information, released to him in line with the principles of FOISA and the public interest.

27. The Ministers contended, however, that following a recent release of an individual officer's diary entries for the last few years, Mr Kane appeared to be working his way through the diary requesting all information held regarding each entry. They pointed out that entries in a diary did not always guarantee that events or meetings took place or discussed items that were initially pencilled in, and a diary did not guarantee that any specific information was held. The Ministers believed that Mr Kane appeared to be of the view that the "targeting" of the individual's diary would provide him with information not provided to him following his previous requests for very similar information.

28. Referring to the cumulative burden they considered had been imposed on the Water Industry Team by Mr Kane's previous requests, all still under consideration at the time the 23 and 25 February requests had been submitted, the Ministers contended that the combined effect of all of his requests was to inflict a manifestly unreasonable burden on the staff and work of the Team. They described the Team's heavy workload at the time, noting that the requests had covered a large expanse of the Team's work.

29. The Ministers contended that at the time the requests of 23 and 25 February 2011 were received, the staff in the Water Industry Team were already dealing with a request of 10 January which consisted of seven separate requests, a request on 12 January consisting of three requests, a request of 9 February consisting of four separate requests, along with two review requests of 17 February with regard to nine separate requests, all of which had been made by Mr Kane. The Ministers also stated that at the same time the Team was finalising the preparation of background information with regard to an appeal due on 25 February. It submitted that only this Team, comprising only six members (only one of whom dealt with the majority of information requests), could consider and deal with the requests.

30. The Ministers emphasised what they considered to be the wide-ranging nature of Mr Kane's requests. They noted that the requests, with the exception of those contained in one of the eight emails, were each for "all pre-meeting notes, briefings or advice, minutes or notes from the meetings, and any post meeting papers, notes or analysis", which could potentially cover all information held by the Scottish Government on a topic or policy to be discussed and therefore could (as policy development can take months and potentially years) include a significant amount of information.

31. The Ministers continued to the effect that meetings frequently covered a considerable range of points and topics and therefore, which could have considerable implications to the work required to be undertaken by the staff (specifically, the Ministers submitted, in terms of the investigation and determination of what information fell within the scope of the requests, locating and retrieving that information and the extensive searches of the electronic Records and Document Management system which would be required to respond to Mr Kane's requests).

32. Returning to the limited resources available to the Water Industry Team to deliver all their statutory functions (of which FOI and the EIRs were only a small, though important, part) the Ministers contended that dealing with Mr Kane's requests would require a disproportionate time and amount of work from any member of the Team. Given the number and scope of the requests, they estimated that it would take approximately 130 hours of work (at what they considered to be an extremely conservative estimate of two hours per request) to deal with the requests. As no one staff member would be able to devote their time solely to responding to Mr Kane, they estimated the actual time required for a response as at least four months. For this reason, the Ministers believed the requests were manifestly unreasonable and substantially burdensome, and potentially extremely costly to the public purse (which we did not consider would be in the public interest).

33. Finally, the Ministers noted (again) that Mr Kane's requests related to areas of significant policy development within the Scottish Government, so there was likely to be a substantial amount of information which could be covered by the requests, including a significant number of internal communications. They went on to provide submissions on the private space they considered necessary for the development of policy and legislation, the loss of which they submitted would not be in the public interest, although at no point was it suggested that any exception other than that under regulation 10(4)(b) was relevant to the requests.

Commissioner's conclusions

34. The Commissioner does not accept that Mr Kane's requests are so wide-ranging as to potentially cover all of the information the Scottish Ministers hold on a specific topic. Mr Kane's requests relate to the meetings listed within his requests and are specific to information relating to those meetings. They are also, as the Ministers have themselves emphasised, specific to the work of a particular team within the Scottish Government.

35. In any event, the Ministers will be aware of the duty to provide advice and assistance in regulation 9 of the EIRs. Regulation 9(2) states that where a request has been formulated in too general a manner, the authority shall ask the applicant to provide more particulars in relation to the request and shall assist the applicant in providing those particulars. The Commissioner must note that the Ministers made no attempt to do this in dealing with Mr Kane's requests.

36. The Commissioner has taken account of the Ministers' submissions on the other requests from Mr Kane which they were still dealing with (at various stages) when they received the requests under consideration here. In the circumstances, he acknowledges that it was reasonable to consider the requests in that context. He also acknowledges that the requests were of some volume and the complexity. On the question of volume and complexity, however, he must take into account his comments above on the definition of "manifestly unreasonable" and also the fact that regulation 10(2)(b) of the EIRs requires that the exceptions in regulation 10 shall be interpreted in a restrictive way.

37. In particular, noting the prominence given to the equivalent provisions of the Aarhus Convention in the *The Aarhus Convention: An Implementation Guide* (see paragraph 24 above), the Commissioner must take into consideration regulation 7(1) of the EIRs. This permits an authority to extend the period of 20 working days allowed by regulation 5(2) for responding to a request for environmental information, by a further period of up to 20 working days, if the volume and complexity of the information requested makes it impracticable for the authority either to comply with the request within the earlier period or to make a decision to refuse to do so. Clearly, volume and complexity alone cannot make a request manifestly unreasonable, although they might (particularly where the time required to respond, on any reasonable estimate, exceeded substantially the maximum time allowed under regulation 7(1)) be indicative of a significant burden.

38. In their submissions, the Ministers made reference to the time they believed it would take to respond to the requests. They referred to an "extremely conservative estimate" that it would take approximately two hours to consider each of Mr Kane's requests. The Ministers did not supply details of how this figure had been arrived at, other than to say that the Scottish Government's research suggested the average length of time for request handling was close to 7.5 hours. In this case, no consideration appears to have been given to the specific demands of dealing with the requests made by Mr Kane (or at least if it was, no details have been provided to the Commissioner). The Commissioner also has difficulty understanding, in the absence of more case-specific information, how it could reasonably be expected to take in the region of four months (even allowing for the considerable other demands on the time of the Water Industry Team) to respond to the requests.

39. Having considered all of the submissions he has received from the Ministers together with the requests submitted by Mr Kane, the Commissioner is not persuaded that responding to these requests would impose such a significant burden on the Ministers, either specifically on the Water Industry Team or more generally, that it would be manifestly unreasonable. Neither is he persuaded by those submissions that the requests should be considered manifestly unreasonable on any other grounds.

40. In all the circumstances, therefore, the Commissioner is not satisfied that the Ministers were entitled to apply the exception in regulation 10(4)(b) of the EIRs to Mr Kane's requests. Having reached this conclusion, he is not required to consider the public interest test in regulation 10(1)(b) of the EIRs. He must find that the Ministers were not entitled to refuse to make the requested information available under the exception claimed.

41. The Commissioner has not reached this conclusion lightly. He appreciates that the Water Industry Team is small and has a demanding workload, but in that respect it is no different to many teams who may be required to respond to requests under FOISA or the EIRs. Mr Kane's requests may focus on the work of the Water Industry Team, but that appears to be an area in which he has a legitimate academic interest. The Commissioner cannot rule out the possibility that requests of this kind *might* become manifestly unreasonable at some point, in some cases simply by virtue of their volume and the resulting impact on the authority. He does not, however, consider Mr Kane's requests to have reached that point, on the basis of the information he has received from the Ministers.

42. The Commissioner therefore requires the Ministers to respond to Mr Kane's information requests in accordance with the EIRs. The Ministers should consider what relevant recorded information they held at the time they received the requests of 23 and 25 February 2011. Any information held should be made available to Mr Kane, unless the Ministers consider themselves entitled, under any relevant provision of the EIRs, to refuse to do so.

DECISION

The Commissioner finds that the Scottish Ministers (the Ministers) failed to comply with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in dealing with Mr Kane's requests for information. In particular, in failing to identify the information requested as environmental information (as defined in regulation 2(1)) and deal with the request accordingly under the EIRs, it failed to comply with regulation 5(1) of the EIRs.

The Commissioner also finds that the Ministers failed to comply with the EIRs (and in particular regulation 5(1)) by withholding information under regulation 10(4)(b) of the EIRs.

The Commissioner therefore requires the Ministers to respond to Mr Kane in accordance with the requirements of the EIRs (other than in terms of regulation 10(4)(b)) by 23 September 2011.

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.

Kevin Dunion
Scottish Information Commissioner
08 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.

…

7 Extension of time

(1) The period of 20 working days referred to in-

(a) regulation 5(2)(a);

…

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

…

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.

(2) Where a request has been formulated in too general a manner, the authority shall-

(a) ask the applicant as soon as possible, and in any event no later than 20 working days after the date of receipt of request, to provide more particulars in relation to the request; and

(b) assist the applicant in providing those particulars.

…

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;

…