

# Decision Notice

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## Decision 198/2015: Mr Ed Pybus and the Scottish Ministers

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### Enclosure accompanying a specified letter

Reference No: 210501408

Decision Date: 18 December 2015



Scottish Information  
Commissioner

## Summary

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On 3 April 2015, Mr Pybus asked the Scottish Ministers (the Ministers) for information relating to communications with Cluff Natural Resources (CNR) and Forth Ports.

The Ministers provided information, but withheld some information under regulation 10(5)(e) of the EIRs. Following a review, as a result of which the Ministers disclosed all the withheld information, Mr Pybus was not convinced that the Ministers had provided all the relevant information they held. He applied to the Commissioner for a decision.

The Commissioner investigated and found that the Ministers had responded to Mr Pybus's request for information in accordance with the EIRs.

## Relevant statutory provisions

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

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 3 April 2015, Mr Pybus made a request for information to the Ministers. The information requested was:

*“Details of all correspondence and contact between Scottish Government Ministers/officials and any representatives of Cluff Natural Resources, since December 1, 2014.*

*Details of all correspondence and contact between Scottish Government Ministers/officials and any representatives of Forth Ports, since December 1, 2014.”*

2. On 14 April 2015, Mr Pybus (responding to a request for clarification from the Ministers) confirmed that the second part of his request only concerned information relating to unconventional oil and gas extraction.
3. The Ministers responded on 19 May 2015. They provided Mr Pybus with information which was redacted in places, applying the exception in regulation 10(5)(e) of the EIRs to the redacted information.
4. On 9 June 2015, Mr Pybus wrote to the Ministers requiring a review of their decision, on the grounds that
  - (i) He did not agree with the application of regulation 10(5)(e), and
  - (ii) He did not believe the Ministers had provided all the relevant information they held. He highlighted references in the disclosed information to a communication with Alex Salmond and a meeting with Marine Scotland.

5. The Ministers notified Mr Pybus of the outcome of their review on 23 July 2015. They disclosed all of the previously withheld information to Mr Pybus. They provided background information on the meeting referred to by Mr Pybus and confirmed that no record of the meeting was held. They also explained that the letter to Mr Salmond had never been enclosed with the document referred to by Mr Pybus: a letter to another individual had been enclosed in error. They reiterated that they had provided all the relevant information they held.
6. On 30 July 2015, Mr Pybus wrote to the Commissioner. Mr Pybus applied to the Commissioner for a decision in terms of section 47(1) of the Freedom of Information (Scotland) Act 2002 (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 Pybus stated he was dissatisfied with the outcome of the Ministers' review because he believed the Ministers should hold further information, specifically the letter to Mr Salmond.

## **Investigation**

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7. The application was accepted as valid. The Commissioner confirmed that Mr Pybus made a request for information to a Scottish public authority and asked the authority to review their response to that request before applying to her for a decision.
8. On 9 September 2015, the Ministers were notified in writing that Mr Pybus had made a valid application 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 detail the searches they had carried out to ascertain whether they held the letter in question.
10. During the investigation the Ministers stated that they had discovered the letter to Fergus Ewing (the document to which a copy of the letter to Mr Salmond was supposed to have been attached) did not in fact contain any attachment, whether a letter to Mr Salmond or anything else. They provided an email chain in support of this position.

## **Commissioner's analysis and findings**

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

### **Application of the EIRs**

12. The Ministers dealt with Mr Pybus's request under the EIRs.
13. The Commissioner is satisfied that any information falling within the scope of the request would be likely to be environmental information, as defined in regulation 2(1) of the EIRs. It would fall within either paragraph (b) of the definition of environmental information contained in regulation 2(1) of the EIRs (as information on factors likely to affect the elements of the environment) or paragraph (c) of that definition (as information on measures affecting or likely to affect those elements and factors). On the basis of these definitions, she is satisfied that the information identified and located by the Ministers in this case is environmental information.

### *Section 39(2) of FOISA*

14. The Ministers confirmed that they wished to rely on the exemption in section 39(2) of FOISA.
15. The exemption in section 39(2) of FOISA provides, in effect, that environmental information as defined by regulation 2(1) of the EIRs is exempt from disclosure under FOISA, thereby allowing any such information to be considered solely in terms of the EIRs. In this case, the Commissioner accepts that the Ministers were entitled to apply this exemption to the information requested by Mr Pybus, given the Commissioner's conclusion that it would all be environmental information.
16. The exemption in section 39(2) 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 Mr Pybus in this case, the Commissioner has also concluded that the public interest in maintaining this exemption, and in dealing with the request in line with the EIRs, outweighs the public interest in disclosure of the information under FOISA.
17. Mr Pybus has not disputed that the information covered by his request would be environmental information, or challenged the Council's application of section 39(2) of FOISA. The Commissioner will consider the information in what follows solely in terms of the EIRs.

### **Was all relevant information identified, located and provided by the Ministers?**

18. Regulation 5(1) of the EIRs requires a Scottish public authority which holds environmental information to make it available when requested to do so by any applicant. This obligation relates to the information held by the authority when it receives the relevant request.
19. The Council submitted that it had disclosed all the relevant information it held.
20. Mr Pybus submitted that the Ministers should have obtained a copy of the letter from Mr Salmond, and provided it in response to his request. He expressed surprise that a copy had not been obtained from CNR when its absence became apparent.
21. The standard of proof to determine whether a Scottish public authority holds information is the civil standard of the balance of probabilities. In determining this, the Commissioner will consider the scope, quality, thoroughness and results of the searches carried out by the public authority. She will also consider, where appropriate, any reason offered by the public authority to explain why the information is not held.

### *The Ministers' explanation for the error in their review response*

22. The Ministers provided confirmation that the letter to Mr Ewing was emailed to his Parliamentary Office by CNR on 25 March 2015 and forwarded on to his Ministerial Private Office the same day. This was the point at which it was received by the Ministers, who then circulated it further internally. At this point, it is clear that the email included no attachment other than the letter from CNR to Mr Ewing.
23. The Ministers went on to explain that it received a further communication from CNR on 23 April 2015. Attached to this was a letter, to an unrelated third party, subsequently returned to CNR as it had been sent in error. Mistakenly, it was identified as relevant to Mr Pybus's request.

### *Searches carried out by the Ministers*

24. The Ministers submitted that it was not considered necessary to conduct wide-ranging searches to see if they held a copy of the letter to Mr Salmond, because the original email

was sent to a specific team within the Scottish Government and one official had dealt with the receipt of the letter and subsequent contact with CNR. The official and her team were asked to search files and inboxes to ascertain whether another copy of the letter had been received separately. No copy of the letter was identified.

25. The Ministers confirmed that they did not hold an electronic or paper copy of the letter to Mr Salmond. They stated that as the letter was originally addressed and sent to Mr Salmond's MSP address, and as it was after he had resigned as First Minister, they would not expect to hold a copy of the letter.
26. As the letter to Mr Salmond was attached for information only, the Ministers stated, officials did not consider it necessary at that time to chase CNR for a copy to be provided.

#### *Seeking information from third parties*

27. The Ministers submitted that they did not agree with Mr Pybus's assertion that they should have asked Mr Salmond for a copy of the letter in order to comply with his information request. They submitted that they were only required to consider information held at the time of a request, not to actively seek information from third parties.

#### *The Commissioner's conclusions*

28. Having considered all the relevant submissions, the Commissioner accepts that the Ministers took adequate and proportionate steps to establish what information they held which fell within the scope of Mr Pybus's request. In reaching this conclusion, the Commissioner has taken into account the fact that nowhere in the EIRs does it state that a public authority must obtain information from other parties when responding to information requests.
29. The Commissioner would emphasise that the EIRs state, at regulation 5(1), that a Scottish public authority that **holds** environmental information shall make it available when requested to do so by any applicant. There is nothing to require an authority to **obtain** information in order to fulfil an information request.
30. In the circumstances of this particular case, the Commissioner is satisfied, on the balance of probabilities, that Mr Pybus has now received all of the information held by the Ministers which falls within the scope of his request, and that the Ministers complied with regulation 5(1) of the EIRs in responding to Mr Pybus's request.
31. The Commissioner would, however, add that the Ministers' handling of Mr Pybus's request caused a lot of unnecessary confusion. This could have been avoided had the Ministers checked their systems more carefully at review stage and confirmed to Mr Pybus at that point that there was in fact nothing (in addition to the letter to Mr Ewing) attached to the email in question.

## **Decision**

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

## **Appeal**

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Should either Mr Pybus 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.

**Margaret Keyse**  
**Head of Enforcement**

**18 December 2015**

### 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.

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**Scottish Information Commissioner**

Kinburn Castle  
Doubledykes Road  
St Andrews, Fife  
KY16 9DS

t 01334 464610

f 01334 464611

[enquiries@itspublicknowledge.info](mailto:enquiries@itspublicknowledge.info)

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