



Scottish Information
Commissioner

**Decision 149/2006 Mr Rob Edwards, Sunday Herald
and the Scottish Executive**

Information on Nirex's plans for nuclear waste disposal

**Applicant: Mr Rob Edwards, Sunday Herald
Authority: The Scottish Executive
Case No: 200502360
Decision Date: 15 August 2006**

**Kevin Dunion
Scottish Information Commissioner**

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Decision 149/2006 Mr Rob Edwards, Sunday Herald and the Scottish Executive

Information on Nirex's plans for nuclear waste disposal – interpretation of information request – Commissioner found that the Executive failed to comply with the requirements of Part 1 of FOISA

Relevant statutory provisions and other sources

Freedom of Information Scotland Act 2002 (FOISA) sections 1(1) (General entitlement)

Facts

Mr Edwards requested information “on Nirex’s plans for nuclear waste disposal” contained in seven specified files held by the Scottish Executive (the Executive). The Executive initially appeared to confirm that relevant information was held, but claimed that this was exempt from release under the Freedom of Information (Scotland) Act 2002 (FOISA). Following a review of this case, the Executive notified Mr Edwards that its initial response had considered information that was not actually that requested. The Executive advised Mr Edwards that on closer examination, it did not actually hold the information requested. Mr Edwards then made an application to the Commissioner in relation to this case. The Commissioner found that the Executive had failed to properly interpret Mr Edwards’ request. He found that in failing to identify and disclose relevant information as required by Part 1 of FOISA, the Executive had failed to comply with the requirements of section 1(1) of FOISA.

Background

1. Mr Edwards, Environment Editor of the Sunday Herald Newspaper, requested the following in an email to the Executive on 18 May 2005:

“copies of the information held by the Executive on Nirex’s plans for nuclear waste disposal [within seven specified files]”.



2. Mr Edwards indicated that he was making his request under FOISA and the Environmental Information (Scotland) Regulations 2004 (EIRs). He also noted that if the files he had specified were voluminous, he would be happy to receive a summary of their contents in the first instance.
3. Nirex is an organisation that was established in 1982 to research, develop and operate radioactive waste facilities on behalf of the nuclear industry. In the 1980s, it was asked by the Government to identify possible sites for use as deep geological repositories for radioactive waste. 500 sites were originally identified, and these were later narrowed down to a short list. A site close to Sellafield was selected by Nirex for the establishment of an underground repository. However, Nirex's proposals were rejected by the Government in 1997 following a planning enquiry, leading to the termination of the programme as a whole.
4. The Executive responded to Mr Edwards' request in a notice dated 16 June 2005. This noted firstly that UK Nirex Ltd had recently published the list of UK sites that had been identified as possible locations for an underground repository for nuclear waste, before the programme to develop such a repository ended in 1997. The Executive noted that it had not held a copy of this list.
5. The Executive stated that some of the information requested by Mr Edwards was held in confidence, having been supplied by a Minister of the Crown or a Department of the UK Government. Under section 3(2)(a)(ii) of FOISA, such information is not technically "held" by a Scottish public authority for the purposes of FOISA. The Executive stated that other information relevant to Mr Edwards requested was exempt from disclosure under the terms of exemptions contained in sections 28, 29 and 30 of FOISA.
6. A table annexed to the Executive's refusal notice provided further information about the information contained in the seven files specified in Mr Edwards' request. This table noted that no requested information was held in two of the files. For another two, the table suggested that relevant information was already in the public domain on Nirex's website. For the final three files, the table suggested that relevant information was "advice to ministers".
7. Mr Edwards then asked the Executive to review its handling of his request in an email dated 20 June 2005. He expressed dissatisfaction with the Executive's response for a number of reasons:
 - a) Mr Edwards asked how it could be that a file named "Nirex repository" contained no information on Nirex's plans for nuclear waste disposal.



- b) Mr Edwards also asked for clarification with regard to information that the Executive had indicated was available on Nirex's website. He noted that he was familiar with the information that had recently been released by Nirex and asked to be reassured that everything within the relevant Executive files had indeed been made available by Nirex.
 - c) In relation to information labelled as "advice to ministers", Mr Edwards observed that this appeared to him to be a blanket description to prevent release of any information within these files. He noted that he found this difficult to accept, especially as the files would seem to deal at least in part with historical matters. He said that he could understand the argument that advice to ministers on current issues is sensitive, but he could not understand why advice on past matters should be so.
8. The Executive notified Mr Edwards of the outcome of its review in a letter dated 15 July 2005. This informed Mr Edwards that the Executive's initial response had not only considered the information requested, but had also taken a broader view of the contents of the relevant files. The Executive informed Mr Edwards that on closer inspection it had concluded that it did not in fact hold the information requested, and that the exemptions cited had in fact applied to information outside the scope of the original request. The Executive advised Mr Edwards that if he wished to see Nirex's plans for nuclear waste disposal, he would need to ask Nirex directly for them.
9. Mr Edwards then made an application for a decision by me as to whether the Executive had complied with the requirements of Part 1 of FOISA in its responses to his information request. The case was received by email on 28 July 2005 and was allocated to an investigating officer. The application was validated by establishing that Mr Edwards had made a request for information to a Scottish public authority and had applied to me for a decision only after asking the authority to review its response to his request.

Investigation

10. The investigating officer formally contacted the Executive on 10 August 2005 in terms of section 49(3)(a) of FOISA, asking it to comment on the application as a whole and seeking certain information in particular. The Executive's response was received on 24 August 2005.
11. On 26 September 2005, the investigating officer visited the Executive to view the seven files (which together comprised of 20 part files) that were specified in Mr Edwards' request. The purpose of this visit was to consider the contents of these files and reach a preliminary view on whether the Executive had been correct to judge that these contained no relevant information.



12. During this visit, the investigating officer identified a range of documents that appeared to her to be relevant to Mr Edwards' request. This review made clear that the interpretation of Mr Edwards' request initially adopted by my Office was broader than the interpretation that appeared to have been adopted by the Executive.
13. The investigating officer had initially assumed that by seeking information *on* Nirex's plans for nuclear waste disposal, Mr Edwards' request had intended to capture information that related to Nirex's plans. Such information might directly set out any such plans, but would also include other information where its subject matter touched upon any such plans, for example by referring to, commenting upon or speculating about any plans, or considering the implications of these. According to this interpretation of the request, information *on* Nirex's plans for nuclear waste disposal is potentially wide ranging.
14. The Executive on the other hand had interpreted Mr Edwards' request for information on Nirex's plans for nuclear waste disposal as simply requesting information that set out those plans. As the Executive did not hold these plans, it held that there was no relevant information contained in the files specified in Mr Edwards' request.
15. Following her visit, the investigating officer emailed the Executive highlighting this discrepancy with respect to the interpretation of Mr Edwards' request, and seeking confirmation of the Executive's interpretation.
16. The investigating officer also contacted Mr Edwards noting that it had become clear that his request for information might be interpreted in different ways. He was asked to confirm which of the two interpretations set out in paragraphs 13 and 14 reflected that intended when first making his request, or to clarify if he had intended his request to be interpreted in some other way.
17. Mr Edwards' response confirmed that he had intended to seek information relating to Nirex's plans, rather than simply those plans. He noted that Nirex itself had recently put detailed information about these plans into the public domain. He added that it was the Executive's comments and views on these plans that he would like to see.
18. The investigating officer then forwarded Mr Edwards' comments on this matter to the Executive on 4 October 2005, noting that it appeared that the Executive might have interpreted Mr Edwards' request inappropriately, and that it seemed to her that information relevant to the request was contained in the seven relevant files. The investigating officer invited the Executive to comment on the issues raised around the interpretation of the request.



19. The Executive's response, dated 11 October 2005, confirmed its interpretation of the request and provided further comments on this. These comments (which I will consider in detail below) made clear that the Executive was not willing to accept a wider interpretation of the request under consideration or to consider the contents of the files in relation to a wider interpretation in the context of the current case.
20. In these circumstances, the subject of my decision must be simply that of whether the Executive acted in accordance with the requirements of Part 1 of FOISA by responding to Mr Edwards' request on the basis of its own interpretation of the request.
21. At this point, the investigating officer advised Mr Edwards of the position reached in the investigation. She advised him in particular that my decision on this case would address only the question of how his request should be interpreted, and whether the Executive should reconsider this in the light of a wider interpretation.

The Commissioner's analysis and findings

22. The question under consideration in this case is a narrow one of interpretation. How should a request for *information on Nirex's plans for nuclear waste disposal* have been interpreted by the Executive?
23. The Executive's initial response to Mr Edwards' request appeared to confirm that information relevant to the request was contained within the specified files, and that this was considered before a refusal notice under the terms of section 16 of FOISA was issued.
24. However, the Executive has claimed in its submissions to my Office that, although this notice appeared to refuse access to the information requested, it actually set out the Executive's position in relation to information that did not fall under the scope of the request.
25. The Executive has therefore claimed that its interpretation of Mr Edwards' request has consistently been that set out in the notice informing him of the outcome of its review. I find this explanation difficult to accept in the light of the Executive's initial response. However, I will not dwell on this point. Whether or not the review outcome is consistent with the Executive's initial response, it is the validity of this review outcome that I am primarily concerned with here.



26. By interpreting Mr Edwards' request as simply seeking information that set out Nirex's plans for nuclear waste disposal, the Executive reached the conclusion that no relevant information was held. I am satisfied that, had a wider interpretation of the request been adopted, a range of information was held by the Executive within the specified files.

General comments on the interpretation of the request

27. Before going on to consider the comments by the Executive and Mr Edwards on this matter, it is worth making some general observations about Mr Edwards' request. This did not simply ask for information revealing Nirex's plans, but requested information "on" these plans. The interpretation of the preposition "on" is therefore integral to any interpretation of the request as a whole.
28. Having consulted the Concise Oxford English Dictionary (OED) entry for the preposition "on", only the following definitions appear to me to be readily applicable in the context of this request:

"about; concerning > having (something) as a basis"

"having (something) as a target, aim or focus"

29. However, the Executive's interpretation of "on" in the context of Mr Edwards' request appears to be something more along the lines of "setting out". No definition within the OED entry for the preposition "on" appears to me to reflect this interpretation. I have also found no definition that would support the Executive's interpretation in Collins or Chambers dictionaries.
30. Having considered dictionary entries for the word "on", it appears to me that an interpretation of Mr Edwards' request as seeking information that relates to Nirex's plans, and not just sets these plans out, is entirely reasonable in the circumstances of this case.
31. It also appears that the interpretation adopted by the Executive is not one based on any accepted definition (in the sense of codification within an established dictionary) of the crucial word "on". I am aware of no alternative statutory definition of the word that would be applicable in this context.

The parties' submissions on the interpretation of the request

32. I would expect that any public authority interpreting a request for information in a way that diverged from the established meaning of the words contained in the request would do so only on the basis on some evidence that the requestor intended such an interpretation.
33. The Executive did not consult Mr Edwards on the intended meaning of his information request in the course of either its initial consideration or its review.



34. When asked by my Office, Mr Edwards indicated that he had intended his request to capture information that related to Nirex's plans; not just information that set out those plans. He pointed out that Nirex had recently put detailed information about its plans into the public domain. He added that he was interested in seeing information that revealed the Executive's comments and views on these plans.
35. In its submissions to my Office, the Executive questioned the validity of a wider interpretation of the request given Mr Edwards' comments. It noted that the release of information by Nirex had not yet happened when Mr Edwards first made his request on 18 May 2005, and so these were not in the public domain or the hands of the Executive at this time.
36. Nirex disclosed a range of information about its plans for nuclear waste disposal on 10 June 2005, more than three weeks after Mr Edwards had made his request to the Executive, but before the Executive provided its response. The Executive's response to Mr Edwards' request, dated 16 June 2005, noted that Nirex had recently released information about these plans.
37. The Executive has stated that it could not see how Mr Edwards could now feel that his original request could have been seen as requiring information on its comments and views on these plans given that he was aware from the original response to his request that the plans were published by Nirex on 10 June. The Executive asked how it could have comments on views directly related to these plans when they had not been seen.
38. The Executive stated that whichever way the request was now being interpreted, either by Mr Edwards or my Office, it considered this was fundamentally different from Mr Edwards' original request.

Conclusions on the interpretation of the request

39. Having scrutinised closely the comments made by the applicant in the course of this investigation, the Executive has claimed that these provide evidence to support its submission that its narrow interpretation of his request was appropriate in this case. The Executive has suggested that Mr Edwards' effectively widened his request when he was consulted by my Office.
40. However, I do not agree with either the Executive's interpretation of the request, or of the circumstances of Mr Edwards' request.



41. For example, the Executive has suggested that because he made his request before details of Nirex's plans were released directly by Nirex, Mr Edwards' request was properly interpreted as seeking only seeking these plans. However, I do not accept that any standard interpretation of the wording of Mr Edwards' request would lead to this conclusion. Furthermore, The Executive's submissions on this point failed to take into consideration the comments made in Mr Edwards' request for review.
42. In this email, Mr Edwards expressed dissatisfaction with the Executive's initial decision to withhold advice to ministers given the historic subject matter of his request. Advice to ministers would clearly be distinct from Nirex's direct plans for nuclear waste disposal, and so this comment makes it clear that, at least when he requested a review of the Executive's handling of his request, Mr Edwards considered that request to be seeking more than just those plans.
43. Had the Executive initially interpreted the request as relating only to those plans, this comment should have prompted some consideration of whether its interpretation of the request was in line with Mr Edwards' intended interpretation. Had there been uncertainty over this point, the Executive could have consulted Mr Edwards to clarify the terms of the request.
44. As no such consultation took place, the outcome of the Executive's review was a conclusion that was supported by neither the wording of the request, nor the applicant's comments on the case.
45. The Executive has also suggested that it could not have commented upon Nirex's plans before these were released, and so questioned how Mr Edwards could have requested comments that did not exist.
46. In making this point, I am again of the view that the Executive has interpreted the terms of the request in a highly restrictive manner that is inappropriate in this case. There was nothing in the wording of Mr Edwards' correspondence either with the Executive or in the course of this investigation that suggested that he was interested only in information that was created in direct response to the actual plans that were released directly by Nirex in June 2005.
47. If *information on Nirex's plans* is interpreted as referring to information *regarding or relating to* these plans, that information might relate to these directly or indirectly. It could make direct reference to these plans or form a part of wider speculation, debate or policy making that might influence or be influenced by these plans. The fact that Nirex's plans for nuclear waste disposal have been a topic of considerable public comment and debate over a number of years makes clear that direct access to these plans is not a pre-requisite for the generation of information or comment that refers or relates to these in some direct or indirect way.



48. I think it quite reasonable that an interested person would expect that such information or comment would have been made by branches of government whose work might be affected by or impinge on these plans, regardless of whether the actual plans were directly held by those authorities.
49. In the light of the above observations, I have concluded that in responding to Mr Edwards' this request, the Executive should have considered the contents of the specified files to identify information that made reference to Nirex's plans for nuclear waste disposal.
50. I do not find the approach taken by the Executive in this case to be either helpful, or within the spirit of FOISA. It seems to me that the Executive chose to read Mr Edwards' request in the narrowest possible terms. To interpret the request in this way given the general meaning of the words of the request and the applicant's comments strikes me as unreasonable and even perverse.
51. The Executive failed to comply with section 1(1) of FOISA by failing to interpret Mr Edwards' request appropriately, and identify and disclose relevant information in line with the requirements of Part 1 of FOISA.
52. In the intervening period since his application for a decision by me on this matter, Mr Edwards has made a series of further requests for information that together seek all information contained within the files that were named in the request under consideration. By responding to these further requests (which are now the subject of an ongoing investigation by my Office) the Executive has now considered all information that would have been identified had it interpreted Mr Edwards' initial request more widely as set out above.
53. As these further requests have superseded the request under consideration in this case, I do not require the Executive to now consider Mr Edwards' current request again in the context of a more appropriate interpretation. Therefore, I do not require any remedial steps to be taken in response to this decision.

Decision

I have found that the Scottish Executive (the Executive) failed to comply with the requirements of Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in its response to Mr Edwards' request for information on Nirex's plans for nuclear waste disposal.



In particular, I find that the Executive failed to comply with section 1(1) of FOISA by failing to interpret Mr Edwards' request appropriately, and identify and disclose relevant information (or advance relevant exemptions in respect of that information) in line with the requirements of Part 1 of FOISA.

For the reasons set out in paragraphs 52 and 53 above, I do not require any remedial steps to be taken in response to this decision.

Appeal

Should either the Executive or Mr Edwards wish to appeal against my 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 of receipt of this notice.

Kevin Dunion
Scottish Information Commissioner
15 August 2006



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.