

Decision Notice

Decision 034/2017 Mr Rob Edwards and the Scottish Ministers

Status of beavers in Scotland

Reference No: 201601559

Decision Date: 14 March 2017



Scottish Information
Commissioner

Summary

The Scottish Ministers were asked for unpublished information on the status of beavers in Scotland. The Ministers responded late (apologising for the lateness), disclosing some information and withholding other information under various EIRs exceptions. A review of this was requested. The Ministers' review response informed the requester that the request was manifestly unreasonable.

The Commissioner accepts that the request was manifestly unreasonable. However, she is critical of the Ministers' handling of the request and review, and finds that the Ministers failed to provide reasonable advice and assistance to the requester. Her decision comments on the Ministers' poor handling.

Relevant statutory provisions

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (Interpretation) (definitions (a) and (c) of "environmental information"); 4 (Active dissemination of environmental information); 5(1) and (2) (Duty to make available environmental information on request); 7 (Extension of time); 9(1) and (2) (Duty to provide advice and assistance); 10(1), (2) and (4)(b) (Exceptions from duty to make environmental information available); 16 (Review by Scottish public authority)

The full text of each of the statutory provisions cited above is reproduced in Appendix 1 to this decision. The Appendix forms part of this decision.

Background

1. On 23 February 2016, Rob Edwards made a request for information to the Scottish Ministers (the Ministers). The request was as follows:
"Please could the Scottish Government supply copies of any unpublished correspondence, memos, reports or other information involving ministers or senior officials and relating to the status of beavers in Scotland since Scottish Natural Heritage submitted its report on beavers in June 2015."
2. Mr Edwards stated that, if the information was voluminous or otherwise difficult to extract, he would be happy to discuss ways of reducing the cost.
3. The Ministers responded on 22 July 2016, apologising for the late response. They disclosed some information (33 documents, in redacted form), but also withheld information under a number of different exceptions in the EIRs.
4. The Ministers did not comment on whether the request was voluminous, etc. or discuss ways of reducing the cost.
5. On 28 July 2016, Mr Edwards wrote to the Ministers requesting a review of their decision. He believed the information which had been withheld should be disclosed in the public interest, given the "intense public debate" about the plight and fate of the Tayside and Argyll beavers.

6. The Ministers notified Mr Edwards of the outcome of their review on 25 August 2016. The Ministers told Mr Edwards that his request was very broad in scope and captured more information than they had originally thought. They now considered his request to be manifestly unreasonable in terms of regulation 10(4)(b) of the EIRs, as it would take a “disproportionate amount of time” to process the request. The Ministers considered the public interest in making the information available to be outweighed by the public interest in maintaining the exception in regulation 10(4)(b). They suggested Mr Edwards reduce the scope of his request to make it more manageable, for example by reducing the timeframe of his request or asking specific questions.
7. On 25 August 2016, Mr Edwards wrote to the Commissioner. Mr Edwards 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 Edwards stated he was dissatisfied with the outcome of the Ministers’ review because:
 - (i) their initial response did not suggest that volume or cost was an issue;
 - (ii) the suggestion that he narrow his request was only made after the review stage (six months after he made his request); and
 - (iii) the public interest was in favour of making the information available, given the public interest in the fate of the Tayside and Argyll beavers and the Ministers’ “prolonged delay” in taking decisions about them.

Investigation

8. The application was accepted as valid. The Commissioner confirmed that Mr Edwards made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to her for a decision.
9. On 31 August 2016, the Ministers were notified in writing that Mr Edwards had made a valid application. The case was allocated to an investigating officer.
10. 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 to answer specific questions.
11. The Ministers responded on 3 October 2016.

Commissioner’s analysis and findings

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

Application of the EIRs

13. It is evident from the Ministers’ correspondence with both Mr Edwards and the Commissioner that any information sought by Mr Edwards would be environmental information, as defined in regulation 2(1) of the EIRs (paragraph (a) of the definition, information relating to the state

of the elements of the environment, or paragraph (c) of that definition, information on measures affecting or likely to affect those elements). Mr Edwards has not disputed this and the Commissioner will consider the Ministers' handling of the request solely in terms of the EIRs.

Regulation 5(1) (Duty to make environmental information available)

14. 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.
15. On receipt of a request for environmental information, the authority must ascertain what information it holds falling within the scope of the request. Having done so, regulation 5(1) requires the authority to provide that information to the requester, unless a qualification in regulations 6 to 12 applies (regulation 5(2)(b)).
16. The public authority must comply with a request as soon as possible and in any event no later than 20 working days after the date of receipt of the request (regulation 5(2)(a)).
17. The EIRs allow public authorities to extend this 20 working day period by a further 20 working days if the volume and complexity of the information requested makes it impracticable for the authority to either comply with the request within the earlier period or to make a decision to refuse to do so (regulation 7(1)).
18. Where an authority wishes to extend the period for complying with a request, it must notify the applicant, explain why they are extending the period for complying and give the applicant an opportunity to seek a review of the decision to extend the period for complying (regulations 7(2) and (3)).
19. As can be seen from the background to this case, the Ministers did not respond to Mr Edwards within the 20 working days required by the EIRs. In fact, a response was not issued until almost five months after Mr Edwards made his request.
20. It is also clear that, at that stage, the Ministers did not consider the request to be voluminous and complex in terms of regulation 7(1) and so failed to notify Mr Edwards that they wished to extend the period for complying. This meant that Mr Edwards was not given an opportunity to seek a review of the extension.

Regulation 10(4)(b) (Manifestly unreasonable)

21. A Scottish public authority may refuse to make environmental information available if the request is manifestly unreasonable (regulation 10(4)(b)) and, in all the circumstances of the case, the public interest in making the information available is outweighed by that in maintaining the exception (regulation 10(1)(b)).
22. The public authority must apply a presumption in favour of disclosure (regulation 10(2)(b)) and interpret the exception restrictively (regulation 10(2)(a)).

Were the Ministers entitled to decide at review that the request was manifestly unreasonable?

23. Mr Edwards asked the Commissioner to determine whether the Ministers were allowed to apply the exception in regulation 10(4)(b) six months after he made his request. He could not understand why, if his request was manifestly unreasonable, the Ministers had made no attempt to engage with him on reducing either the costs or the scope of his request.

24. Regulation 16 of the EIRs states that, when it receives representations from an applicant (i.e. Mr Edwards' correspondence of 28 July 2016), an authority must consider the representations and review the matter to decide whether it has complied with the EIRs.
25. Section 21 of FOISA, which is the equivalent of regulation 16, is more prescriptive about the steps a public authority can take at review stage. Section 21(4) makes it clear that there are three options open to an authority at this stage. These are to:
 - (i) confirm a decision;
 - (ii) substitute a decision; or
 - (iii) reach a decision where no decision has been reached.
26. Although regulation 16 of the EIRs does not set out the options open to a public authority in the same way as section 21(4) of FOISA does, the Commissioner considers that regulation 16 is sufficiently wide to allow the Ministers to substitute their original decision for a new one, and to apply regulation 10(4)(b) to the request, albeit after such a long period of time.
27. The Commissioner will now consider whether the Ministers were correct to refuse to comply with Mr Edwards' request on the basis that it was manifestly unreasonable.

The Ministers' submissions: manifestly unreasonable

28. The Ministers considered that the time and cost involved in complying with the request meant that any reasonable person would regard them as excessive and that extending the response time by an additional 20 working days under regulation 7 of the EIRs would not have been sufficient to make the request manageable.
29. The Ministers also commented on the volume of work involved and the consequent diversion of staff away from other core work.
30. Searches carried out by the Ministers identified the following as falling within the scope of Mr Edwards' request:
 - EDRM – 183 documents with the word “beaver” in the title and within the timescale specified by Mr Edwards
 - Email system – approximately 300 emails (for three members of staff)
 - MACCS system – 40 cases identified using the keyword “beaver”
 - Four electronic files (“mammals” or “general species” in their titles) containing respectively 147, 92, 57 and 2 documents. The Ministers clarified that they could not identify all of the relevant information in these files, so a manual search would be required.
 - Paper files in branch – approx. 40-50 documents
31. The Ministers estimated it would take up to 64 hours to comply with the request, excluding time to review information and to decide what information to redact. They commented that the future of beavers in Scotland is “a complex and sensitive issue” about which they had not (at that time) reached a settled view. (The decision to reintroduce beavers was taken on 24 November 2016.) This meant that time would be spent considering what information should be redacted and applying those redactions.

The Commissioner's conclusions: manifestly unreasonable

32. As the Commissioner's guidance on regulation 10(4)(b)¹ recognises, the exception is concerned with the effect of a request on an authority and its staff. There is no single or formula or definitive set of criteria that support a formulaic approach to determining whether a request is manifestly unreasonable. Each request must be considered on the merits of the case, supported by evidence, clear evaluation and reasoning.
33. However, in determining whether a request is manifestly unreasonable, the Commissioner will generally consider the following factors, i.e. whether the request:
- (i) would impose a significant burden on the authority.
 - (ii) does not have a serious purpose or value.
 - (iii) is designed to cause disruption or annoyance to the public authority.
 - (iv) has the effect of harassing the public authority.
 - (v) would otherwise, in the opinion of a reasonable person, be considered to be manifestly unreasonable or disproportionate.
34. It should be noted that this is not an exhaustive list; other factors may be relevant.
35. The Ministers argue that complying with the request would impose a significant burden on them as complying with the request would take up to 64 hours.
36. On balance, the Commissioner accepts the Ministers' arguments that the volume of information covered by Mr Edwards' request and the manner in which it is held is such that responding to the request would impose a significant burden on them.
37. It is evident to the Commissioner that a significant contributory factor to the request being deemed manifestly unreasonable is the way Ministers' records were managed. Much of the information which was the subject of Mr Edwards' request is held in disparate filing systems with generic and often unhelpful indexing, making responding to the request more complex and time consuming. This point is addressed in more detail below.

Public interest test

38. Regulation 10(4)(b) is subject to the public interest test set out in regulation 10(1)(b). This means that information can be withheld under the exception only where, in all the circumstances, the public interest in making the information available is outweighed by that in maintaining the exception.

Mr Edwards' submissions

39. Mr Edwards submitted that there was intense public interest in the plight and fate of the Tayside and Argyll beavers.

¹ <http://www.itspublicknowledge.info/nmsruntime/saveasdialog.aspx?IID=10064&sID=10272>

The Ministers' submissions

40. The Ministers recognised the extensive interest in the status of beavers, e.g. on social media and in the press, but did not believe that the fact that the public are interested in information on this subject is the same as there being a public interest in disclosure.
41. The Ministers recognised there is a public interest in disclosing information about Scottish Government policy as part of an open and transparent government and to inform public debate. However, they concluded that, at the time of the review, there was a greater public interest in avoiding excess costs and disproportionate burden of the work which would be required to comply with Mr Edwards' request.
42. According to the Ministers, the request captured a large and complex amount of information. The Wildlife Management Team, a team of six people, would have had to comply with the request and the team was already busy developing the Scottish Government's policy on beavers and supporting Ministers to reach a decision. To comply with the request, it would have been necessary to divert staff away from this work, leading to a delay in the final decision on beavers (and, indeed, a delay in other high profile work being carried out). This would not have been in the public interest.

The Commissioner's view

43. The Commissioner has weighed up the public interest arguments both for and against disclosure in this case, as required to do by regulation 10(1)(b) of the EIRs. She considers that Mr Edwards identified a strong public interest in disclosure of the information in informing debate on a matter which is deeply important to the environment. Disclosure would enable and inform scrutiny of the status of beavers by both sides of the debate.
44. She agrees with the Ministers that the fact that the public are interested in a matter does not automatically mean that there is a public interest in making information about that matter available. However, she cannot agree that there is no public interest in disclosure of information about the status of beavers. This is underlined by the extensive media interest in the subject, not only within Scotland.
45. That said, she must take into account the effect on the Ministers of responding to this information request. It is clear that responding to the request would be very time consuming, particularly given the way the information was held and the sensitivity of the information at the relevant time. Mr Edwards may have been trying to assist the Ministers by only asking for unpublished information, but in practice this will have increased the time to comply with the request, given that a check would have to be carried out on what had or had not already been published.
46. It is also clear that complying with the request would have diverted staff away from work, including the very work, i.e. a decision on the re-introduction of beavers, which Mr Edwards was concerned had not been made by the Ministers.
47. In all the circumstances, the Commissioner is satisfied that the public interest in making the information available is outweighed by that in maintaining the exception. The Commissioner therefore accepts that the Ministers were correct to not to make the information available under regulation 10(4)(b) of the EIRs.

Regulation 9 (Duty to provide advice and assistance)

48. Regulation 9 of the EIRs requires a Scottish public authority to provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to applicants and prospective applicants.
49. Mr Edwards' initial request made it clear that he would be happy to discuss ways of reducing the cost if the information was voluminous or otherwise difficult to extract.
50. During the investigation, the Ministers commented that Mr Edwards "could have been more specific" about what he was trying to find out, rather than asking for, in effect, "all information about the status of beavers over a period of around 10 months." This effectively ignores the offer originally made by Mr Edwards on 23 February 2016 and it is difficult to understand why the Ministers did not engage with Mr Edwards to address this issue. This is something the Commissioner would have expected as basic customer service, irrespective of training (or otherwise) in the EIRs.
51. The limited advice given to Mr Edwards six months later was far too late to be useful and it is not surprising that Mr Edwards was not inclined to follow it.
52. The Commissioner accepts that there is an onus on applicants to state clearly what they are asking for. This must be balanced against the fact that, however experienced an applicant is, they cannot know the extent of information held by an authority or how and where it is held. This is especially relevant in this case given the apparently disparate way in which the Ministers' records were kept. The EIRs recognises that requesters may need help when asking for information, hence the duty to advise and assist under regulation 9.
53. In this case, there were missed opportunities to alert Mr Edwards to the way in which information was held and how best it could be searched, as well as providing advice on how to focus the request on more specific information or on information of most interest to Mr Edwards.
54. It is clear that the Ministers recognised this point, commenting that they "should have realised the scale of the work which would have been needed to comply with the request at a much earlier stage and then discussed the request with Mr Edwards to try to make it more manageable."
55. The Commissioner finds that the Ministers failed comply with regulation 9(1) by failing to provide reasonable advice and assistance to Mr Edwards. The Commissioner now requires the Ministers to provide advice and assistance to Mr Edwards in order to allow him to make a narrower information request, should he wish to do so.

The Ministers' handling of the request

56. It is clear that Mr Edwards' request was so poorly handled by the Ministers that, by the time they realised the extent of information they potentially held, they were too late to extend the timeframe for responding under the EIRs or have a meaningful discussion with Mr Edwards about his request. The handling fell considerably short of what the Commissioner expects of effective public authorities.
57. The Ministers explained that "The team dealing with the request had had little previous experience of dealing with information requests and received this request at a time when they were very busy." The Ministers also commented that the team "... did not fully appreciate their obligations under the EIRs or the options available to them (such as

discussing the request with the applicant or extending the deadline where the information is complex and voluminous)." These comments are surprising, given that the EIRs have been in force since 2005.

58. The Ministers stated that an extension of time under regulation 7 of the EIRs would "not be sufficient". This gives cause for serious concern about the Ministers' approach:
- A simple email or telephone call to Mr Edwards was all that was required to manage the request in a cost effective way. This would not have been burdensome given Mr Edwards' very reasonable offer to engage with the Ministers.
 - Regulation 4 of the EIRs requires public authorities to take reasonable steps to organise and keep up to date the environmental information they hold, relevant to their functions, with a view to the active and systematic dissemination of that information to the public. If the Ministers are complying with regulation 4, particularly given the interest in the subject matter of this request, 20, if not 40, working days is entirely sufficient to respond to such a request.
 - If staff are unable to process information requests effectively and efficiently within 40 working days, it is clear that there is an issue with the manner in which the requests are being handled.
59. The Ministers commented on the lack of experience, etc. of the team responding to the request. Although the team itself may have had a lack of experience, it is important to note that the obligations under the EIRs lie with the authority, i.e. with the Ministers as a whole, not simply with one team. It is clear that sufficiently robust arrangements had not been made to ensure that the skills and resources were in place to enable the Ministers to meet their statutory duties under the EIRs. The onus is on the authority to ensure that its officers are sufficiently knowledgeable and competent, and that it is capable of meeting its statutory duties. Had this been the case here, the Ministers, by their own admission, would have taken a different approach to addressing Mr Edwards' request.

The Section 61 Code of Practice

60. The Commissioner notes that many of the issues arising in this case stem from records management and the time which it would take the Ministers to make the information available. For example, some of the file structures used by the Ministers made it difficult for the Ministers to identify what information they held.
61. The Scottish Ministers' own Code of Practice on Records Management by Scottish Public Authorities under the Freedom of Information (Scotland) Act 2002 ("the Section 61 Code"), states that:
- "...records systems should be designed to meet the authority's operational needs and using them should be an integral part of business operations and processes".
62. Responding to requests under FOISA or the EIRs is a statutory function and so the Ministers' records systems should be designed to help them respond to such information requests.
63. The Commissioner would encourage the Ministers to reflect on this and on whether changes need to be made to their record keeping practices.

Decision

The Commissioner finds that Mr Edwards' information request was manifestly unreasonable and that the exception under regulation 10(4)(b) of the EIRs is engaged.

However, the Commissioner also finds that the Ministers failed to comply with regulation 9(1) of the EIRs when responding to Mr Edwards' request.

The Commissioner requires the Ministers to provide reasonable advice and assistance to Mr Edwards to allow him, should he wish to do so, to make a narrower request. The advice and assistance must be provided to Mr Edwards by **28 April 2017**.

Appeal

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

Enforcement

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

Rosemary Agnew
Scottish Information Commissioner

14 March 2017

Appendix 1: Relevant statutory provisions

The Environmental Information (Scotland) Regulations 2004

2 Interpretation

(1) In these Regulations –

...

"environmental information" has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on

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(a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;

...

(c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in paragraphs (a) and (b) as well as measures or activities designed to protect those elements;

...

4 Active dissemination of environmental information

(1) A Scottish public authority shall take reasonable steps to organise and keep up to date the environmental information, relevant to its functions, which it holds and at least the types of information listed in paragraph (2), with a view to the active and systematic dissemination of that information to the public and shall make that information progressively available to the public by electronic means unless it was collected before 14th February 2003 and is not available in electronic form.

(2) The types of information referred to in paragraph (1) are-

(a) texts of international treaties, conventions or agreements, and of Community, national, regional or local legislation, on the environment or relating to it;

(b) policies, plans and programmes relating to the environment;

(c) progress reports on the implementation of the items referred to in sub paragraphs (a) and (b) when prepared or held by a Scottish public authority in electronic form;

(d) reports on the state of the environment;

(e) data or summaries of data derived from the monitoring of activities that affect or are likely to affect the environment;

(f) authorisations with a significant impact on the environment and environmental agreements or a reference to the place where such information can be requested or found;

- (g) environmental impact studies and risk assessments concerning those elements of the environment referred to in paragraph (a) of the definition of "environmental information" in regulation 2(1); and
- (h) facts and analyses of facts which the authority considers relevant and important in framing major environmental policy proposals.

5 Duty to make available environmental information on request

- (1) Subject to paragraph (2), a Scottish public authority that holds environmental information shall make it available when requested to do so by any applicant.
- (2) The duty under paragraph (1)-
 - (a) shall be complied with as soon as possible and in any event no later than 20 working days after the date of receipt of the request; and
 - (b) is subject to regulations 6 to 12.

...

7 Extension of time

- (1) The period of 20 working days referred to in-
 - (a) regulation 5(2)(a);
 - (b) regulation 6(2)(a); and
 - (c) regulation 13(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.
- (2) Where paragraph (1) applies the Scottish public authority shall notify the applicant accordingly as soon as possible and in any event no later than 20 working days after the date of receipt of the request for the information.
- (3) Notification under paragraph (2) shall-
 - (a) be in writing;
 - (b) give the authority's reasons for considering the information to be voluminous and complex; and
 - (c) inform the applicant of the review provisions under regulation 16 and of the enforcement and appeal provisions available in accordance with regulation 17.

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;

...

16 Review by Scottish public authority

- (1) Subject to paragraph (2), an applicant may make representations to a Scottish public authority if it appears to the applicant that the authority has not complied with any requirement of these Regulations in relation to the applicant's request.
- (2) Representations under paragraph (1) shall be made in writing to the Scottish public authority no later than 40 working days after either the date that the applicant receives any decision or notification which the applicant believes does not comply with these Regulations or the date by which such a decision or notification should have been made, or any other action should have been taken, by the authority but was not made or taken.
- (3) The Scottish public authority shall on receipt of such representations-
 - (a) consider them and any supporting evidence produced by the applicant; and
 - (b) review the matter and decide whether it has complied with these Regulations.
- (4) The Scottish public authority shall as soon as possible and no later than 20 working days after the date of receipt of the representations notify the applicant of its decision.
- (5) Where the Scottish public authority decides that it has not complied with its duty under these Regulations, it shall immediately take steps to remedy the breach of duty.

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