

Decision Notice



Decision 121/2013 Mr Severin Carrell and the Scottish Ministers

Torness and Hunterson power stations

Reference No: 201201739

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www.itspublicknowledge.info

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Summary

On 26 September 2011, Mr Carrell asked the Scottish Ministers (the Ministers) for certain information relating to the Scottish Government's policy on civil nuclear power, and in particular to Hunterston and Torness power stations. After a notable delay, the Ministers responded, providing Mr Carrell with a variety of information falling within the scope of his requests.

Following an investigation, the Commissioner found that the Ministers failed to give complete responses to all of Mr Carrell's requests and in some instances failed to give adequate notice that information was not held.

The Commissioner required the Ministers to respond fully and appropriately to all of Mr Carrell's requests.

Relevant statutory provisions

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

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (definitions (b) and (c) of "environmental information") (Interpretation); 5(1) and (2) (Duty to make available environmental information on request); 7(1) (Extension of time); 9(1) (Duty to provide advice and assistance); 10(1), (2) and (4) (a) (Exceptions from duty to make environmental information available); 13 (Refusal to make information available)

The full text of each of the statutory provisions cited above is reproduced in the Appendix to this decision. Both Appendices form part of this decision.

Background

1. On 26 September 2011, Mr Carrell wrote to the Ministers requesting certain information relating to nuclear power and covering the period from 3 May 2007, with particular reference to the operational lives of Hunterston and Torness power stations. Full details of Mr Carrell's request are contained in Appendix 2 to this decision.



2. On 7 October 2011, the Ministers suggested that Mr Carrell might wish to narrow the scope of his request, given the amount of information involved.
3. On 12 October 2011, Mr Carrell confirmed that he was willing to reduce the period covered by his request, to start at 1 September 2008.
4. On 14 October 2011, the Ministers notified Mr Carrell that, due to the complexity and volume of the information falling within the scope of his request, they were (in line with regulation 7 of the EIRs) extending the timeframe for responding to his request by 20 working days.
5. On 20 December 2011, Mr Carrell wrote to the Ministers, requesting a review on the basis that they had failed to respond to his request.
6. The Ministers did not respond to Mr Carrell's requirement for review.
7. On 26 June 2012, Mr Carrell applied to the Commissioner for a decision in terms of section 47(1) of FOISA on the basis that the Ministers had failed to respond.
8. On 6 September 2012, following a decision issued by the Commissioner¹, the Ministers responded to Mr Carrell's requirement for review. The Ministers informed Mr Carrell that they were dealing with his request in terms of the EIRs and applied the exemption in section 39(2) of FOISA. They provided him information they considered to fall within the scope of his request, stating that that they held no further relevant information.
9. On 7 September 2012, Mr Carrell wrote to the Commissioner, stating that he was dissatisfied with the Ministers' response to his requirement for review and making a new application 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.
10. The application was validated by establishing that Mr Carrell made a request for information to a Scottish public authority and 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

11. The investigating officer contacted the Ministers on 15 October 2012, 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. They were asked to explain the steps they had taken to identify and locate any relevant information they held, and to respond to specific points raised by Mr Carrell.

¹ <http://www.itspublicknowledge.info/applicationsanddecisions/Decisions/2012/201201241.aspx>



12. During the investigation, Mr Carrell made further submissions, stating that he had been provided with evidence to suggest that the Ministers held further information which fell within the scope of his requests. Further comments were sought from the Ministers.
13. The relevant submissions received from both the Ministers and Mr Carrell will be considered fully in the Commissioner's analysis and findings below.

Commissioner's analysis and findings

Handling under the EIRs

14. The Ministers dealt with Mr Carrell's request under the EIRs. "Environmental information" is defined in regulation 2(1) of the EIRs (the relevant parts of the definition are reproduced in the Appendix to this decision). Where information falls within the scope of this definition, a person has a right to access it under the EIRs, subject to various restrictions and exceptions contained in those regulations.
15. Having regard to the subject matter of Mr Carrell's request (the extension of the operating lives of Torness and Hunterston power stations and Scotland's policies towards civil nuclear power generation), and taking account of the information provided to Mr Carrell, the Commissioner is satisfied that it concerns measures and activities affecting, or likely to affect, the state of the elements of the environment (potentially, any of those specified in paragraph (a) of the definition). It also concerns factors (in particular, energy and radiation) which could in turn affect, or be likely to affect, the elements of the environment. The Commissioner is therefore satisfied that the information falls within the definitions of "environmental information" in paragraphs (b) and (c) in regulation 2(1) of the EIRs.

Section 39(2) of FOISA – environmental information

16. The exemption in section 39(2) of FOISA provides 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. This exemption is subject to the public interest test in section 2(1)(b) of FOISA. In this case, the Commissioner finds that the Ministers were entitled to apply the exemption in section 39(2) of FOISA to the information, given her conclusion that it is properly considered to be environmental information.
17. As there is a separate statutory right of access to environmental information available to Mr Carrell in this case, the Commissioner also 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 disclosing the information under FOISA. The Commissioner has therefore considered this case in what follows solely in terms of the EIRs.



18. Within his application to the Commissioner, Mr Carrell raised the concern that he had not been provided with all the information held by the Ministers and falling within the scope of his request. With this in mind, the Ministers were asked to provide the investigating officer with details of the searches undertaken to locate information falling within the scope of Mr Carrell's request. The Ministers were also asked to address those parts of Mr Carrell's request he did not consider had been responded to.

Background to request

19. The Ministers provided some context and background information to the subject matter of Mr Carrell's request, in an attempt to explain the extent of the information provided.
20. The Ministers explained that the operational life of a nuclear power station was determined primarily by its safe design life. Power stations could stay in operation longer than their design life, provided they could demonstrate a robust safety case to the UK Health and Safety Executive and the Office for Nuclear Regulation. In relation to nuclear power stations located in Scotland, the Scottish Environmental Protection Agency would be consulted by the UK wide regulatory bodies as part of this process: they also confirmed that their own policy was not to oppose operating life extension applications where the relevant safety case was made. If this safety case was made and accepted by the UK regulatory bodies, an extension to the operational life of the station would be given and the plant could continue to operate.
21. The Ministers emphasised that they did not have a role in the decision to grant life extensions to nuclear power plants in Scotland. They distinguished this from their role in relation to new nuclear power stations, stating that their policy was to oppose such proposals (which required their consent under section 36 of the Electricity Act 1989).

Searches and nil responses

22. When questioned, the Ministers provided details of how they had interpreted Mr Carrell's requests, with details of the searches they had undertaken and evidence of these searches.
23. Searches were conducted of the Ministers' electronic Records and Document Management system (eRDM) and in specific parts of internal departmental systems across the Scottish Government, including the Energy Directorate and Ministerial private offices. Nuclear radioactive waste policy officials and a range of policy officials with an interest in nuclear power were also asked to conduct searches of email records. The search process, the Ministers advised, was coordinated by the Energy Directorate.
24. The Ministers interpreted Mr Carrell's requests as being focussed on nuclear power, life extensions of nuclear power stations and interaction between the Scottish Government and EDF Energy concerning nuclear power. The data search therefore focussed on using the following key words, spanning the years in question:
- Hunterston Nuclear
 - Hunterston
 - Torness Nuclear



- Torness
 - Nuclear extensions
 - Nuclear
 - EDF
 - Torness Extension
 - Hunterston Extension.
25. The Ministers stated that all information located and found to be within the scope of Mr Carrell's request was released. No information considered to be within the scope or relevant to Mr Carrell's request was withheld.
26. Where no information was provided to Mr Carrell in response to his request, the Ministers considered this to be because no further information had been identified which fell within the scope of the request. Given the limited information ultimately released to Mr Carrell, the Ministers acknowledged that a short narrative should have been provided to him to more fully explain how his request was interpreted and the limitations of the information provided.

Point 6

27. Mr Carrell was concerned that he had not been provided with any information falling within the scope of point 6 in his request, dealing with the Ministers' Council of Economic Advisers' (CEA) views on nuclear power. He believed there was ample evidence that this had been a topic of discussion by CEA, noting references in CEA's annual reports and providing a number of links to "broader issues of low carbon energy sources and alternatives to fossil fuels discussed by the CEA".
28. The Ministers advised that they had interpreted point 6 to refer to interaction between Ministers and officials within CEA on nuclear power. They stated that searches were made using the key words "nuclear power" and "Scottish Council of Economic Advisors" and no information was identified from those searches: consequently, no information was provided. The Ministers also stated that the minutes of CEA meeting and its reports were already publicly available.²
29. The Ministers also pointed out that point 6 referred to nuclear power. It did not specify or mention low carbon energy sources or alternatives to fossil fuels, so they carried out no searches on these subjects as part of the response to point 6.
30. Again, the Ministers accepted that a narrative explanation of why no information was provided in answer to this point would have been helpful in the first instance.
31. The Commissioner has considered the terms of Mr Carrell's point 6 and accepts that it specifically requests correspondence concerning CEA's advice to the Scottish Government on the issue of nuclear power, as opposed to alternative fuel sources.

² <http://www.scotland.gov.uk/Topics/Economy/Council-Economic-Advisers/Meetings>



Conclusions relating to point 6 and nil responses

32. The Commissioner accepts that the searches carried out by the Ministers were reasonable and proportionate in the circumstances, and therefore that the Ministers held no information covered by point 6 or any of the other points in Mr Carrell's request to which there was no response. However, in failing to respond to these points, the Ministers were (in effect) refusing to make the requested information available. They did not do so in accordance with regulation 13 of the EIRs, and the Commissioner also considers (as the Ministers have acknowledged) that they should have provided some explanation of the lack of any information covered by these points, in line with regulation 9(1) of the EIRs (Duty to provide advice and assistance). The Commissioner therefore requires the Ministers to provide Mr Carrell with adequate notice that information was not held, with further explanation as to why no information was available.

Partial responses

33. Mr Carrell also raised concerns that certain of his requests had not been answered in full. For example, he had been made aware that certain visits to these power stations had taken place, but he was not given full details of these visits (in accordance with point 8).
34. In response to this point, the Ministers accepted that there had been a lack of narrative provided to Mr Carrell in response to this request. In their submissions to the Commissioner, they provided the dates of the visits, the locations, who attended and the purpose of those meetings.
35. Mr Carrell also highlighted that he had not, despite asking (request 5) been provided with notes, minutes or memoranda of these meetings.
36. In response to this point, the Ministers explained that, with regard to the first two visits, the records of the meetings were publicly available and (with reasons) that with regard to the third meeting, no notes or minutes were taken. The Commissioner would note that, although records of these meetings might be publicly available, Mr Carrell would have been unable to determine this unless he had been given further details of the meetings.
37. Mr Carrell also raised concerns that he had been provided with an incomplete set of correspondence between the First Minister and the chief executive of EDF. Mr Carrell argued that, as a result of a document which had been disclosed to him, there had clearly been a series of discussions between the Scottish Government and EDF, which appeared likely to include nuclear power (points 4 and 5).
38. In response to this concern, the Ministers accepted that the correspondence provided was incomplete, explaining that the email referred to relates to a press release concerning Centrica's investment in EDF's nuclear business in the UK. The Ministers stated that the press release is in the public domain, but the covering email, which is not in the public domain, was considered by the Ministers to fall outwith the scope of Mr Carrell's requests. A copy of this email and press release was copied to the Commissioner for information: the Commissioner has considered it and accepts that it does not fall within the scope of Mr Carrell's request.



Conclusions – partial responses

39. Given the submissions outlined above, the Ministers accepted that their response to Mr Carrell was incomplete, specifically in relation to visits to the power stations by the Scottish Government. In these respects, while acknowledging that the Ministers' searches for information were adequate as described above, the Commissioner concludes that the Ministers failed to comply with regulation 5(1) of the EIRs in responding to points 5 and 8 of the request. The Commissioner therefore requires the Ministers to provide an appropriate response to Mr Carrell, in line with regulation 5(1), providing the information held and identified as falling within the scope of the requests where no exception applies. If applying any exception, they must do so in accordance with regulation 13, while they must comply with regulation 6 in relation to any information they consider to be publicly available. Where appropriate, they should also provide such further explanation as is required to comply with regulation 9(1).

Point 9

40. Mr Carrell did not accept that the Ministers held no correspondence, meetings, or phone contacts between the Scottish Government and officials in the UK Government, on the subject of nuclear power. During the investigation, Mr Carrell submitted further arguments, highlighting that he was aware that information potentially falling within the scope of this request had been provided to another party as a result of an information request. He also suggested that some of the information provided suggested that there had been contact between the Governments on the subject matter of his request. Mr Carrell made specific reference to a document which suggested that the Energy Minister sent a letter to the then UK Energy Secretary in connection with the future of Torness and Hunterston power stations.
41. Initially, the Ministers stated in response to this concern that searches were conducted using the same search terms and parameters as set out above in paragraph 24, but that no information relevant to this request was identified. On receipt of the further arguments presented by Mr Carrell, the investigating officer sought further submissions from the Ministers on this point.
42. The Ministers explained that point 9 of Mr Carrell's request referred only to "correspondence ... to, from and/or between the Scottish Government and the UK Government", whereas the other request referred to by Mr Carrell referred to "all documentation" on the same topic. It believed this to be the reason for any difference in the information provided. The Ministers also explained that the other information referred to by Mr Carrell either did not relate specifically to the future operational life of either power station, or was internal Scottish Government correspondence rather than correspondence exchanged with the UK Government. As a result, they did not consider this additional information to fall within the scope of point 9.



Conclusion – point 9

43. Having considered the explanations summarised in the previous paragraph, together with the information to which they relate and the submissions on the Ministers' searches considered above, the Commissioner accepts that it would be reasonable to conclude that no further information is held by the Ministers falling within the scope of point 9. However, the Commissioner is concerned that it took until 10 June 2013 for these issues to be clarified by the Ministers, Mr Carrell's additional comments having been relayed to them on 27 February 2013. While eventual answers to these questions may have obviated the need to require the Ministers to carry out further searches for the information, there would appear to be no reason why the appropriate answers could not have been provided considerably sooner.

General handling of request

44. The technical failings in this case with respect to adherence to timescales have already been noted in *Decision 126/2012 Mr Severin Carrell and the Scottish Ministers*³, but the significant delays and other general handling failures apparent in this case warrant further comment. It should be noted that Mr Carrell was provided with a substantive response to his request on 6 September 2012, nearly a year after he made his initial request and only after the Commissioner's intervention.
45. On receipt of Mr Carrell's request, the Ministers asked Mr Carrell if he would be willing to reduce the scope of the request, with a view to making the task of information retrieval easier. He agreed to reduce the period covered. Then, in accordance with regulation 7(1) of the EIRs, the Ministers notified Mr Carrell that they were seeking an extension to the 20 working day period for responding to his request. They considered the volume and complexity of the information requested made it impossible to comply within the time allowed.
46. As highlighted by Mr Carrell and as recognised by the Commissioner, the information ultimately disclosed to Mr Carrell was limited in volume and relatively innocuous in nature. According to the Ministers, it encompassed all the information falling within the scope of the requests. This would suggest that the information requested by Mr Carrell was neither voluminous nor complex, and so the Ministers' reliance on regulation 7(1) of the EIRs appears unjustified. In any event, as indicated above, even the extension of 20 working days was exceeded considerably by the time Mr Carrell received a response.
47. In addition to the above, the Ministers acknowledged during the investigation that their response to Mr Carrell was (in certain respects) incomplete and ambiguous. Given the time taken to deal with the request, and thereafter with aspects of the investigation, the Commissioner finds this admission concerning.

³ <http://www.itspublicknowledge.info/applicationsanddecisions/Decisions/2012/201201241.asp>



DECISION

The Commissioner finds that the Scottish Ministers (the Ministers) were correct to handle Mr Carrell's request in terms of the Environmental Information (Scotland) Regulations 2004 (the EIRs).

However, in failing to inform Mr Carrell that they did not hold certain information and in providing only partial responses to certain of his requests, the Ministers failed to comply with regulation 5(1) of the EIRs.

The Commissioner therefore requires the Ministers to provide refusals under regulation 13 of the EIRs in respect of those parts of the request for which no information is held, together with further explanations of the lack of information, in line with regulation 9(1). In relation to the visits to the power stations by the Scottish Government, the Commissioner requires the Ministers to respond to requests 5 and 8 in accordance with regulation 5(1) of the EIRs. The Commissioner requires the Ministers to do this by 12 August 2013.

Appeal

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

Margaret Keyse
Head of Enforcement
26 June 2013



Appendix 1

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 of the provisions 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

-

...

(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)-

(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.

...

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.

...

10 Exceptions from duty to make environmental information available—

- (1) A Scottish public authority may refuse a request to make environmental information available if-
 - (a) there is an exception to disclosure under paragraphs (4) or (5); and
 - (b) in all the circumstances, the public interest in making the information available is outweighed by that in maintaining the exception.
- (2) In considering the application of the exceptions referred to in paragraphs (4) and (5), a Scottish public authority shall-
 - (a) interpret those paragraphs in a restrictive way; and
 - (b) apply a presumption in favour of disclosure.

...

- (4) A Scottish public authority may refuse to make environmental information available to the extent that
 - (a) it does not hold that information when an applicant's request is received;

...



13 Refusal to make information available

Subject to regulations 10(8) and 11(6), if a request to make environmental information available is refused by a Scottish public authority in accordance with regulation 10, the refusal shall-

- (a) be given in writing 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;
- (b) specify the reasons for the refusal including, as appropriate, any exception under regulation 10(4) or (5) or provision of regulation 11 and how the Scottish public authority has reached its decision with respect to the public interest under regulation 10(1)(b);
- (c) state the basis on which any exception relied on under regulation 10(4) or (5) or provision of regulation 11 applies if it would not otherwise be apparent;
- (d) if the exception in regulation 10(4)(d) is relied on, state the time by which the authority considers that the information will be finished or completed; and
- (e) inform the applicant of the review provisions under regulation 16 and of the enforcement and appeal provisions available in accordance with regulation 17.



Appendix 2

The request

1. All correspondence to, from and/or between the Scottish Government and the power company EDF since 1 September 2008 which either wholly or partly concerns any proposed extension to the operating lives of Hunterston nuclear power station and Torness nuclear power station, whether by letter, email or any other form of correspondence;
2. All correspondence to, from and/or between the Scottish Government and the power company EDF since 1 September 2008 which either wholly or partly concerns the Scottish Government's policies towards civil nuclear power generation in Scotland, whether by letter, email or any other form of correspondence;
3. A list of all contacts by telephone or in person or by another means between Ministers and/or officials within the Scottish Government since 1 September 2008 with EDF which either wholly or partly concerns any proposed extension to the operating lives of Hunterston nuclear power station and Torness nuclear power station, by date, location and including the names of all participants;
4. A list of all contacts by telephone or in person or by another means between Ministers and/or officials within the Scottish Government since 1 September 2008 with EDF which either wholly or partly concerns the Scottish Government's policies towards civil nuclear power generation in Scotland, by date, location and including the names of all participants;
5. All memoranda, minutes or notes of those meetings or contacts;
6. All correspondence from Ministers and/or officials with the Scottish Government's Council of Economic Advisers which either wholly or partly concerns the Council of Economic Advisers' advice to the Scottish Government on nuclear power;
7. Details of any hospitality or events which have been attended by Scottish Government Ministers or officials which were hosted or sponsored by EDF and/or any of its subsidiaries since 1 September 2008; including details of any invitations from EDF to attend events or take up hospitality to the Scottish Government which were not accepted, by date, purpose and participants;
8. Details of any tours, meetings or site visits by any Scottish Government Ministers or officials to either Torness or Hunterston nuclear power stations since 1 September 2008, by date, purpose and names of participants, including any invitations from EDF which were declined;



9. All correspondence on the future operational life of Hunterston and Torness power stations to, from and/or between the Scottish Government and the UK Government since 1 September 2008.