



Scottish Information
Commissioner

Statement about the publication of decisions

Scottish Information Commissioner

This statement concerns an email, sent by this office, referring to delaying decisions which are critical of Ministers until after the election. This email was the result of a breakdown in internal communications, for which I take full responsibility.

As was clarified in response to an enquiry from the applicant, and later to a journalist, there are occasions when we consider the timing of publication of decisions. During purdah, any such decision to delay is rooted clearly in avoiding bringing this office into disrepute by issuing decisions that could be interpreted as politically biased. It is not simply about decisions concerning Ministers; it could apply to any decisions.

As you are aware, this office is not subject to the requirement to observe purdah. Although not bound by purdah, I am still mindful of the need to both be impartial and to be seen to be impartial at all times, so we are alert to the need for care during the election period to avoid any suggestions of bias in the issuing of decisions, particularly involving the Ministers.

We consider the circumstances of each case to help us decide whether issuing it could create actual bias or an impression of bias. In the rare event that issue of a decision during the election period might be viewed as less than impartial in the context described, we consider whether to postpone its issue.

I am proud of the impartiality of this office, and deeply regret that something as basic as a breakdown of internal communications has resulted in the current situation.

It might be helpful if I set out how the misunderstanding occurred.

Paragraph 225 of my internal investigation procedures states:

225.[...] the decision notice will be issued the following day, subject to certain exceptional circumstances. (In the run-up to an election or referendum, SIC may be unable to publish a decision until after the election or referendum has taken place (see, for example, Part 4 [of Schedule 4] of the Scottish Independence Referendum Act 2013 (SIRA), [which covers publication])). HOE will issue guidance on this.)

Guidance was issued in an email to all staff on 16 March 2016 and stated:

As you'll be aware, the Scottish Parliament election takes place on Thursday 5 May. Purdah starts at midnight on 23 March 2016. During this time, we should avoid doing anything which could distract attention from or compete with the election campaign.

This affects all of us – although decisions are likely to be the most risk, particularly if the decision is very critical of the Scottish Government and deals with a high profile matter.

If you have a case which you think falls into this category, please let the Head of Enforcement or a Deputy Head of Enforcement¹ know asap. The options would be to try and get the decision issued by 23 March or to delay it until after the election. If we delay the decision, we need to let the applicant know and why.

The intention was to notify applicants only if there was likely to be a delay. Any such notification would focus on the need for impartiality by the Commissioner in the context of other legislation or restrictions. We also intended to give a full explanation as to why the publication of the decision could be interpreted as me not being impartial in the circumstances, and so as a result we had decided that a decision could not be issued at the time. With hindsight, the communication to staff could have made this clearer and as a result our internal guidance was misapplied.

A small number of cases were brought to the attention of my Head of Enforcement (who is also my in-house lawyer). We saw no reason to delay the majority of these, whether or not they were critical of the Ministers. Three decisions could potentially have been delayed. One of these we resolved before purdah, and had we not done so we would have issued the decision. Two others were under investigation, and still are (including Mr McEnaney's). Depending on the outcome of my investigation, they might have resulted in a decision that if published, in turn could result in criticism of my impartiality in deciding to publish them during purdah.

It is not yet clear when the investigation of these applications will be concluded. You will appreciate at this point I cannot share more information about the cases under consideration (because of the restrictions under Section 45 of FOISA). Unfortunately, the breakdown in communication here meant that a misleading and premature email was sent by this office to the applicant. I take full responsibility for this failure in our systems and apologise unreservedly for the inconvenience and distress caused.

I can assure Parliament, that I have not, and will not delay issuing decisions simply because they are critical of Ministers (or any other Scottish public authority). I consider it only responsible as an Office Holder that I consider my own impartiality and make carefully considered decisions about when it is appropriate or inappropriate to issue decisions, taking into account other legislation and restrictions. The presumption is always that decisions will be issued at the earliest possible opportunity and reasons to delay must be exceptional.

During my time as Commissioner I have not had to consider the publication of decisions in the run-up to a Scottish Parliamentary election until recently.

Although different because of the restrictions under Part 4 of Schedule 4 of SIRA, the question of timing of publication of decisions arose in 2014 in relation to the Scottish Independence Referendum. In the run-up to the referendum I delayed publishing three decisions². My decision to delay was based on the subject matter under investigation and my view that publication would be seen as biased on my part because they fell under the specific restrictions set out in SIRA in that they might be seen as "*designed to encourage voting at the referendum... published by ... any Scottish public authority with mixed functions or no reserved functions (within the meaning of the Scotland Act 1998).*"

¹ The original included names. I have included titles instead.

² Decision [204/2014](#), Decision [203/2014](#) and Decision [190/2014](#), all available on our website

You may also recall that in the run-up to the referendum I publicised that I had prioritised applications concerning information in relation to the referendum with the aim of issuing them in advance of SIRA coming into force. I did so with the aim of ensuring that there was public access to as much information as possible.

Since the disclosure of the email in question, this office has also received information requests about the matter. These will be considered and responded in due course. It is my intention to publish as much of the information disclosed as I can, subject to the restrictions place on me by Section 45 of the Freedom of Information (Scotland) Act 2002, to keep information confidential. I will inform Parliament when this is done.

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