Scottish Information Commissioner

009/2008 Mr Joe Watson and the Scottish Ministers

Article 226 letters of formal notice and reasoned opinion

Applicant: Mr Joe Watson, Press and Journal
Authority: Scottish Ministers
Case No: 200700766
Decision Date: 21 January 2008

Kevin Dunion
Scottish Information Commissioner

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Decision 009/2008 Mr Joe Watson and the Scottish Ministers

Request for Article 226 letters of formal notice and reasoned opinion – request refused under several of the EIRs – refusal upheld as information not held

Relevant Statutory Provisions and Other Sources

Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(2) (Interpretation – when information is held); 5(1) (Duty to make environmental information available on request); 10(1) and (4)(a) (Exceptions from duty to make environmental information available – information not held and public interest test).

The full text of this provision is reproduced in the Appendix to this decision. The Appendix forms part of this decision.

Facts

Mr Joe Watson requested from the Scottish Ministers (the Ministers) "any correspondence, internal or external, in which there is any specific threat made to … impose infraction proceedings on the Scottish Executive that is related to the [Nitrate Vulnerable Zone] issue". Mr Watson's request was refused on the basis that the requested information had been supplied by a department of the UK Government and held in confidence, and therefore was not held by the Ministers for the purpose of the EIRs.

Following a review, Mr Watson remained dissatisfied and applied to the Commissioner for a decision. During the investigation, Mr Watson narrowed the scope of information sought to the Article 226 letters of formal notice and reasoned opinion issued by the European Commission. Following an investigation, the Commissioner found that, insofar as Mr Watson's request related to these particular items of information, the Ministers had dealt with that request in accordance with the EIRs, in that the information was not held for the purposes of the EIRs. In light of that conclusion, the Commissioner required no further action on the part of the Ministers.

Background

1. On 9 March 2007, Mr Watson emailed the following request for information to the Ministers:

> "To ask the Scottish Executive how many times its officials / ministers have over the last three years met European Commission officials to discuss the Nitrates Directive and nitrate vulnerable zone [NVZ] regulations for Scotland. To also provide the same answer for the occasions the Scottish Executive official[s] have met their colleagues at DEFRA to discuss the same subject.
>
> To provide the cost of attending those meetings.
>
> To release any correspondence, internal or external, in which there is any specific threat made to either delay Scotland's rural development plan or to impose infraction proceedings on the Scottish Executive that is related to the NVZ issue".

2. On 5 April 2007, the Ministers emailed Mr Watson to notify him of their decision on his request. The Ministers:

   i. provided the information requested in paragraphs 1 and 2 of Mr Watson's request;

   ii. refused Mr Watson's request for "correspondence, internal or external, in which there is any specific threat made to … delay Scotland's rural development plan" under regulations 10(4)(e), 10(5)(a) and 10(5)(d) of the EIRs;

   iii. refused Mr Watson's request for "correspondence, internal or external, in which there is any specific threat made to … impose infraction proceedings …" on the basis that regulation 2(2) of the EIRs applied, on the basis that the information had been supplied by a department of the UK Government (the Department for Environment, Food and Rural Affairs, or DEFRA) and was held in confidence.

3. Mr Watson requested a review of the Ministers' refusal to disclose the requested correspondence on 6 April 2007. The Ministers responded on 4 May 2007.

4. The Ministers confirmed their original decision to withhold the requested correspondence in reliance on the above-stated regulations. They varied their original decision only to the extent that, in addition to relying on regulation 2(2) of the EIRs as a basis for refusing Mr Watson's request for "correspondence, internal or external, in which there is any specific threat made to … impose infraction proceedings …", the Ministers also sought to rely on regulations 10(4)(e), 10(5)(a) and 10(5)(d).

5. On 28 May 2007, Mr Watson wrote to my Office, stating that he was dissatisfied with the outcome of the Ministers' review and applying to me for a decision in terms of section 47(1) of the Freedom of Information (Scotland) Act 2002 (FOISA), which also deals with applications under the EIRs. In addition to complaining about the Ministers' decision on his request for information, Mr Watson noted that he was awaiting the outcome of an identical request for information (barring the fact that references to Scotland were replaced by references to the UK as a whole) submitted to DEFRA. He put forward various arguments as to why he considered it be in the public interest for the information to be released.

6. Mr Watson's application was validated by establishing that he 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 that request.

The Investigation

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7. On 31 May 2007, the Ministers were notified in writing that a valid application had been received from Mr Watson. They were asked to supply a copy of the withheld information. On receipt of that information, the case was allocated to an investigating officer. In the course of the investigation, comments were sought from both Mr Watson and the Ministers.

8. The progress of my investigation is set out under the following headings:

   - Attempted settlement and refinement of request
   - Scottish Ministers' submissions

Attempted settlement and refinement of request

9. Having carried out an initial analysis of the information at issue, the investigating officer wrote to Mr Watson to advise that a relatively large number of documents were covered by his request. The investigating officer advised Mr Watson that I could reach a decision in respect of all these documents. However, she also gave Mr Watson the opportunity to identify any key information of interest, noting that this might expedite my consideration of the issues.

10. In the interim, Mr Watson received DEFRA's response to his identically-worded request for information. In discussions with, and emails to, my investigating officer, Mr Watson expressed satisfaction with this response, and suggested that if the Ministers could respond in similar terms this might provide scope to effect a settlement of his application. On 30 July 2007, my investigating officer wrote to the Scottish Ministers enquiring whether settlement would be possible on this basis.

11. On 20 August 2007, the Ministers confirmed they were happy to respond to Mr Watson in a manner similar to that of DEFRA and on 6 September 2007 a letter was dispatched to him (hereafter referred to as "the settlement letter").

12. In relation to Mr Watson's request for information concerning the "threat" to impose infraction proceedings, the Scottish Ministers – like DEFRA – confirmed they held copies of the Article 226 letters of formal notice and reasoned opinion issued by the European Commission, but advised that this information engaged the exceptions in regulations 10(5)(a) and 10(5)(b) of the EIRs.

13. In relation to Mr Watson's request for information concerning the "threat" of delay to Scotland's rural development plan, the Ministers confirmed that the position for Scotland was the same for DEFRA. The Ministers advised that they did not hold any correspondence from the European Commission concerning this issue, apart from that addressed to DEFRA and summarised previously in DEFRA's letter to Mr Watson.

14. Following dispatch of the settlement letter, my investigating officer enquired of Mr Watson how he wished to proceed. Mr Watson advised that he remained dissatisfied with the Ministers' decision on his request, and specifically with the decision to withhold the Article 226 letters of formal notice and reasoned opinion issued by the European Commission. He asked me to proceed to issue a decision in respect of these items of information.

15. At this point, the investigating officer wrote to Mr Watson, explaining a number of matters.

16. First, the investigating officer advised that the reasoned opinion was not among the material supplied by the Ministers as being relevant to Mr Watson's request. Accordingly, she noted there might be an issue – which would need to be explored in an investigation – as to whether that opinion was physically held by the Ministers, and whether it was considered by the Ministers to be captured by Mr Watson's request.

17. Secondly, the investigating officer noted that the reasons advanced by the Ministers for withholding the letter of formal notice included, in addition to various substantive exceptions, regulation 2(2) of the EIRs. Regulation 2(2) states that:

> "For the purpose of these Regulations, environmental information is held by a Scottish public authority if it is –
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> (a) in its possession and it has been produced or received by that authority; or
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> (b) held by another person on that authority's behalf,
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> and, in either case, it has not been supplied by a Minister of the Crown or department of the Government of the United Kingdom and held in confidence" (my emphasis).

18. The investigating officer advised that if I proceeded to investigate Mr Watson's application in relation to the formal notice (and potentially, the reasoned opinion), my primary focus, at least at the outset, would be on establishing whether that information was held by the Ministers for the purpose of the EIRs.

19. The investigating officer went on to observe that DEFRA had also refused Mr Watson's request for the letters of formal notice and reasoned opinion. She explained that if Mr Watson wanted to test the legitimacy of the UK Government's reasons for doing this, and ultimately to get a determination on the balance of the public interest considerations favouring withholding and disclosure of the information, his best recourse might be to ask DEFRA to review its decision, followed by an appeal to the UK Information Commissioner.

20. Having considered the matter further, Mr Watson elected to proceed with his application. The investigating officer informed the Ministers of this and requested comments, in accordance with section 49(3)(a) of FOISA (which applies to investigations under the EIRs by virtue of regulation 17), on the following two issues:

    i. whether the reasoned opinion was held (physically) by the Ministers, and if so, whether the Ministers were in agreement with Mr Watson that it should be captured by his request; and if so

ii. whether the letters of formal notice and reasoned opinion were held by the Ministers for the purpose of the EIRs.

21. In relation to the latter issue, the investigating officer asked the Ministers to address a number of matters with a view to establishing whether the information met the requirements of regulation 2(2).

The Ministers' submissions

22. The Ministers advised that the reasoned opinion was physically held, but disputed that it was captured by Mr Watson's request, arguing that only correspondence produced prior to the formal notification of infraction proceedings (which did not include the reasoned opinion letter) could be regarded as relating to a threat of infraction proceedings. This was based on their interpretation of "threat" as "an announcement of intention", which they argued was supported by the definition of the word in the Oxford English Dictionary. Subsequent correspondence, they argued, would be an *action* in the infractions procedure rather than an *intention* to impose infraction proceedings. They also took the view that obtaining a copy of the reasoned opinion was not the intention of Mr Watson's original request to them, but an additional demand that arose following his receipt of a reply from DEFRA.

23. However, in the event that I found otherwise, the Scottish Ministers reiterated their reliance on regulation 2(2), noting DEFRA's verbal advice that the information had been supplied in confidence and remained confidential, and providing an email from the Cabinet Office to similar effect.

24. They explained that the information at issue came to be held by the Scottish Ministers because it had been supplied to them by DEFRA.

25. They argued that the information at issue had been supplied in circumstances importing a clear obligation of confidence, and that it remained confidential at the time of Mr Gordon's request (the evidence adduced in support of this argument will be discussed in more detail in my analysis and findings below).

26. The question having been raised with them by the investigating officer, the Ministers advised that they did not accept that the prospect of damage from disclosure of information was a relevant consideration in determining whether that information was genuinely held in confidence for the purposes of regulation 2(2). They noted that the regulation did not state any such requirement. It simply referred to information being held in confidence, and did not address the issue of an authority needing to show that damage would occur.

27. Notwithstanding this, the Ministers maintained that damage would undoubtedly result from disclosure. Specifically, they argued, damage would result to their negotiations and relations with the European Commission, and to their relations with other Government Departments, and this might have a bearing on similar situations in the future. The Ministers supported their argument in this regard by reference to a decision by the UK Information Commissioner (FS500110720), which concerns the Department for Constitutional Affairs' decision to withhold a copy of a letter from the European Commission to the UK government regarding alleged deficiencies in the implementation of a directive and a copy of the UK government's response to that letter. The UK Commissioner found the information exempt under section 27(1)(c) of the Freedom of Information Act 2000 (prejudice to the interests of the United Kingdom abroad), in particular accepting that disclosure of this information would make it more difficult for the UK to negotiate flexibly with the Commission, to the prejudice of the UK's interests abroad.

28. The Ministers concluded that even if I found regulation 2(2) not to be applicable, other exceptions would apply and the information must continue to be withheld and not released into the public domain.

The Commissioner's Analysis and Findings

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29. In coming to a decision on this matter, I have considered all the information and submissions that have been presented to me by both parties, and I am satisfied that no matter of relevance has been overlooked.

30. I set out below my analysis and findings in relation to the two issues presented by this application, that is whether the reasoned opinion is captured by Mr Watson's request, and whether the letters of formal notice and reasoned opinion are held by the Ministers for the purpose of the EIRs.

Was the reasoned opinion captured by Mr Watson's request?

31. I have carefully considered the Ministers' submission that the reasoned opinion was not captured by Mr Watson's request. However, I am not persuaded to accept it.

32. The Ministers seek to distinguish between the "threat" of infraction proceedings and the commencement of infraction proceedings, the letter of reasoned opinion not having been sent until the latter stage.

33. My first difficulty is that this narrow interpretation of Mr Watson's request seems not to be borne out by the documentation relating to that request.

34. The initial response to Mr Watson's request was conveyed via a letter attached to an email. The title of the attached letter, and the subject of the email, was "Reasoned Opinion – EIR reply to Edinburgh Press Journal". It would seem odd to title the response in this way if, as the Ministers' now submit, the reasoned opinion was regarded as outwith the scope of Mr Watson's request.

35. The response to Mr Watson's request refers to "internal and external correspondence about infraction proceedings", and "correspondence with [DEFRA] concerning or relating to the Commission's infraction case", with the apparent implication that these are considered to be covered by the request. The response to Mr Watson's request for review also discusses "correspondence between the Commission and a Member State in infraction proceedings" (my emphasis), again with the apparent implication that these are covered by the request, noting such correspondence is regarded as confidential by both parties. Nothing in these letters suggests the exclusion of information post-dating the commencement of infraction proceedings; in fact, to the contrary, they appear to imply such information was considered by the Ministers for the purposes of Mr Watson's request.

36. The Ministers' interpretation seems particularly puzzling given that officials had previously advised me (in the letter accompanying the information at issue) that they had "applied a broad interpretation [of Mr Watson's request] and considered any papers related to the infraction proceedings…" (my emphasis).

37. Finally, I note that the settlement letter sent to Mr Watson discusses the reasoned opinion (and letter of formal notice), noting that it "engages the exceptions in regulation[s] 10(5)(a) … and … 10(5)(b) of the EIRs". It seems unusual then to assert that the reasoned opinion was not in fact captured by Mr Watson's request.

38. My second difficulty is that I am not convinced that this interpretation was a reasonable one in the circumstances.

39. It seems to me to presume a degree of knowledge on the part of the general public (or even an agricultural specialist) about the infraction proceedings process, and the "line" that can apparently be drawn between the "threat" of proceedings, and the actual instigation and pursuit of such proceedings. This presumption may not be warranted.

40. I do not think Mr Watson would have known (or could have been expected to know) the potential limiting effect of his use of the word "threat"; that is, that the "threat" of infraction proceedings ended when proceedings were instigated. Indeed, Mr Watson's request for review discussed this notion of a "threat" in the present tense There is nothing in this to suggest that Mr Watson appreciated that the "threat" of infraction proceedings had ceased at a certain point and that his request for information would therefore not capture information generated after that date.

41. I also note that DEFRA – when faced with an identically-worded request from Mr Watson – construed that request in a manner which captured the reasoned opinion. Although Mr Watson used the word "threat" in that request also, DEFRA's letter to Mr Watson simply made it clear that infraction proceedings had in fact commenced ("these letters [the letter of formal notice and reasoned opinion] are part of the administrative phase of live infraction proceedings").

42. In my view, if there was any doubt in connection with Mr Watson's use of the word "threat", and the effect of this on the scope of the information he was attempting to capture, this should have been clarified with him. At the very least, if Ministers felt this kind of restrictive interpretation was warranted by virtue of the wording of the request, they should have put Mr Watson on notice of this fact. None of this was in fact done.

43. In light of the above considerations, I have concluded that the reasoned opinion was captured by Mr Watson's request.

Were the letter of formal notice and reasoned opinion held by the Scottish Ministers for the purpose of the EIRs?

44. The issue for consideration here is whether the letter of formal notice and reasoned opinion are held by the Scottish Ministers for the purpose of the EIRs, and therefore, whether they can fall within the scope of a request under the EIRs.

45. This is the first (and in this case significant) hurdle Mr Watson must overcome; if the letters of formal notice and reasoned opinion are not held by the Ministers for the purpose of the EIRs, it then becomes academic whether that information was also properly withheld under exceptions in the EIRs.

46. As noted above, regulation 2(2) states:

> "For the purpose of these Regulations, environmental information is held by a Scottish public authority if it is –
>
> (a) in its possession and it has been produced or received by that authority; or

(b) held by another person on that authority's behalf,

and, in either case, it has not been supplied by a Minister of the Crown or department of the Government of the United Kingdom and held in confidence".

47. Regulation 2(2) is similar (although not identical) in wording and effect to section 3(2)(a)(ii) of FOISA. Like that section, the purpose of regulation 2(2) is to allow UK Ministers and Government departments to provide confidential information to Scottish public authorities while ensuring that any decision to release the information remains with them, and subject to the UK EIRs rather than the Scottish EIRs.

48. The purpose is not to restrict an applicant's rights of access to information, as applicants will have similar access and complaints-adjudication rights south of the border; it is simply a question of which Government should, most appropriately, exercise decision-making rights in respect of particular information.

49. There are two issues to consider:

i. whether the information was supplied by a UK Minister or Government department; and

ii. whether the information has been held in confidence.

Was the information supplied by a Minister of the Crown or department of the Government of the United Kingdom?

50. It will be a simple matter of fact – often easily verifiable by reference to supporting documents – whether information was supplied by a UK Minister or Government department.

51. In this case, it is apparent from the documents at issue that they were sent in the first instance to the UK Permanent Representative to the European Union (UKRep). The supporting documents provided by the Scottish Ministers show the documents were thereafter forwarded in turn to the Cabinet Office, DEFRA, and then the Scottish Ministers. This would appear to be in line with the usual practice followed in European Commission infraction proceedings. The Concordat between the UK Government and Scottish Ministers on Co-ordination of European Union Policy states that:

"Where the European Commission instigates informal or formal proceedings against the UK for alleged breaches of EC law, the Cabinet Office will commission and co-ordinate the UK response, which will be sent by UKRep on behalf of the UK Government" (paragraph B4.22).

It also states that:

> "In line with paragraphs B4.2 and B4.3 above, lead Whitehall departments and UKRep (within its normal reporting responsibilities) will inform officials of the devolved administrations of developments in EU business which touch on matters which fall within the responsibility of the devolved administrations. Such information will be shared both with the devolved administrations and with other interested Government Departments from the outset. Officials of the devolved administrations will have access to relevant papers (including telegrams) which are copied inter-departmentally by UKRep and lead Whitehall departments" (paragraph B4.9).

52. I am satisfied, based on my analysis of the information at issue, and the supporting documents and explanation provided by the Scottish Ministers, that the information at issue was supplied to the Ministers by a UK Government department (in this case DEFRA).

Has the information been held in confidence?

53. In commencing my analysis on this point, I note that that regulation 2(2) appears to exclude from the category of information which is held by a Scottish public authority information which has been held in confidence. Section 3(2)(a)(ii) of FOISA, on the other hand, refers to information which is held in confidence and I am satisfied that this means there must be a subsisting obligation of confidence at the time of the applicant's request, assessed by reference to the principles involved in considering whether disclosure would constitute and actionable breach of confidence for the purposes of section 36(2) of FOISA.

54. Given that there is no obvious difference between the respective purposes of the provisions in the EIRs and in FOISA governing information of this general description, I think it unlikely that the legislators intended their respective effects to be different. It might be argued, however, that the wording of regulation 2(2) is of necessity broader than that of section 3(2)(a)(ii), covering information which has been held in confidence but does not remain confidential. As will become apparent in the following paragraphs, I do not think this distinction, if indeed it exists, is material to the outcome of this particular case.

55. In determining whether the information at issue here has been held in confidence, I will consider:

- Whether it was provided in circumstances giving rise to (or at least implying) a specific obligation to keep it confidential. Ordinarily I would expect a clear indication from the relevant UK Minister or department, at the time the information was supplied, that the information was expected to be held in confidence.

- Whether (assuming the provisions in regulation 2(2) and in section 3(2)(a)(ii) have the same meaning and effect) the information remained confidential at the time of the request. Here I would look to the nature of the information at issue, and consider whether – to use the test applicable under section 36(2) of FOISA – it had the "necessary quality of confidence". The information must not be common knowledge or otherwise publicly available. On this basis, information which had ceased to be confidential by the time of the applicant's request would be regarded as held by the authority.

- Whether any damage would result (or would have resulted) from the release of the information. I accept the Scottish Ministers' point that nothing in the wording of regulation 2(2) requires the holder of information – or the Commissioner on appeal – to take into account the likely prospect of damage from disclosure of information. However, I remain of the view that the prospect of damage will inform whether information is (or was) genuinely confidential. Where damage of some description would be likely to result from disclosure of information, this will lend significant weight to assertions that the information is (or was) held in confidence.

56. I understand that there are established UK Government protocols concerning the confidentiality of information in connection with European Commission infraction proceedings.

57. The Concordat between the UK Government and Scottish Ministers on Co-ordination of European Union Policy states:

> "**Provision of Information**
>
> B4.2 In order to contribute effectively to the United Kingdom's decision making on European Union (EU) matters, the devolved administrations will need to have information on relevant EU business. The UK Government will therefore provide the devolved administrations with full and comprehensive information, as early as possible, on all business within the framework of the European Union which appears likely to be of interest to the devolved administrations, including notifications of relevant meetings within the EU. This is likely to mean all initiatives within the framework of the EU which appear to touch on matters which fall within the responsibility of the devolved administrations. The same policy will be followed by the devolved administrations on such issues likely to

be of interest to the UK Government.

B4.3 These arrangements will rely for their effectiveness on mutual respect for the confidentiality of information (including statistics) exchanged. Complete confidentiality is often essential in formulating a UK negotiating position in the EU and in developing tactical responses".

58. The Scottish Ministers advised that the information at issue in this case was provided with a covering letter from the Cabinet Office to DEFRA and a minute from DEFRA. Copies of these documents were provided for my information. The Cabinet Office letter refers the reader to a guidance note on handling Article 226 reasoned opinion cases. An extract from this guidance was, again, provided for my information. The guidance outlines the reasons for maintaining confidentiality during European Commission infraction proceedings. The minute from DEFRA also contains a statement to the effect that reasoned opinion letters are kept confidential between the Commission and the UK Government.

59. I also understand that the European Commission itself upholds the confidentiality of such documents, for the benefit of the concerned Member State. From my reading of the UK Information Commissioner's decision FS500110720 (discussed above), it appears that the European Commission's opinion was sought in relation to disclosure of the information at issue in that case (that information being similar to the information at issue in the present case). The Commission apparently advised that as the infraction proceedings were still in progress, it would not disclose the correspondence if the request were made to it, nor would it expect the UK government to disclose the information. Indeed this approach would appear to be confirmed by the judgment of the European Court of First Instance in Petrie (Case T-191/99), which concluded that "…an amicable resolution of the dispute between the Commission and the Member State concerned before the Court of Justice has delivered judgment, justifies refusal of access to the letters of formal notice and reasoned opinions drawn up in connection with the Article 226 EC proceedings…".

60. All of these factors lead me to conclude that the information was provided to the Scottish Ministers in circumstances giving rise to an obligation of confidence.

61. I further understand that the requirement for confidentiality is considered to persist while negotiations between the Member State and European Commission remain ongoing. In this regard, I am advised that the infraction proceedings were at the time of Mr Watson's request (and still remain) ongoing. The detailed content of the letters of formal notice and reasoned opinion are not (and have not been) common knowledge or otherwise publicly available. I am satisfied, therefore, that this information remained confidential

at the time of Mr Watson's request and throughout the intervening period.

62. In light of the UK Information Commissioner's decision FS500110720, and having considered fully the submissions made to me by the Ministers in this connection I am prepared to accept in the present circumstances that there would at least some prospect of damage to the negotiating process between the Commission and the UK Government if the information at issue were disclosed during the relevant proceedings. In the circumstances, I am satisfied that the potential damage would be sufficient to meet the requirements of confidentiality for the purposes of regulation 2(2).

63. For the reasons discussed in detail above, I find that the letter of formal notice and reasoned opinion issued by the European Commission had been supplied to the Scottish Ministers by a UK Government department and held in confidence, and therefore that this information was not held by the Scottish Ministers for the purpose of the Scottish EIRs, whether or not the test in regulation 2(2) is regarded as being different in any material respect from that in section 3(2)(a)(ii) of FOISA. Mr Watson's substantive rights of access and complaints-adjudication lie under the UK EIRs. For the Scottish Ministers, the appropriate course of action in the circumstances was to give Mr Watson notice under regulation 10(4)(a) of the EIRs to the effect that it did not hold the information (which was, to all intents and purposes, what it did).

64. It would have made sense for the authority's obligations in the matter to end there. It is quite clear from the wording of regulation 10 of the EIRs, however, that the exception in regulation 10(4)(a) is subject to the public interest test set out in regulation 10(1)(b). Strictly speaking, this appears to reflect the requirements of Directive 2003/4/EC, which the EIRs implement in Scotland. However, as regulation 5(1) makes clear (as does the equivalent provision in the Directive – and as any reasonable person would expect), the duty to make environmental information available on request is intended to apply only to information the relevant Scottish public authority actually holds for the purposes of the EIRs. It is difficult to imagine the legislators really intending otherwise and I have difficulty criticising any authority for not applying the public interest test to information I accept not to be held. I make no such criticism in this case.

65. I note that my conclusion in this case is generally consistent with my earlier *Decision 042/2005 Mr Rob Edwards of the Sunday Herald and the Scottish Executive*. In that decision, I concluded that copies of Article 226 letters of formal notice and reasoned opinions, as well as information relating to the substance of infraction proceedings, being information supplied by the UK Government and held in confidence, was not held by the Scottish Executive (as it was then) for the purpose of FOISA.

66. As noted earlier, Mr Watson has already submitted a request to DEFRA, and DEFRA has refused to disclose the letter of formal notice and reasoned opinion under the UK EIRs. Mr Watson was advised of his right to seek internal review of this decision within 40 working days. Mr Watson is now well outwith this time limit. However, it would be open to Mr Watson to write to DEFRA once more, explaining the outcome of his attempt to obtain this information by way of application to the Scottish Information Commissioner, and asking whether DEFRA would be prepared to consider his request for review out of time.

Decision

I find that the Scottish Ministers acted in accordance with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by Mr Joe Watson, in that the requested information was not held by the Scottish Ministers for the purposes of the EIRs and therefore could not be provided. In light of that conclusion, no further action is required to be taken on the part of the Scottish Ministers.

Appeal

Should either Mr Watson 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.

Kevin Dunion
Scottish Information Commissioner
21 January 2008

Appendix

Relevant statutory provisions

Environmental Information (Scotland) Regulations 2004

2 Interpretation

…

(2) For the purpose of these Regulations, environmental information is held by a Scottish public authority if it is-

(a) in its possession and it has been produced or received by that authority; or

(b) held by another person on that authority's behalf,

and, in either case, it has not been supplied by a Minister of the Crown or department of the Government of the United Kingdom and held in confidence.

…

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.

…

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.

…

(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;

…