



Scottish Information
Commissioner

**Decision 039/2008 Mr Rob Edwards and the
Scottish Ministers**

Draft response to the UK Energy Review consultation

**Applicant: Mr Rob Edwards
Authority: The Scottish Ministers
Case No: 200601208
Decision Date: 10 March 2008**

**Kevin Dunion
Scottish Information Commissioner**

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Unpublished reports etc relating to the UK Government's energy review – information withheld – under various exemptions in FOISA – Commissioner also determined information to be environmental and considered it under regulation 10(4)(e) of the EIRs – Commissioner required release of certain information

Relevant Statutory Provisions and Other Sources

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (Interpretation) (definition of “environmental information”); 5(1) (Duty to make available environmental information on request); 6(1)(b) (Form and format of information - publicly available); 10(1), (2) and (4)(e) (Exceptions from duty to make environmental information available); 17(1) (Enforcement and appeal provisions).

Freedom of Information (Scotland) Act 2002 (FOISA) sections: 1(1) (General entitlement); 2(1) (Effect of exemptions); 25(1) (Information otherwise accessible); 28(1) (Relations within the United Kingdom); 30(b)(i) and (ii) (Prejudice to the effective conduct of public affairs).

The full text of each of these provisions is reproduced in the Appendix to this decision. The Appendix forms part of this decision.

Facts

Mr Rob Edwards requested from the Scottish Ministers (the Ministers) copies of all unpublished reports, memos and correspondence relating to the UK Government's energy review. The Ministers responded by supplying some information but refusing most of what it held, citing various exemptions contained within FOISA. Following a review, Mr Edwards remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, during which the Commissioner decided that the information withheld from Mr Edwards was environmental information for the purposes of the EIRs, the Commissioner found that the Ministers had been correct to withhold information relating to the preparation of their response under both regulation 10(4)(e) of the EIRs and section 30(b) of FOISA, given the prejudice to similar future exercises that could have been expected to follow from disclosure. He



also found, however, that certain other information should be released, either not being internal communications for the purposes of the EIRs or not being capable of causing substantial prejudice to inter-governmental relations through disclosure.

Background

1. On 17 May 2006, Mr Edwards emailed the Ministers requesting the following information: copies of all unpublished reports, memos and correspondence, whether draft or final, relating to the UK Government's energy review.
2. On 15 June 2006, the Ministers wrote to Mr Edwards in response to his request for information. In that response the Ministers stated that only "centrally held" information had been considered as to widen the scope of Mr Edwards's request would most likely take it beyond the £600 limit prescribed for the purposes of section 12(1) of FOISA. The Ministers released some information but refused other information and cited sections 29(1)(a) and (b) of FOISA as reasons for exemption.
3. Mr Edwards emailed the Ministers on 15 June 2006,, requesting a review of their decision. Mr Edwards confirmed that he was not interested in anything other than the "centrally held" information but questioned whether all the information withheld was in fact exempt and, if so, whether it was in the public interest to keep the exempt information secret.
4. On 12 July 2006, the Ministers wrote to notify Mr Edwards of the outcome of their review. The Ministers released one further document but upheld the decision not to release the remainder of the information. In addition to the exemptions claimed in their initial response to Mr Edwards, the Ministers now came to the view that some of the information was also considered exempt under sections 28(1) and 30(b)(i) and (ii) of FOISA. They also claimed that some of the information had been provided by the Department of Trade and Industry (DTI) on a confidential basis and therefore (in accordance with section 3(2)(a)(ii)) was not held by them for the purposes of FOISA.
5. Mr Edwards wrote to my Office on 18 July 2006, 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 FOISA.
6. The application was validated by establishing that Mr Edwards had made a request for information to a Scottish public authority and had applied to me for a decision only after asking the authority to review its response to that request.



The Investigation

7. On 19 July 2006, as required by section 49(3)(a) of FOISA, the Ministers were notified in writing that an application had been received from Mr Edwards and asked to provide comments on the application as well as specified items of information required for the purposes of the investigation. In particular, they were asked to provide details of their reasoning for applying the exemptions claimed. The Ministers responded on 6 September 2006 with the information requested and the case was then allocated to an investigating officer.
8. The investigating officer subsequently contacted the Ministers asking them to respond to specific questions on the application, seeking in particular the DTI's comments on the withholding of certain documents. In due course, these were provided.

Submissions from the Ministers

9. The Ministers provided background to the UK Energy Review. This advised that Energy Policy was a matter reserved to the UK Parliament under the Scotland Act 1998. However, certain elements were devolved to Scottish Ministers (consents for power stations, energy implications for planning matters etc). The review of UK energy policy was announced by the Prime Minister in December 2005 and resulted in a consultation exercise led by the Minister for State for Energy at the Department of Trade and Industry (DTI). As major stakeholders, the Scottish Ministers were consultees and prepared a response which was formally submitted to the UK government on 14 June 2006.
10. In their submissions the Ministers stated that they had reconsidered the information in several of the documents and these could now be released. Other documents were claimed as exempt under section 25 of FOISA because they were otherwise accessible.
11. However, the Ministers also claimed exemptions under sections 28(1), 29(1)(a) and (b), 30(b)(i) and (ii), and 38(1)(b) of FOISA. The arguments advanced at review stage in relation to section 3(2)(a)(ii) of FOISA were not pursued at this stage, however.
12. Having considered the content of the withheld information, the investigating officer asked the Ministers to confirm their position on the application of the EIRs to the information, and to advise whether they considered any exceptions in the EIRs to apply (with relative submissions on the public interest, if they considered any of the arguments to be different from those advanced in relation to the FOISA exemptions).



13. In replying, the Ministers argued that the information was not environmental and therefore that the EIRs did not apply, but also that if I considered the EIRs to apply then the exception in regulation 10(4)(e) would be applicable to the documents to which they had applied the exemptions under sections 28(1), 29(1)(a)&(b), and 30(b)(i)&(ii) of FOISA as the documents in question were internal communications, regulation 6(1)(b) to the documents to which they applied section 25 of FOISA, and regulation 11(2) to the one item of information to which they had applied section 38(1)(b). They advised that their reasons for relying on the exceptions in question (including, where relevant, their arguments in relation to the public interest) would be the same as those advanced earlier in support of the equivalent exemptions under FOISA. They also referred back to a letter to me dated 5 November 2007, which they advised represented their current general position on determining whether an information request should be dealt with under FOISA or the EIRs, and on my remit in relation to these matters once I received an application for decision on such a request.
14. I will consider the Ministers' arguments further in my analysis and findings below. In the course of the investigation, Mr Edwards advised that he did not require the information to which the Ministers had applied section 38(1)(b) of FOISA and regulation 11(2) of the EIRs, and therefore I will not consider that information further in this decision. Similarly, I do not intend to consider further documents 6, 8, 13, 15, 16 (part), 17, 18, 19a, 36, 42, 43, 45 (part), 74, 75, 94 and 113, as these have been released to Mr Edwards, either in response to his request for review or in the course of my investigation.



The Commissioner's Analysis and Findings

Whether the EIRs applied to the information requested

15. In my *Decision 218/2007 Professor A D Hawkins and Transport Scotland*, I considered the relationship between FOISA and the EIRs at some length and set out my understanding of the situation. Broadly, my general position on the interaction between the two regimes is as follows:
- The definition of what constitutes environmental information should not be viewed narrowly
 - There are two separate statutory frameworks for access to environmental information and an authority is required to consider any request for environmental information under both FOISA and the EIRs
 - Any request for environmental information therefore **must** be dealt with under the EIRs
 - In responding to a request for environmental information under FOISA, an authority may claim the exemption in section 39(2)
 - If the authority does not choose to claim the section 39(2) exemption it must deal with the request fully under FOISA, by providing the information, withholding it under another exemption in Part 2, or claiming that it is not obliged to comply with the request by virtue of another provision in Part 1 (or a combination of these)
 - I am entitled (and indeed obliged) where I consider a request for environmental information has not been dealt with under the EIRs to consider how it should have been dealt with under that regime
16. Firstly, therefore, I must determine whether the information withheld is environmental information. If it is, I must go on to consider the Ministers' handling of the request in terms both of the EIRs and FOISA.



17. The Ministers argued that the withheld information was not environmental information in that the UK Energy Review was a strategic review of energy policy and did not contain firm proposals for specific sites. Many of the documents were, they argued, only about the process of the review. As such, none of the withheld documents could, in their view, be said to be information on measures, such as policies, legislation, plans or programmes, affecting the elements and factors set out in paragraphs (a) and (b) of the definition of environmental information. Therefore, the Ministers were firmly of the view that the information withheld was not environmental information.
18. While taking due account of the Ministers' submissions as to whether the information withheld is environmental, I have considered fully the categories of environmental information as defined in regulation 2(1) of the EIRs, a copy of which is to be found in the Appendix to this decision.
19. When considering the definition of environmental information in regulation 2(1), I have taken account of *The Aarhus Convention: an implementation guide*, published by the Economic Commission for Europe (<http://www.unece.org/env/pp/acig.pdf>) which at page 30 states that in reading any definition, it is important to distinguish between the core of the definition and the use of elements, lists or explanation. The Convention uses both exhaustive and non-exhaustive lists. Words such as "including", "such as" or "*inter alia*" indicate that the elements following are non-exhaustive. Furthermore, "such as" and "*inter alia*" also suggest that there are known elements not named, whereas "including" is less specific on this count.
20. In this case, I accept that the UK Energy Review is a strategic review of energy policy. While no specific sites are identified in any of the withheld documentation, the information was created for the purposes of contributing to that Energy Review and would not have been held in this form otherwise. The Energy Review considers various policies and other measures which would have an effect on the environment, including the cutting of emissions etc, any of which could be expected to have an effect on the elements and factors listed at paragraphs (a) and (b) of regulation 2 (1) of the EIRs. The Energy Review itself is undoubtedly a measure or activity of the kind envisaged by regulation 2(1)(c) and in all the circumstances I am of the opinion that any information held for the purposes of and/or connected with the Energy Review, certainly if it is held for the purposes of making a substantive contribution to that review (as the information under consideration in this case undoubtedly was at the time of Mr Edwards' request), falls within the definition of environmental information contained in regulation 2(1) of the EIRs.
21. In coming to this decision I have taken account of the opinion of the UK Information Commissioner in *Case Ref: FER0098306/7 - Department for Environment Food and Rural Affairs*, which related to information not connected to specific sites but to such things as energy and waste targets.



22. Having concluded that the information under consideration in this case is environmental information, and given that the Ministers have not chosen to apply section 39(2) of FOISA to it, I must now go on to consider how the Ministers dealt with (or should have dealt with) Mr Edwards' request under both the EIRs and FOISA.

Regulation 6(1)(b) of the EIRs

23. I am satisfied that documents 16 (part), 30 – 32, 46, 48, 119 and 121 were publicly available and reasonably accessible to the applicant at the time of his request, and indeed remain so. Therefore, in terms of regulation 6(1)(b) of the EIRs, the Ministers were not required to provide Mr Edwards with these documents and I will not consider them further for the purposes of the EIRs.

Regulation 10(4)(e) of the EIRs

24. The Ministers have claimed regulation 10(4)(e) as an exception in relation to all the documents in that it has classed them as internal communications. For information to fall within the scope of this exception, it need only be established that it is an internal communication.
25. As for all the exceptions under regulation 10, however, a Scottish public authority applying this exception must do so in a restrictive manner and apply a presumption in favour of disclosure. Even where the exception applies the information must be released unless, in all the circumstances of the case, the public interest in making the information available is outweighed by that in maintaining the exception.
26. The first thing for me to do, therefore, is to determine whether each item of information withheld can be described as an internal communication.
27. Examination shows that Document 24 is the draft submission by the Scottish Sustainable Development Forum (SSDF) to the energy review. As well as providing the draft response the covering email invites comments before a deadline. The document appears to have been circulated to all members of the Forum. Membership of the SSDF is open to all individuals who want to make Scotland more sustainable, while its Steering Group is representative of a broad range of environmental interests across Scotland (including the Ministers). It appears to be independent of government and I think it must be questionable whether anything it does could be said to be of a sufficiently "public" character to make it even potentially a Scottish public authority for the purposes of the EIRs.
28. Documents 33-35 relate to the draft submission by Scottish Enterprise (SE – another Scottish public authority for the purposes of the EIRs) to the energy review. These incorporate a copy of SE's response and invite the Ministers' comments. These comments are not included.



29. Documents 12, 14 and 26 are correspondence (or have been exchanged) between the Department of Trade and Industry (DTI), a department of the UK Government, and the Ministers. The relevant part of document 45 duplicates document 14 and therefore I will not consider it further for these purposes.
30. As indicated above, I am required to interpret the exception in regulation 10(4)(e) in a restrictive way, and to apply a presumption in favour of disclosure when considering the application of the exception. Unlike the broadly equivalent regulation 12(8) of the Environmental Information Regulations 2004 (which applies to UK public authorities), regulation 10(4)(e) does not provide for internal communications including communications between government departments (which, in the case of the UK Government, are separate public authorities). In fact, the Scottish regulation is silent on the term including communications between separate public authorities.
31. I accept that there will be cases where communications between two separate public authorities will be capable of being considered as internal communications for the purposes of regulation 10(4)(e). I cannot accept in this case, however, that correspondence with the SSDF, SE or the DTI can be classed as internal communication for those purposes. I am aware of nothing particular in the administrative or legal relationship between the Ministers and any of these other bodies to give credence to a suggestion that the communications should be regarded as internal and nothing particular of that kind has been brought to my attention by the Ministers. The SSDF and SE draft submissions appear to have been generated by each of the respective bodies independently and to have been submitted to the Ministers simply for comment (in the case of the SSDF, at least, as one consultee among many).
32. Since I do not accept that documents 12, 14, 24, 26 and 33 – 35 could be regarded as internal communications for the purposes of the exception contained in regulation 10(4)(e) of the EIRs, I must conclude that the Ministers would not have been justified in withholding these documents under the exception. I therefore find that the Ministers were in breach of regulation 5(1) of the EIRs in withholding the information in these documents and now require its release to Mr Edwards.
33. I am, however, satisfied that the remaining documents constitute internal communications within the Scottish Administration and therefore are subject to the exception in regulation 10(4)(e) of the EIRs.



The public interest

34. Regulation 10(4)(e) is, as I have indicated above, subject to the public interest test contained in regulation 10(1)(b) of the EIRs, so the request might legitimately be refused only if, in all the circumstances, the public interest in making the information available was outweighed by that in maintaining the exception. I must also bear in mind the presumption in favour of disclosure in regulation 10(2)(b).
35. In relation to the public interest for the purposes of regulation 10(4)(e), the Ministers asked that I consider the initial arguments put forward by them for withholding the information under sections 28, 29 and 30 of FOISA. While recognising the public interest in having access to information in general and on energy issues in particular, they considered this to have been satisfied by publication of their finalised response to the energy review. On the other hand, they identified a number of (interlinked) countervailing public interest arguments against disclosure.
36. The Ministers advised that the formal position of any organisation in a situation such as responding to the Energy Review was the result of careful discussion and the exchange of views of stakeholders, culminating in their case in the provision of advice to Ministers who would make the final decision. It was vital, the Ministers argued, for views to be expressed and debated frankly and confidentially in such circumstances. I was advised that the public interest in high-quality policy-making and implementation demanded an ability to consider all available options, debate them rigorously, expose their merits and demerits, understand their possible implications and assess any attendant risks fully, all based on the best advice available. The Ministers considered it very likely that such exchanges and the related provision of advice would be jeopardised or constrained if officials were concerned that their comments could be made public while the issues discussed remained current in a sensitive area. It was argued that this would be to the substantial detriment of the policy process, which would not be in the public interest.



37. It was also put to me that early disclosure might distort public perceptions of advice, in particular calling into question the impartiality of advice provided or leading to the risk that officials might come under political or public pressure not to challenge ideas in the formulation of policy, leading to poorer decision making. It was also argued that premature disclosure might close off discussion and the development of options. This would not be in the public interest. While accepting that the public interest test required to be considered on a case by case basis, the Ministers argued that where the information requested related to an important process (such as discussion and the provision of advice in order to reach policy decisions, as here), there could be an inherent public interest in protection of a process (such as internal communications, where the likely effect of disclosure would be the suppression of effective communication in the future).
38. In relation to information claimed to have been provided by the DTI in confidence, the Ministers (with the support of comments received from the DTI itself) submitted that disclosure would cause real harm to the maintenance of good communications with Whitehall, on which they relied in order to keep up to date on relevant issues and to inform their response to these. They pointed out that energy policy embraced both reserved and devolved matters, creating considerable complexities and making good communication all the more important: this required a clear private space. They referred to mutual cooperation and trust between the UK Government and the devolved administrations underpinning the devolution settlement, and argued that where disclosure of information might cause damage to this relationship there was strong reason for the balance of the public interest favouring withholding of the information concerned.
39. In addition to the comments provided by the Ministers in this particular case, I have taken into account (insofar as relevant) the Ministers' further general arguments on the application of section 30(b) of FOISA, considered at length in my *Decision 089/2007 Mr James Cannell and Historic Scotland*. It will be noted that in that case I rejected the notion that constraint of the kind the Ministers appear to envisage in this case might be presumed to follow from the disclosure of documents of a particular kind, such as internal communications.
40. The information falling within the exception in regulation 10(4)(e) covers the processes of setting out the background the Ministers' participation in the UK Energy Review, determining the scope and form of that participation, consulting with relevant civil servants in the Scottish Government and taking their advice, views and opinions, drafting the consultation response, and taking the views of Ministers and Deputy Ministers on that draft.



41. I have considered the content of the information I regard as falling within the scope of the exception in regulation 10(4)(e), noting the timing of Mr Edwards' request (at which point the Ministers response to the Energy Review had not been finalised) and time at which the Ministers dealt with his request for a review (at which point the response had been submitted to the DTI only relatively recently and remained unpublished).
42. There is always a general public interest in making information held by public authorities accessible, to enhance scrutiny of decision making and thereby improve accountability and participation. I would also acknowledge a more specific public interest to allow scrutiny of the matters considered by the Ministers in drafting its response to the energy review. Given that the Ministers have a number of devolved responsibilities which relate closely to the overall reserved matter of UK energy policy, and given that the outcome of the Energy Review in turn is likely to have tangible consequences for Scotland, the matters considered by the Ministers would appear to be the legitimate subjects of public debate in a transparent democratic society.
43. That said, however, noting the actual content of the information under consideration, I have found little that would inform the ongoing public debate on any aspect of energy policy to any significant extent. I have noted the publication of the Ministers' actual response to the DTI in this case and the terms of that final response, and in all the circumstances am not convinced that publication of the internal communications withheld would add substantially to what is already in the public domain on these issues.
44. On the other hand, while I will not generally accept arguments that there is an inherent public interest in protecting certain information because it falls into a particular class (such as internal communications), I do accept that there may be a public interest in allowing Ministers and officials time and space to consider and debate a draft consultation response in order that the settled view of the Ministers can be arrived at and submitted without fear of misinterpretation or misrepresentation by the release of draft documents or the advice of officials, particularly where the form and content of the submission are still under consideration.
45. In all the circumstances of this case, having considered all the internal communications withheld (that is, all of the information withheld with the exception of that in documents 12, 24, 33 – 35 and 45) along with all relevant submissions and balanced the respective public interests supporting disclosure and the maintenance of the exception, I would conclude that the balance of the public interest favours the maintenance of the regulation 10(4)(e) exception. Therefore, the Ministers would have been justified in withholding this information under the exception in regulation 10(4)(e) of the EIRs.

Consideration of FOISA



46. As noted above, I have concluded that the information under consideration in this case is environmental information, and that Mr Edwards was entitled to receive some of it under the terms of the EIRs. Nothing in FOISA can affect the applicant's rights under EIRs and so my conclusions on the release of that information (as set out above) would remain even if I were to find that some or all of that information were exempt from disclosure under FOISA. In future, I will not always go on to consider a case under the terms of both FOISA and the EIRs if I find that one set of legislation requires disclosure.
47. Nonetheless, I am aware in this case that the Ministers disagreed with my view that the information under consideration was environmental information and chose not to apply the exemption in section 39(2) of FOISA to it. In addition, I have found a considerable quantity of the information to have been correctly withheld under the EIRs. In the circumstances, I consider it necessary to set out my consideration of the case under FOISA to demonstrate the outcome under that legislation as well as under the EIRs.
48. Should I find that a FOISA exemption does not apply to any the documents which I have already considered to be excepted under the EIR's, I will have to order release of the information under FOISA. While I have already decided that documents 12, 24, 33 – 35 and 45 are not excepted under the EIRs and therefore have to be released, for completeness I have also considered the application of FOISA to the information in these documents.
49. I note that there is a degree of overlap between the documents and the various exemptions claimed for each document, with more than one exemption being claimed in respect of some of them. If it can be demonstrated that the information could have been properly withheld under one exemption in FOISA, however, I will not be required to (and will not) go on to consider the same information under another exemption.

Section 25 (Information otherwise accessible)

50. Given that documents 16 (part), 30 – 32, 46, 48, 119 and 121 were publicly available and reasonably accessible to the applicant at the time of his request, and indeed remain so, I am satisfied that the information in them was exempt under section 25(1) of FOISA. Section 25 confers absolute exemption and therefore I am not required to consider the public interest in respect of this information.

Section 30 (Prejudice to effective conduct of public affairs)

51. The Ministers have claimed the exemption in section 30(b)(i) and (ii) for documents 1 – 5, 7, 9 – 11, 16 (part), 19, 20 – 25, 27 – 29, 33 – 35, 37 – 41, 44, 47, 49 – 73, 76 – 93, 95 – 112, 114 – 118, 120, 122 – 126.



52. Section 30(b)(i) and 30(b)(ii) of FOISA allow information to be withheld if disclosure of the information would, or would be likely to, inhibit substantially the free and frank provision of advice or the free and frank exchange of views for the purposes of deliberation, respectively.
53. Under section 30(b)(ii) of FOISA, information is exempt if its disclosure under FOISA would, or would be likely to, inhibit substantially the free and frank exchange of views for the purposes of deliberation. It is a qualified exemption and therefore subject to the public interest test in section 2(1)(b) of FOISA.
54. The arguments put forward by the Ministers for the application of these exemptions are substantially those set out in paragraphs 36 and 37 above, in relation to the constraining effects that could be expected to follow from the premature release of information of this kind. As will be noted from paragraph 39, I have also taken into account the Ministers subsequent general comments on the application of section 30(b), as described and considered more fully in my *Decision 089/2007*.
55. It should be apparent from my previous decisions on the application of the exemptions in section 30(b) (and in particular *Decision 089/2007*) that before I will accept that these exemptions apply I require authorities to provide substantial reasoned arguments, specific to the information under consideration, that disclosure carries with it a real risk or likelihood that actual harm of the relevant kind will occur at some time in the near (certainly the foreseeable) future, not simply that the harm in question is a remote possibility. For the purposes of section 30(b), the harm must be of some real and demonstrable significance. In this case, having considered the relevant information and submissions in the context of Mr Edwards' request (taking due account of the timing as set out in paragraph 41 above), I am satisfied that substantial inhibition to the future exchange of views and related provision of advice in equivalent situations could have been expected to follow had the Ministers been required to release the majority of the information withheld under either or both of the section 30(b) exemptions.
56. I do not, however, accept the Ministers' arguments in respect of documents 24 and 33 – 35, which were all withheld under section 30(b)(ii) only. As indicated above, these documents did not originate from the Ministers.
57. As I have indicated above, I expect any public authority relying on this exemption to be able to justify their use by explaining where the inhibition is likely to occur, who will be affected, and why. The authority should be able to be specific about the inhibition resulting from disclosure of the information withheld. These documents clearly are not about internal deliberation within the Scottish Administration and yet I have been given no argument for their exemption more specific than the general ones summarised above.



58. Having examined the content and context of these drafts I note that the SSDF set a deadline for 4 April 2006 for the Ministers to provide its comments and actually submitted its final response to the DTI during April 2006. As such, I cannot see how, at the time of Mr Edwards' request in May 2006, the release of that draft would have substantially inhibited the free and frank exchange of views for the purposes of deliberation.
59. The content of the draft response are of a routine and unsurprising nature and I cannot accept that disclosure would ever have been likely to have had a substantially inhibiting effect on the SSDF providing or exchanging similar information in future. In any event, circulation of this draft appears to have been wide, with no indication that its contents were confidential or otherwise sensitive. The language within the SSDF draft submission is neither free nor frank but the draft circulated appears to be almost the final version of the document. Further, I have seen no evidence, and none has been provided, to suggest that the SSDF draft submission influenced or affected the Ministers' own response.
60. Neither am I convinced that the release of the draft SE response would have an inhibiting effect. SE is listed in paragraph 84 of schedule 1 to FOISA and, being subject to obligations FOISA entails, should have been aware that both its own information and the information it submitted to the Ministers could have been considered for release under FOISA. Again, there is nothing to suggest that SE considered this draft to be confidential or otherwise sensitive. Again, the draft response is almost complete and does not appear to contain free or frank opinion or views. There is nothing to suggest that its contents had any bearing on the Ministers' own response
61. As I have indicated, the Ministers have not provided any specific evidence or arguments to suggest that either the SSDF or the SE would be inhibited by the prospect of disclosure from providing them with similar information in the future. In any event, while the Ministers may find it helpful to be party to such exchanges there is nothing to suggest that they are a necessary, or even a particularly important, element of the business of government. In the circumstances, therefore, I am not persuaded that substantial inhibition would, or would be likely to occur if this information were to be released.

Public interest test

62. I have accepted that the Ministers applied section 30(b)(i) and/or (ii) correctly to documents 1 – 5, 7, 9 – 11, 16 (part), 19, 20 – 23, 25, 27 – 29, 37 – 41, 44, 47, 49 – 73, 76 – 93, 95 – 112, 114 – 118, 120, 122 – 126. However, the exemptions under section 30(b) of FOISA are qualified exemptions, which means that information exempt under these provisions must still be disclosed unless the public interest in disclosure is outweighed by the public interest in maintaining the exemption.



63. I have considered all relevant public interest arguments in relation to the contents of these documents fully at paragraphs 34 – 45 above and consider the same considerations to apply equally for the purposes of section 30(b) of FOISA. In all the circumstances, therefore, I find that the Ministers were justified in withholding the documents listed in paragraph 62 above under one or both of the exemptions in section 30(b).
64. As I have decided that all of the documents to which the Ministers have applied the exemptions in section 29(1)(a) and 29(1)(b) of FOISA are in any event exempt under the exemptions in section 30(b), I will not go on to consider the application of the section 29 exemptions in this decision.

Section 28 (Relations within the United Kingdom)

65. Section 28(1) of FOISA provides that information may be withheld if its disclosure would, or would be likely to, prejudice substantially relations between any administration in the United Kingdom and any other such administration. The relevant administrations for the purposes of this section are the Government of the United Kingdom and the three devolved administrations within the UK.
66. The documents exempted under this section and not already accounted for under section 30(b)(i) and (ii) (discussed above) are numbers 12, 14, 16 (part), 19b, 26 and 45 (part). The Ministers claimed these contained confidential material provided by the Department for Trade and Industry (DTI) in connection with the UK Energy Review. It should be noted that the relevant part of document 16 for these purposes comprises documents 12 and 14, while the relevant part of document 45 duplicates document 14: my conclusions in respect of documents 12 and 14, therefore, will apply equally to documents 16 (part) and 45 (part) and I will not consider the latter two documents further for these purposes.
67. The arguments presented by the Ministers for applying this exemption are basically those contained in paragraph 38 above, in other words that disclosure would place in jeopardy vital lines of communications between the Scottish Administration and Whitehall.
68. The DTI is part of the Government of the United Kingdom and the Ministers are the Scottish Administration, so I am satisfied that these bodies are both administrations covered by section 28(1) of FOISA.



69. I have examined these documents in detail and can find no protective markings to suggest that they were to be regarded as confidential, or anything within the documents or the correspondence relating to them to suggest that the information was supplied to the Ministers under an obligation of confidentiality. In one instance a document is marked “restricted” but my understanding is that this is not the same as confidential. I must bear in mind, however, that the relevant test for the application of section 28(1) is not one of confidentiality, but rather one of substantial prejudice to relations between the relevant administrations as a consequence of disclosure. For there to be such prejudice, the authority must satisfy me of a real risk of actual, significant harm as a consequence of disclosure, occurring at a point in the near (certainly the foreseeable) future.
70. Having examined the contents of the documents withheld under this exemption, I accept that the information in question reveals a level of detail in the DTI’s background work on the Energy Review which may have gone beyond what was required to assist the Ministers in draft their response to the consultation. On the other hand, the information is routine in nature, expressed in measured language and descriptive of work being carried out as part of the Energy Review rather than containing anything by way of opinion, views or advice. There is nothing in the Ministers’ submissions on section 28 which indicates to me that any particular sensitivity should attach to this information and, while I accept the general force of the Ministers arguments on this exemption and their relevance to many situations, it is far from obvious to me why, at the time the Ministers dealt with Mr Edwards’ request, the release of this information should have carried with it any risk of compromising relations between the Ministers and the UK Government.
71. Consequently, given the nature of the information and the timing of Mr Edwards’ request, I do not accept that relations between the Scottish and United Kingdom would have been, or would have been likely to be, prejudiced substantially were these documents to have been released, and therefore I do not accept that the Ministers were justified in claiming section 28(1) of FOISA. As I am satisfied that the exemption was not applied correctly, I am not required to (and will not) go on to consider the application of the public interest test to the information.
72. In conclusion, I would emphasise that my reasons for accepting that certain information was correctly withheld by the Ministers are based very much on the circumstances applying at the time the Ministers dealt with Mr Edwards’ request, in particular the time of their review. Given the passage of time, it is entirely possible that I would now consider the arguments for withholding to have diminished and reach a different decision.



Decision

I find that the Scottish Ministers (the Ministers) failed to comply with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request from Mr Edwards. In failing to deal with a request for environmental information under the EIRs, the Ministers failed to deal with the request in accordance with regulation 5(1) of the EIRs.

I also find that the Ministers failed to comply with the EIRs (and in particular regulation 5(1)) in withholding from Mr Edwards under regulation 10(4)(e) the information in documents 12, 14, 24, 26 and 33 – 35. However, I find that the Ministers complied with the EIRs by withholding from Mr Edwards the remainder of the documents under regulation 10(4)(e).

I also find that the Ministers failed to comply with Part 1, and in particular section 1(1), of the Freedom of Information (Scotland) Act 2002 (FOISA) in withholding from Mr Edwards documents 12, 14, 19b and 26 under section 28(1), and documents 24 and 33 – 35 under section 30(b)(ii). However, I find that the Ministers complied with Part 1 of FOISA by withholding from Mr Edwards the remainder of the documents under either section 28(1) or section 30(b) and/or (ii).

I therefore require the Scottish Ministers to release documents 12, 14, 19b, 24, 26 and 33 – 35 to Mr Edwards, within 45 days after the date of intimation of this decision notice.

Appeal

Should either Mr Edwards 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
10 March 2008



Appendix

Relevant statutory provisions

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-

- (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;
- (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;
- (d) reports on the implementation of environmental legislation;
- (e) costs benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in paragraph (c); and



- (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in paragraph (a) or, through those elements, by any of the matters referred to in paragraphs (b) and (c);

...

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.

...

6 Form and format of information

- (1) Where an applicant requests that environmental information be made available in a particular form or format, a Scottish public authority shall comply with that request unless-

(...)

- (b) the information is already publicly available and easily accessible to the applicant in another form or format.

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-

...

(e) the request involves making available internal communications.

...

17 Enforcement and appeal provisions

(1) The provisions of Part 4 of the Act (Enforcement) including schedule 3 (powers of entry and inspection), shall apply for the purposes of these Regulations as they apply for the purposes of the Act but with the modifications specified in paragraph (2).

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.

2 Effect of exemptions

(1) To information which is exempt information by virtue of any provision of Part 2, section 1 applies only to the extent that –

(a) the provision does not confer absolute exemption; and

(b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

25 Information otherwise accessible

(1) Information which the applicant can reasonably obtain other than by requesting it under section 1(1) is exempt information.



28 Relations within the United Kingdom

- (1) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice substantially relations between any administration in the United Kingdom and any other such administration.

30 Prejudice to effective conduct of public affairs

Information is exempt information if its disclosure under this Act-

...

- (b) would, or would be likely to, inhibit substantially-
- (i) the free and frank provision of advice; or
 - (ii) the free and frank exchange of views for the purposes of deliberation; or.

...