Decision Notice

Decision 105/2008 Mr Rob Edwards and the Scottish Ministers

Handling of a previous information request

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Summary

Mr Rob Edwards requested from the Scottish Ministers (the Ministers) copies of correspondence relating to the handling of a previous information request made by him. The Ministers responded by advising Mr Edwards that the information was considered exempt from disclosure in terms of sections 25, 30(b)(i) and (ii), 38(1)(b) and 39(1) of FOISA. Following a review, Mr Edwards remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the Ministers had partially failed to deal with Mr Edwards' request for information in accordance with Part 1 of FOISA by misapplying the exemptions in sections 30(b)(i) and (ii) and 35(1)(g) of FOISA to the majority of the information withheld. The Commissioner also found that the Ministers had partially failed to deal with Mr Edwards' request in line with the Environmental Information (Scotland) Regulations (the EIRs), in particular regulation 5(1). He required the Ministers to disclose the majority of the information to Mr Edwards.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2 (Effect of exemptions); 14(1) (Vexatious or repeated requests); 30(b)(i) and (ii) (Prejudice to effective conduct of public affairs); 35(1)(g) and (2)(a) (Law enforcement); 38(1)(b), (2)(a)(i) and (b) (Personal information).

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); 10(1), (2) and (4)(d) and (e) (Exceptions from duty to make environmental information available).

Data Protection Act 1998 (the DPA) sections 1(1) (Basic interpretative provisions – definition of personal data); Schedule 1 Part I (The data protection principles: the first principle).

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

Background

1. On 14 February 2007, Mr Edwards wrote to the Ministers requesting the following information: "copies of all emails, memos, correspondence or other documents relating to my request for information on flights within mainland Britain on 25 October 2006. I wish the information to encompass the handling of my request in October, November, December and January, and any responses or reactions to date to my article about the Executive's flights in the Sunday Herald on 21 January 2007."

2. The Ministers responded on 14 March 2007. In their response, the Ministers confirmed that they held the information in question but claimed that the majority of it was exempt from disclosure in terms of sections 25, 30(b)(i) and (ii), 38(1)(b) and 39(1) of FOISA. The Ministers did agree to release some documents which comprised exchanges between Mr Edwards and civil servants. They advised Mr Edwards that they held no information in relation to the part of his request regarding responses or reactions to his newspaper article.

3. On 14 March 2007, Mr Edwards wrote to the Ministers requesting a review of their decision. Mr Edwards advised the Ministers that he was not concerned with the information withheld under section 25 of FOISA (information otherwise accessible).

4. The Ministers notified Mr Edwards of the outcome of their review on 17 April 2007. They advised Mr Edwards that they were prepared to release some further documents to him. However, in relation to the remaining information the Ministers advised Mr Edwards that they were upholding the original decision, and additionally that they now considered the exemption in section 30(a) of FOISA to apply to some of the information.

5. On 19 April 2007, Mr Edwards wrote to the Commissioner stating that he was dissatisfied with the outcome of the Ministers' review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA. Mr Edwards repeated that he was not concerned with any information withheld under section 25 of FOISA and therefore any documents to which this exemption has been applied have not been considered as part of this decision. Mr Edwards did not ask the Commissioner to investigate the aspect of his request relating to responses to his newspaper article.

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 the Commissioner for a decision only after asking the authority to review its response to that request.

Investigation

7. On 10 May 2007, the Ministers were notified in writing that an application had been received from Mr Edwards and asked to provide the Commissioner with any information withheld from the applicant. The Ministers responded with the information requested and the case was then allocated to an investigating officer.

8. The investigating officer subsequently contacted the Ministers providing them with 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. In particular, the Ministers were asked to justify their reliance on any provisions of FOISA they considered applicable to the information requested.

9. The Ministers responded by providing submissions on their application of the exemptions in question and, where appropriate, their application of the public interest test contained in section 2(1)(b) of FOISA. The Ministers also provided further arguments in support of their application of the exemptions under section 30(b) of FOISA, arguing in addition that section 35(1)(g) (read in conjunction with section 35(2)(a)) and (in respect of one document) section 38(1)(b) of FOISA applied to the information withheld. They withdrew their earlier reliance on sections 30(a) and 39(1). They also suggested that the request was vexatious in nature.

10. The investigating officer subsequently advised the Ministers that the Commissioner, having considered the documents withheld in this case, considered much of the withheld information to be environmental and therefore subject to the EIRs. The Ministers were asked to comment on this point and provide submissions on whether they considered the information withheld to fall under the scope of any of the exceptions contained in the EIRs. They were also asked if they wished to rely on section 39(2) of FOISA, which allows Scottish public authorities to exempt information from disclosure under FOISA if it is environmental information which the authority is obliged to make available to the public in accordance with the EIRs.

11. In their response, the Ministers stated they did not consider any of the requested information to be environmental and therefore did not wish to apply the exemption in section 39(2). However, they also submitted that should the Commissioner disagree with their position and proceed to deal with the case under the EIRs, they would apply the exceptions at:

    i) regulations 10(4)(d) and (e) to the documents to which they had applied sections 30(b) and 35(1)(g) of FOISA; and

    ii) regulation 11(2) to the document to which they had applied section 38(1)(b) of FOISA.

Commissioner's analysis and findings

12. In coming to a decision on this matter, the Commissioner has considered all of the submissions and other information that have been presented to him by both Mr Edwards and the Ministers and he is satisfied that no matter of relevance has been overlooked.

FOISA or EIRs?

13. In the Commissioner's *Decision 218/2007 Professor A D Hawkins and Transport Scotland*, he considered the relationship between FOISA and the EIRs at some length. Broadly, the Commissioner's 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)
- The Commissioner is entitled (and indeed obliged) where he considers 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.

14. The implication of the Hawkins Decision for the Commissioner's consideration of Mr Edwards' request is therefore that the Commissioner must first determine whether the information withheld is environmental information. If it is, he must go on to consider the Council's handling of the request both in terms of the EIRs and FOISA.

15. Environmental information is defined in regulation 2(1) of the EIRs (the definition is reproduced in full in the Appendix). 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 the EIRs.

16. The Ministers submitted that the request in this case was only for information relating to the handling of a previous FOISA request and did not relate directly to the information contained in the documents under the previous request.

17. The Ministers understood the Commissioner to have reached the conclusion that certain of the withheld information was environmental on the basis that it was information on "activities", as more particularly described in regulation 2(1)(c). They also referred to a decision of the European Court of Justice (No 316/01) which decided that there were limitations to the definition of "environmental information" and that certain information was not within the definition even though it had a remote connection with safeguarding the environment. The Ministers submitted that the EU Directive on public access to environmental information, whether in its current version from which the EIRs were derived or in the 1990 version considered by the Court of Justice, was not intended to give a general and unlimited right of access to all information held by authorities which had a connection, however minimal, with one of the environmental factors mentioned in the definition of environmental information.

18. The Ministers also pointed out that guidance on the EIRs produced by the UK Department for Environment, Food and Rural Affairs (DEFRA) stated that the Directive imported a concept of "remoteness" to the definition of environmental information, indicating that where the information was too remote from the effect or likely effect on the environment then it was not environmental information. In support of this argument, the Ministers referred to a decision by the Information Tribunal in appeal number *EA/2007/0072 The Department for Business, Enterprise and Regulatory Reform and Friends of the Earth*.

19. The Ministers also referred to guidance produced by the UK Information Commissioner on the definition of "environmental information" and, in particular, the advice on the definition of "activities". Additionally, the Ministers referred to the Aarhus Convention Implementation Guide. In their view, the relevant discussion in the Guide suggested that the definition was intended to catch the more "obvious" functions of a public authority. For an activity to be dealt with under the EIRs it would have to be shown that it would, or would be likely to, affect the environmental factors set out in paragraphs (a) and (b) of the definition of environmental information, and they could not accept that the process of handling this particular request for information could be sufficiently connected with any such effect. Given the subject matter of the original request for information (ministerial flights, an incidental activity of Ministers in carrying out their routine functions), the information was too far removed from any possible effect on the environment. In addition, they submitted that any elements of the withheld information that could be said to relate to the environment were incidental to the subject of the request.

20. The Commissioner's view is that none of these points detract from his conclusion that some of the information is environmental and should have been considered in terms of the EIRs. The fact that the request was not manifestly for environmental information is not the issue. What matters is whether the information which is involved in responding to that request is environmental. Mr Edwards was not in a position to know what, if any, information was held which fell within the terms of his request. Only by considering the content, as well as the context, of the information involved can a conclusion be arrived at as to whether it contains environmental information. In this case the context of this request, albeit that it relates directly to the handling of an information request, is Ministerial and Civil Service travel. The information contains comment and discussion on media and handling issues, lines to take and advice to Ministers. It anticipates follow up questioning about environmental impact.

21. The Ministers have argued that such travel activity is incidental, the impact on the environment is minimal, and the relationship of the information to the environment is remote. However, the Commissioner's view is that the EIRs clearly apply when an authority holds environmental information. Some of the passages within the documents gathered in response to this particular request unmistakeably include environmental information, for example in relation to the commitment to reduce CO_2 emissions and relative targets, which is why this information must also be considered under the EIRs. In this case the original information request was in respect of Ministerial travel. The carbon emissions from such travel clearly have an environmental affect. Reduction in such travel would help safeguard the environment – but it could not be claimed, of itself, to have a significant affect. The fact that travel by Scottish Ministers does not have a major impact on global warming does not mean that the information ceases to be environmental.

22. As previously indicated, the definition of what constitutes environmental information should not be viewed narrowly. The Commissioner regards a significant proportion of the documents under consideration as containing information on measures, including activities, policies, plans and programmes, which would be likely to affect the elements and factors referred to in part (a) and (b) of the definition of environmental information. He does not accept that this information becomes any less environmental in character by virtue of the circumstances in which it came to be considered by him in this case (i.e. Mr Edwards' request on the handling of his earlier information request). Considerations of remoteness may be relevant in appropriate circumstances, but he does not consider them to be so given the character of the information in question.

23. The Commissioner is therefore unable to agree with the Ministers' arguments that none of the information under consideration is environmental.

24. Having concluded that some of 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, the Commissioner must now go on to consider how the Ministers dealt with (or should have dealt with) Mr Edwards' request under both FOISA and the EIRs. In doing so, the Commissioner will consider the submissions made by the Ministers in relation to sections 30 (b), 35(1)(g) (read in conjunction with section 35(2)(a)) and 38(1)(b) of FOISA and regulations 10(4)(d) and (e) and 11(2) of the EIRs, taking account also of all other relevant information provided by both the Ministers and Mr Edwards.

Information outwith the scope of the request

25. The Ministers submitted that several of the documents that had been withheld were outwith the scope of Mr Edwards' request. Before going on to consider the Ministers' application of the exemptions under FOISA or exceptions under the EIRs, the Commissioner gave consideration to whether these documents did indeed fall outwith the scope of the request.

26. Having reviewed the documents in question, the Commissioner is of the opinion that document T119, pages 10 and 11 of document T160 and document T164 are outwith the scope of the request. The information in these documents relates to a parliamentary question and to internal cost centre codes and not to Mr Edwards' previous information request. The Commissioner also considers that document T169, which relates to expenses, should also be considered outwith the scope of the request. Additionally, the Commissioner considers the final two pages of document T163 are outwith the request's scope.

27. Documents 3 and T52 comprise emails, a media briefing note concerning the response to Mr Edwards' previous request and a Ministerial briefing note (with annex) on the Scottish Executive Travel Survey. The Ministers argued that only the emails and media briefing note came within the scope of the current request. However, the Commissioner takes the view that all of the constituent parts of these documents are within the scope of this request. The email covering the Ministerial briefing note and annex clearly makes reference to Mr Edwards' previous information request and appears to show a relationship between the publication of the Survey and the issuing of a response to Mr Edwards. Given this apparent correlation, the Commissioner has concluded that the Ministerial briefing and annex should be considered as part of this investigation and decision.

Duplicate documents

28. The information supplied to the Commissioner by the Ministers comprised approximately 160 documents. The Ministers helpfully provided a schedule showing where a number of these documents had been duplicated. These duplicate documents have been discounted from consideration in this decision. The documents under consideration are identified in the schedule of documents at the end of this decision.

Consideration of section 30(b)

29. The exemptions under section 30(b) of FOISA are qualified exemptions, which means that where a public authority finds that certain information falls within the scope of the exemption it is then required to go on to consider the application of the public interest test laid down in section 2(1)(b) of FOISA.

30. In order for the Ministers to be able to rely on the exemptions laid down in section 30(b)(i) and 30(b)(ii) of FOISA, they would have to show that the disclosure of the information under FOISA 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, respectively.

31. As the Commissioner has said in previous decisions, it his view that the standard to be met in applying the tests contained in sections 30(b)(i) and 30(b)(ii) is high. In applying these exemptions, the chief consideration is not whether the information constitutes advice or opinion, but whether the release of the information would, or would be likely to, inhibit substantially the provision of advice or the exchange of views. The Ministers' own guidance to their staff on the application of section 30(b) points out that the word "inhibit" suggests a suppressive effect, so that communication would be less likely, more reticent or less inclusive.

32. In their submissions, the Ministers pointed out that the information being withheld consisted of a number of documents created during the process of responding to Mr Edwards' previous request of October 2006. They stated that it contained a vast number of emails, submissions and spreadsheets, principally concerned with gathering together the information required by the applicant and seeking clarification of details before issuing a fully informed response.

33. It was also stated that the content of the information consisted of a mixture of advice, views, opinions and factual content, some of which had in effect been released to Mr Edwards in responding to his original request.

34. The Ministers considered that the metadata request (as it considered Mr Edwards' request to be) in effect asked for the release of the internal workings of the Scottish Government in responding to an information request. Given their full response to the initial request, they found it difficult to see how the release of this background material could offer anything new to the applicant.

35. The Ministers also stated that much of the information constituted raw data and included material beyond the scope of the request. Accordingly, it was considered imperative to check this data before responding to the applicant in the interests of providing a full and accurate answer, as the Scottish Government would not want to provide inaccurate information to an applicant.

36. The Ministers submitted that their general rationale for the application of these exemptions was that an organisation should have the ability, and continue to have the ability, to communicate freely and frankly. They believed that, particularly in the context of this request, disclosure of the information would significantly prejudice the effective conduct of public affairs by being likely to inhibit substantially the free and frank provision of advice and exchange of views for the purpose of deliberation.

37. In their submissions relating to the harm test applicable to these exemptions, the Ministers stated that (whilst accepting that all recorded information was subject to FOISA) they could not accept that there would be no impact on officials' expectations and work practices if it was generally understood that such information as was at issue here would routinely be made available. They considered it highly likely that officials would become extremely circumspect about creating the secondary information inevitably generated in the course of responding to requests under FOISA, which in turn would raise questions about the resulting detail and accuracy of the information created as well as that supplied, along with (more fundamentally, it was submitted) issues about the quality of the public record.

38. In relation to this particular request, the Ministers stated that a substantial quantity of documentation had been created, including draft responses, spreadsheets containing the actual information and numerous emails requesting clarification and confirmation of the data. They suggested that if officials believed such information could be placed in the public domain as standard practice, far less secondary material would be produced with the effect that the response to the original request would not have been as full or accurate as it had been. They considered it unlikely that the verification process would be as fully documented if disclosure were considered likely, given that inaccuracies might be seen to reflect poorly on record keeping practices, with detrimental effects on similar processes carried out in the future.

39. The Ministers have previously provided general submissions on the arguments relied upon in justifying their position in relation to the section 30(b) exemptions.

40. The Commissioner has addressed these additional, general submissions already in paragraphs 23 to 31 of *Decision 089/2007 Mr James Cannell and Historic Scotland*. These general arguments are not specific to the information under consideration in this case and the Commissioner does not discuss them further here (except where revised arguments are presented for the first time – see below), other than to say that they have been considered fully, together with the case-specific arguments submitted by the Ministers, in reaching his decision on the applicability of the exemptions in section 30(b) of FOISA to the information under consideration here. In particular, it should be clear that the Commissioner cannot as a rule accept an automatic presumption that harm will be caused by the release of information simply because it falls into a particular category

41. In *Decision 166/2006 Mr Martin Williams of The Herald and the Scottish Executive*, the Commissioner discussed in detail his views on the issues that should be considered in deciding whether the exemptions in section 30(b)(i) and (ii) can apply. These are not repeated in full in this decision notice, but they can be summarised as follows:

- Information must be treated on a case-by-case basis: release of information in one case need not imply release in another case
- The nature and content of the information in question must be considered, rather than considering "advice" or "exchange of views" as categories of information
- If the information withheld does not in itself constitute advice or an exchange of views, the argument for exemption under section 30(b) may be weaker.

42. The Commissioner's consideration of the Ministers' application of the exemptions under section 30(b) has also been informed by the decision in the Court of Session appeal: *Scottish Ministers v Scottish Information Commissioner (re Alexander's Application) 2007 S.L.T. 274*. The Court's conclusions made clear that the actual content of the information must be considered in determining whether disclosure would be likely to have a substantially inhibitive effect, rather than proceeding on an assumption that disclosure of certain types of information, such as advice to Ministers, would always lead to future substantial inhibition for the purposes of these exemptions.

43. In their correspondence with the Commissioner, the Ministers supplied a new version of their general arguments in relation to section 30(b) of FOISA. The Commissioner has addressed below any new arguments raised. In summary the new arguments raised by the Ministers are as follows:

- Conflation of the harm test and the public interest test;
- Additional arguments on the difficulties in predicting future inhibition;
- Parliamentary discussion and class based approach;
- Conflation of sections 29 and 30;
- Court of Session rulings;
- Information Tribunal decisions.

Conflation of the harm test and the public interest test

44. The Ministers identified a number of the Commissioner's decisions where they considered that the harm test and the public interest test had been conflated and provided examples of phrases in decisions to support their assertion. The Commissioner understands that the Ministers want to ensure that the consideration of section 30(b) is a two stage process whereby the harm test is considered first and, if upheld, then the public interest test is considered.

45. The harm under section 30(b) of FOISA referred to by the Ministers which would, or would be likely to, result from disclosure must be at the level of causing substantial inhibition to the free and frank provision of advice or the free and frank exchange of views for the purposes of deliberation. It is important to recognise that this is not a class based exemption such that any information which is classed as the provision of advice or exchange of views attracts the exemption. It has to be the case that disclosure would, or would be likely to, inhibit substantially the free and frank nature of the advice or views.

46. Although the term "inhibit substantially" is not defined in FOISA, the Commissioner takes the view that in the context of these exemptions the word "inhibit" means to restrain, decrease or suppress the freedom with which opinions or options are expressed. Where an authority is seeking to exempt information under section 30(b)(i) or (ii), the primary consideration is not just whether any inhibition would, or would be likely to, occur but whether this would be substantial. In other words it would not be enough simply to show that disclosure might cause officials to choose their words more carefully or to be somewhat more circumspect about opinions proffered, but rather that they would be (or would be likely to be) substantially inhibited to such a degree that, for example, the nature of the advice was materially affected or even that views were not proffered at all.

47. In his earlier decisions, the Commissioner provided guidance on the factors which should be considered when applying these exemptions which include:

- The subject matter of the advice or opinion
- The content of the advice and opinion itself
- The manner in which the advice or opinion is expressed and

- Whether the timing of release is a relevant factor.

48. The Ministers contend that these matters are more relevant to the application of public interest test and that, in many decisions, the Commissioner has conflated the two tests and by doing so has defeated the purpose of the Scottish Parliament in enacting a two stage process.

49. The Commissioner disagrees with this contention. The Commissioner clearly recognises that that this is a two stage process and has identified the matters referred to in paragraph 47 as relevant to the first stage which is to establish whether the exemption applies at all - if it does not the second stage of considering the public interest is not reached.

50. The Commissioner is concerned that the approach taken on behalf of the Ministers is effectively to argue that, when dealing with any information which contains advice or views, he should simply accept that disclosure of the information has, or would be likely to have, a substantially inhibiting effect and move on to consider the public interest test. In his view, this approach is unjustified. It could have the effect of taking a de facto class based approach to those communications providing advice or exchanging views; or dispensing with any test as to what constitutes 'substantial'; or accepting, without evidence, that substantial inhibition would occur. The Commissioner does not accept that any of these courses of action are correct. Rather, the onus is upon the authority to demonstrate why it believes that disclosure would, or would be likely to, have the effect of substantial inhibition. If it cannot, then the exemption does not apply.

Difficulties in predicting future inhibition

51. The Ministers argued that they knew from their intimate knowledge of the Government and from conversations with staff that they often felt much more inhibited in what they wrote down and that sometimes they had been asked for oral rather than written advice or views on sensitive topics. They admitted that this was not concrete evidence, but argued that it was impossible to provide evidence of advice or views being inhibited, or the provision of oral advice where written advice would have been provided before, i.e. to prove a negative.

52. The Ministers argued that often civil servants could not anticipate whether the advice or views provided in any particular instance would be likely to be released or withheld. They did not consider the Commissioner's Decisions in individual cases to assist in this, save that where the views were more trenchant there seemed to be a slightly increased chance that the information might be exempt. They suggested that their own proposed approach to section 30, as articulated in earlier submissions, would be easier to understand and apply, and more consistent.

53. In the Commissioner's view, this would be to give the benefit of the doubt to the authority which is neither justified nor necessary. Contrary to the conclusions of the Ministers regarding previous decisions, the Commissioner has made it clear that he recognises that certain information, because of its content, the circumstances in which an exchange took place or the timing of disclosure etc., is worthy of exemption. He has drawn attention in the past to the sensitivity of the matter being discussed, and whether discussion is still under way. He has distinguished between advice which is required to be provided and by contrast that which might simply not be volunteered. In so doing he has attempted to explain how the harm test is being considered in the circumstances of a case.

54. The argument has elsewhere been put to the Commissioner that officials are generally not going to familiarise themselves with the circumstances of a case which has led to information being released and will simply note that internal communications are likely to be released and this will be very likely to inhibit the way in which they give advice or views in the future. However, in the Commissioner's view, professional civil servants should be well able to understand that some information of a type will be released and other of the same type will be withheld depending on circumstances.

55. In any case, it cannot be expected that the freedom of information regime will leave previous working assumptions untouched. However, evidence of change does not necessarily mean evidence of harm (by way of substantial inhibition). The Commissioner reiterates that he has not been provided with any evidence to suggest that civil servants have acted differently, to the significant detriment to the quality and nature of the advice provided and views offered, on the grounds of knowing that the information could be disclosed in due course under FOISA. He does not accept that a substantial increase in reticence in this area is something it would not be possible to evidence, particularly given the time that has now elapsed since the coming into force of FOISA.

Parliamentary discussion and class based approach

56. The Ministers did not consider Parliament's views on the proper interpretation of section 30 could be gleaned from its relative lack of debate on the section during the legislative process. They stated that they did not argue for a class based approach in dealing with cases under section 30, but rather that in his interpretation of section 30 the Commissioner was applying tests which were not set out in FOISA and in relation to the harm test was expecting evidence (in asking them to prove a negative) it was not possible to provide. The Ministers contended that the Commissioner's approach meant that the exemption would seldom be engaged and as a result the public interest test would seldom be applied. In their view, by properly following the provisions of FOISA, the exemption would be engaged more frequently and the public interest test would then be the determining factor as to whether the information should be disclosed.

57. The Commissioner takes the view that Parliament was reassured that this was one of the content based exemptions for which authorities would have to evidence significant harm by way of substantial prejudice or inhibition. The fact that the public interest cannot be considered if authorities are unable to demonstrate, in respect of section 30(b), that substantial inhibition has occurred is no different from any other content based exemption. Having given consideration to the additional submissions provided by the Ministers, the Commissioner is unable to agree with their assertion that his decisions go beyond what was the policy intention of section 30(b). His approach has sought to indicate the types of matters which may be taken into account by authorities, and by him, when attempting to establish whether substantial inhibition would or would be likely to occur. He is clear that it was not intended that the harm test should be lowered, in the case of section 30, to be met, for example, by an untested statement of apprehension or assertion of potential harm.

Conflation of sections 29 and 30

58. The Ministers disagreed with the Commissioner's previous suggestions that their arguments conflated sections 29 and 30 when making reference to the importance of safeguarding the important policy and decision making processes. They contended that in practice they often had to apply sections 29(1)(a) and 30(b) to the same information and often the arguments in relation to these exemptions were very similar, pointing out that the Government's core business was policy and decision making and so the material to which they applied section 30 would almost always relate in some way to policy and decision making.

59. The Commissioner has noted the Ministers' clarification of their views concerning this aspect of their submissions and has taken this into account in reaching a decision in this case.

Court of Session rulings

60. The Ministers disagreed with the Commissioner's view that their position did not reflect recent Court of Session rulings, arguing that they were adopting the approach endorsed by the Court of Session in the case of *Scottish Ministers v Scottish Information Commissioner (re Alexander's Application)*, "…namely, (1) that each case was to be assessed on the facts and circumstances of that case and (2) that the proper approach was to assess whether the release of the advice or opinion contained within each document would be capable of having an inhibiting effect. That approach acknowledges and applies the principle that a piece of information viewed in context may qualify as being non-disclosable, albeit viewed in isolation it might have appeared to be innocuous."

61. The Ministers submitted that the Court ruling did not fully consider the section 30(b) exemption. Paragraph 18 had started by noting that the Commissioner, in giving reasons for his decision, was restrained by the need to avoid disclosing information which ought not to be disclosed. It had then gone on to say "That restraint also affects the ability of the court, if provided only with the respondent's decision, to supervise the exercise by him of his powers. …… In these circumstances the scope for detection of errors of law is limited." The Ministers argued that this left the door open for the Court to consider section 30(b) in more detail in another case, provided it could have sight of the relevant papers.

62. The Commissioner notes the Ministers' views in this regard. However, he contends that the decision of the Court of Session in the Alexander case supports the approach that he has adopted in previous decisions. The judgment in the Alexander case contains nothing to suggest that the Commissioner's approach in that and other relevant decisions was incorrect.

Information Tribunal decisions

63. The Ministers acknowledged that in support of his arguments the Commissioner has drawn their attention to two decisions of the Information Tribunal – *The Department for Education and Skills v the Information Commissioner and the Evening Standard (Appeal No. EA/2006/0006)* and *The Department for Work and Pensions v the Information Commissioner (Appeal No. EA/2006/00400)*. They accepted the point that similar arguments to theirs had been advanced in these cases and that the relevant UK Departments had lost their appeals. However, they pointed out that neither of these appeals related to the UK equivalent of the section 30(b) exemption – they were in fact about the policy formulation exemption at section 35(1)(a) of the Freedom of Information Act 2000 (the equivalent of section 29(1)(a) of FOISA). Therefore, the Ministers contended that it was wrong to place too much reliance on these decisions, which in any event were made under the UK Act and based on circumstances particular to those cases.

64. The Commissioner notes the comments made by the Ministers. However, the Commissioner's reasoning for identifying these Tribunal decisions was to provide guidance to the Ministers that such general arguments would not be upheld and to encourage consideration of withheld information on its merits.

Conclusion on section 30(b)

65. Having considered the information withheld in this case, the Commissioner is unable to conclude that all of the documents would engage the exemptions in section 30(b) of FOISA. Much of the information consists of background data or email exchanges concerning updates and clarification or verification of matters relating to progress in responding to Mr Edwards' initial request. Others simply supply portions of the information to be provided in the final response. The vast majority is innocuous in nature and contains nothing that is contentious, sensitive or controversial.

66. The Commissioner is also unable to accept the Ministers' assertions that release of this type of information will invariably lead to less, or less accurate, information being created or provided to applicants in future: indeed, the Commissioner is surprised by the Ministers' suggestion that this will be the likely reaction of officials should disclosure take place. In particular, he sees no reason why the act of verification, which to him appears to be a perfectly routine administrative process, should be treated with the degree of sensitivity the Ministers appear to suggest it merits.

67. Having considered the Ministers' arguments, therefore, the Commissioner is unable to accept that release of the majority of the information withheld in this particular case 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, as laid down in section 30(b)(i) and 30(b)(ii) of FOISA.

68. The Commissioner does, however, consider that these exemptions are engaged in relation to the draft responses to Mr Edwards and draft minutes to Ministers. The Commissioner considers that officials should be permitted some breathing space to consider, review and redraft such communications and that substantial future inhibition might be expected to result if such documents were released. Given that the Commissioner has upheld the application of the exemption in relation to these specific documents, he has gone on to consider the public interest test, as required by section 2(1)(b) of FOISA.

Public interest test

69. The Ministers argued that there was an important public interest in maintaining a secure environment within which officials could operate and carry out their duties without the fear of disclosure inhibiting their ability to work to maximum effectiveness. They considered that officials, although public servants, did not expect to be constantly working in the public eye and required a non-public arena enabling rigorous and frank debate without fear that their deliberations would be picked over out of context and subject to misinterpretation. In their view, it was in the public interest for information to be provided fully and accurately and to be based on the best advice and exchange of views available. They did not consider it to be in the public interest for information to be issued incorrectly or inaccurately, as might be the case if the background processes involved (in responding to a request for information) were regularly publicised and subject to what they regard as "misguided" scrutiny. Given that they considered the response to Mr Edwards' original request to have been full and accurate, they found it difficult to see what could be added to public debate by release of the additional information covered by the request under consideration in this case.

70. The Ministers also noted that the information requested in this case related to a process, and suggested that there could be a public interest in the protection of the process itself. They believed that the routine release of internal communications focussing on process would not be in the public interest. The Ministers considered that the effect of releasing such information would be the suppression of effective communication in the future (for example, officials would be far less likely to fully investigate a response to a request or as effectively seek clarification of information, especially if there were concerns about complexity or accuracy). This would result, they submitted, in inadequate or partial responses which would jeopardise the effectiveness of FOISA as a mechanism to hold Scottish Ministers to account.

71. The Ministers also argued that any public interest in internal discussion about the accuracy or otherwise of data was outweighed by the desirability of the final data being correct. They suggested that the possibility of an overemphasis on points they considered relatively minor or technical, or which were expressed particularly freely or frankly, would divert attention from the actual provision of information. This would potentially lead to less open advice and exchanges, which would be against the wider public interest.

72. The Ministers also contended that release of the information would neither provide any valuable insight or usefully increase the public's understanding of Scottish Government practices, nor provide any further information in terms of the original request or a better understanding of the information released in response to it. Taking into account the information that had already been released, they did not consider there to be any strong public interest argument justifying disclosure of the metadata information.

73. In considering the public interest test in relation to the draft responses, the Commissioner accepts that there is a general public interest in making information available to the public and a general need for transparency and accountability in decision making, but this must be balanced against any detriment to the public interest as a consequence of disclosure. Exempt information can only be released under FOISA where the public interest in disclosure is not outweighed by the public interest in maintaining the relevant exemption (i.e. in withholding).

74. The Commissioner's view is that there is no particular public interest in making drafts of the response letter to Mr Edwards or draft minutes to Ministers available. The Commissioner is of the opinion that they provide no further substantive information in addition to that which has already been made available to Mr Edwards. The Commissioner has not identified any substantial public interest in favour of disclosure of these particular documents. For these documents, the Commissioner finds that the public interest in favour of disclosure is outweighed by that in favour of maintaining the section 30(b) exemptions and enabling the rough drafting process to proceed with a degree of privacy.

75. The Commissioner therefore considers that the Ministers were correct to withhold the following documents under section 30(b)(i) and 30(b)(ii): 11 (draft minute), T56 (draft letter), T61 (draft letter), T70 (draft letter), T78 (draft letter), T115 (draft letter), T136 (draft letter), T142 (draft minute), T143 (draft minute and letter), T148 (draft letter), T150 (draft minute and letter), T160 (draft minute and letter), T163 (draft minute and letter) and T165 (draft letter).

Consideration of section 35(1)(g)

76. The Ministers applied the exemption in section 35(1)(g) (in conjunction with section 35(2)(a) of FOISA) to all of the information withheld in this case. The Commissioner has considered the application of this exemption in relation to the information he has not considered properly withheld above.

77. Section 35(1)(g) of FOISA allows Scottish public authorities to withhold information if its disclosure would, or would be likely to, prejudice substantially its ability (or that of another public authority) to carry out its functions for any of the purposes listed in section 35(2). In this case, the Ministers wished to apply the exemption in respect of the Commissioner's ability to fulfil his statutory responsibilities. The purpose referred to in section 35(2)(a) is: "to ascertain whether a person has failed to comply with the law".

78. In considering the use of section 35(1)(g) in this case, the Commissioner must consider three fundamental points as follows:

- Does the Commissioner have a statutory function in relation to of the purpose described in section 35(2)(a)?

- If so, would disclosure of the information prejudice substantially, or be likely to prejudice substantially, the Commissioner's ability to carry out that function?
- If so, does the public interest in maintaining the exemption outweigh the public interest in disclosure of the information?

79. The Ministers stated that FOISA set out a clear process for submitting an information request and, if the appellant was dissatisfied with the response, for requesting a review and ultimately appealing to the Commissioner. They argued that in this case Mr Edwards' request was effectively circumventing that due process and thus usurping the statutory role of the Commissioner: the applicant was seeking to investigate the case himself, not having taken advantage of the statutory remedies of review and application to the Commissioner following the Ministers' response to his original request.

80. The Ministers submitted that a primary function of the Commissioner was to ascertain whether or not a public authority correctly fulfilled its obligations according to FOISA. If the Commissioner was not called to investigate and, if necessary, enforce compliance with FOISA, his ability to fulfil that function was substantially prejudiced in that he was being prevented from carrying it out. They argued that there was therefore a very high level of substantial prejudice to the operation of the Commissioner, and more broadly of FOISA, if in effect the due process set out on FOISA could be disregarded.

81. The Commissioner accepts that his responsibilities under FOISA do constitute functions for the purposes of section 35(2)(a).

82. Here, the Ministers have argued that the request in this case has circumvented the process set out in FOISA by providing an alternative option to that of requesting a review and applying to the Commissioner. However, the Commissioner can see nothing within FOISA which precludes a request of this nature. There is nothing to indicate, as the Ministers have concluded, that Mr Edwards is dissatisfied with the response to his original request and is using his current application as an alternative to obtaining a review from the Ministers. The Commissioner views this is an entirely separate and distinct request for information. In any event, he fails to see how the exercise of his functions under FOISA could have been undermined or otherwise prejudiced simply by disclosure of the information requested in this case.

83. Although it is not entirely clear from the Ministers' submissions, it might be inferred that they were also concerned as to the prejudicial effect of disclosure on the exercise of their own functions. On this point, the Commissioner is unclear as to what statutory functions the Ministers could rely upon for the purposes of section 35(1)(g), read in conjunction with section 35(2)(a). In any event, given that he does not accept the Ministers' position in relation to the underlying nature of the request (and given that the nature of the anticipated prejudice has not been explained to him), the Commissioner is unable to accept in the circumstances that disclosure could cause any substantial prejudice of the kind envisaged by section 35(1)(g) to the exercise of the Ministers' functions.

84. As the Commissioner is not satisfied that the exemption in section 35(1)(g) is engaged, he has not gone on to consider the public interest test.

Consideration of section 38(1)(b)

85. The Ministers have applied the exemption under section 38(1)(b) to redactions from document T168.

86. The exemption under section 38(1)(b) of FOISA, read in conjunction with section 38(2)(a)(i) or (as appropriate) section 38(2)(b), provides that information is exempt information if it constitutes personal data (as defined in section 1(1) of the DPA) and its disclosure to a member of the public otherwise than under FOISA would contravene any of the data protection principles contained in the DPA. This is also an absolute exemption and therefore is not subject to the public interest test laid down by section 2(1)(b) of FOISA.

87. In order for a public authority to rely on this exemption, it must therefore show firstly that the information which has been requested is personal data for the purposes of the DPA, and secondly that disclosure of the information would contravene at least one of the data protection principles laid down in the DPA.

88. The Ministers submitted that the redacted information was personal information, the release of which would contravene the first data protection principle on fair processing of personal data. They considered that of the 6 conditions for processing as set out at Schedule 2 of the DPA, only the sixth might be of relevance but in practice it was not met. In their view, processing of the data in this case was not necessary for the purposes of any legitimate interest, and even if it were the processing would be prejudicial to the rights and freedoms or legitimate interests of the individuals involved.

Is the information personal data?

89. When considering the exemption in section 38(1)(b) of FOISA, the Commissioner must first establish whether the information withheld is personal data. Personal data is defined in section 1(1) of the DPA as data which relate to a living individual who can be identified from those data, or from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller (the definition is set out in full in the Appendix).

90. In this case, the redacted information is clearly information from which an individual can be identified and which contains personal comments (which are not in any way work related) made by that individual. It focuses on and is biographical of that individual and the Commissioner is satisfied that it relates to them. The Commissioner has therefore concluded that the information is personal data for the purposes of section 1(1) of the DPA.

Would disclosure of the information breach the first data protection principle?

91. As noted above, the Ministers have argued that release of the information in question in this case would breach the first data protection principle of the DPA.

92. The first data protection principle requires that the processing of personal data (which would include the disclosure of data in response to a request made under FOISA) must be fair and lawful and, in particular, that personal data shall not be processed unless at least one of the conditions in Schedule 2 (to the DPA) is met.

93. The Ministers have not made any submissions which suggest that disclosure of the information requested by Mr Edwards would be unlawful, other than by contravening the first data protection principle. The Commissioner has therefore solely considered whether disclosure of the information in this case would be fair.

94. According to guidance from the Information Commissioner, who is responsible for enforcing and regulating the DPA throughout the UK ("Freedom of Information Act Awareness Guidance No 1"), which can be viewed at: http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/awareness_guidance%20_1_%20personal_information_v2.pdf), the assessment of fairness includes looking at whether the disclosure would cause unnecessary or unjustified distress or damage to the person whom the information is about, whether the third party would expect that his/her information might be disclosed to others and/or whether the third party would expect that his/her information would be kept private.

95. Having considered this guidance for the purposes of this case and having considered the information withheld under section 38(1)(b), the Commissioner has found that the disclosure of the information would contravene the first data protection principle in that it would be contrary to the reasonable expectations of the individual concerned. The Commissioner is also satisfied that disclosure of the information could be expected to cause at least a degree of unnecessary or unjustified distress or damage to the subject of the information. In all the circumstances, therefore, he is satisfied that disclosure of the information would be unfair.

96. Given that the Commissioner has found that the disclosure of the information would be unfair, he is not required to go on to consider whether it would be unlawful, or whether any of the conditions in Schedule 2 of the DPA could be met.

97. The Commissioner therefore finds that Ministers were correct to withhold document T168 under the exemption in section 38(1)(b) of FOISA.

Consideration of Mr Edwards' request under the EIRs

98. The Commissioner has gone on to consider the Ministers' handling of Mr Edwards' request from the point of view of the EIRs. As noted above, the Commissioner considers that some of the information in this case is environmental.

99. As also noted above, during the course of the investigation, the Ministers were advised of the Commissioner's view that some of the information under consideration was environmental information, and offered the opportunity to make submissions as to whether any of the exceptions within the EIRs would apply if this information were considered under those regulations.

100. The Ministers declined to apply the exemption in section 39(2) of FOISA. However, as indicated above, they indicated that should the Commissioner decide to deal with the case under the EIRs they would apply specific exceptions (those in regulations 10(4)(d) and (e), and 11(2)) to the withheld information.

101. Given the Ministers' position, the Commissioner considers it appropriate to go on to consider whether the information withheld from Mr Edwards is subject to the exceptions cited by the Ministers under the EIRs.

Regulation 10(4)(d) and (e)

102. The Ministers have applied the exceptions at regulation 10(4)(d) and (e) to the documents to which they have applied the exemptions at sections 30(b) and 35(1)(g) of FOISA. These provide that a Scottish public authority may refuse to make environmental information available to the extent that-

…

(d) the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data; or

(e) the request involves making available internal communications.

103. The Commissioner considered regulation 10(4)(d) in the recent *Decision 101/2008 Mr Alistair Johnson and East Renfrewshire Council*, with reference to the relevant section of *The Aarhus Convention: an implementation guide.* He has considered the content and context of the information withheld in this case and, for the same reasons as given in that earlier case, cannot accept that any of it was (at the time the Ministers dealt with Mr Edwards' request and request for review) still in the course of completion, an unfinished document or incomplete data. Some of the data under consideration in the withheld information was in the course of verification when the withheld information was created, but that did not (in the Commissioner's view) make it incomplete. Consequently, the Commissioner is not satisfied that regulation 10(4)(d) applies and will not consider it further.

104. Having reviewed the documents in question, the Commissioner is satisfied that they can all in the circumstances be considered internal communications and therefore to fall within the scope of regulation 10(4)(e).

105. The exception in regulation 10(4)(e) is subject to the public interest test laid down by regulation 10(1)(b) of the EIRs. In considering the application of these exceptions, regulation 10(2) requires that Scottish public authorities shall interpret each exception in a restrictive way and apply a presumption in favour of disclosure. In considering the public interest test, the Commissioner has had regard to the submissions made by the Ministers in relation to the public interest test for the purposes of the FOISA exemptions discussed above. No additional public interest arguments were advanced by the Ministers for the purposes of the EIRs.

106. In addition to the arguments set out above in relation to section 30(b) of FOISA, the Ministers argued that there was a public interest in ensuring that public authorities were able to carry out their functions properly and discharge their duties. They also argued that there was a strong public interest in authorities being accountable in ensuring their statutory requirements were met and for robust systems to be in place to prevent unlawfulness or impropriety. They contended that if the Commissioner was prevented from fulfilling his duties then it was possible in turn that authorities generally would not be held properly accountable for their actions in terms of FOISA, which would be contrary to the public interest.

107. As stated above in his consideration of the public interest test under FOISA, the Commissioner considers that 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. In this case, it would allow scrutiny of the matters considered by the Ministers in collating and responding to the previous request. The Commissioner does not consider this to be inherently unreasonable, as the Ministers appear to argue.

108. Turning to the arguments advanced by the Ministers as to why disclosure would not be in the public interest, the Commissioner accepts that such arguments may be of relevance in certain cases (although he is not persuaded, as the Ministers appear to suggest, that there is an inherent public interest in protecting "background" administrative processes from scrutiny, misguided or otherwise). In the circumstances of this particular case, however, given that he does not accept the Ministers' arguments that disclosure would be harmful in the various ways they claim, the Commissioner does not find there to be convincing arguments that the public interest favours withholding most of the information..

109. In relation to the majority of the withheld documents, therefore, the Commissioner is unable to conclude that in all the circumstances, the public interest in making the information available is outweighed by that in maintaining the exception. The Commissioner therefore concludes that the Ministers failed to comply with regulation 5(1) of the EIRs by withholding the environmental information in these documents from Mr Edwards.

110. As the Commissioner has stated already in considering section 30(b), however, he does not deem there to be any particular public interest in making drafts of the response letter to Mr Edwards or draft minutes to Ministers available and accepts that there is a strong public interest in withholding these documents under regulation 10(4)(e) of the EIRs.

Regulation 11(2)

111. Regulation 11(2), read in conjunction with regulation 11(3)(a)(i) or (as appropriate) 11(3)(b), provides that a public authority shall not make third party personal data available where its disclosure would contravene any of the data protection principles contained in the DPA. This is the equivalent provision of section 38(1)(b) of FOISA, which the Ministers applied to document T168. The Ministers only raised this exception in relation to document T168.

112. The Commissioner does not consider the information withheld from document T168 to be environmental information and therefore has not considered the application of regulation 11(2) in this case.

Is the request vexatious?

113. In their submissions to the Commissioner, the Ministers suggested that Mr Edwards' request was open to interpretation as being vexatious in nature, if not intent. The Ministers commented that the context of this particular request had imposed a significant burden on the Scottish Government in terms of distraction and they questioned its purpose, value and reasonableness – especially as the applicant had been provided with the information out of which the metadata request had arisen.

114. The Ministers have not sought formally to rely on section 14(1) of FOISA in relation to Mr Edwards' request, but given that they have specifically suggested that the request could be considered vexatious the Commissioner does consider it appropriate to comment on this aspect of their submissions.

115. Section 14(1) of FOISA states that section 1(1) (which confers the general entitlement to information held by such authorities) does not oblige a Scottish public authority to comply with a request for information if the request is vexatious. Section 14 does not provide an exemption as such: instead, its effect is to render inapplicable the general right of access to information contained in section 1(1) of FOISA.

116. The corresponding provision within the EIRs is regulation 10(4)(b), which provides that an authority may refuse to make environmental information available to the extent that the request for information is manifestly unreasonable.

117. If the Ministers arguments are correct, then they would have been under no obligation to comply with the Mr Edwards' request. The Commissioner is unable to require the Ministers to comply with any request that he accepts to be vexatious.

118. FOISA does not define "vexatious". For the equivalent provision in the (UK) Freedom of Information Act 2000, the Information Tribunal, in the case of *Ahilathirunayagam v. Information Commissioner and London Metropolitan University* (EA/2006/0070), accepted that the normal use of this word is "to describe activity that is likely to cause distress or irritation, literally to vex a person to whom it is directed".

119. The Commissioner's approach is that a request (which may be the latest in a series of requests, or one among a large number of individual requests) will be vexatious where it would impose a significant burden on the public authority and one or more of the following conditions can be met:

- it has the effect of harassing the public authority
- it does not have a serious purpose or value
- it is designed to cause disruption or annoyance to the public authority
- it would otherwise, in the opinion of a reasonable person, be considered to be manifestly unreasonable or disproportionate.

120. In an earlier decision (*Decision 062/2005 MacRoberts and the Scottish Executive* (which related to 720 requests for information made to the then Scottish Executive on the same day)), the Commissioner provided guidance in relation to the meaning of vexatious. In particular, the Commissioner is likely to be sympathetic to public authorities which refuse a request if responding to that request would impose a significant burden on the public authority and would, in the opinion of a reasonable person, be considered to be manifestly unreasonable or manifestly disproportionate.

121. In considering what is manifestly unreasonable or manifestly disproportionate, it will sometimes be necessary to consider the effect of dealing with the request on a public authority. Even if an applicant does not intend a request to be vexatious, it is possible that dealing with that request will impose a significant burden on a public authority and will be considered to be manifestly unreasonable or manifestly disproportionate. The nature and effect of the request, rather than the intentions of the applicant, must therefore be taken into account.

122. The Scottish Ministers' Code of Practice on the Discharge of Functions by Public Authorities under FOISA makes it clear that authorities should be prepared to provide justification for deciding that a request is vexatious and that the power to refuse to respond to a request on the grounds contained in section 14(1) of FOISA should be used sparingly and should not be abused simply to avoid dealing with a request for information. Paragraph 5 of the Section 60 Code also states the following: "Staff should also be aware that, in giving assistance, an applicant's reasons for requesting the information are not relevant. Applicants should not be given the impression that they are obliged to disclose the nature of their interest or that they will be treated differently if they do so."

123. The Commissioner has considered the arguments made by the Ministers but does not accept that this request can be considered vexatious. In the Commissioner's view, Mr Edwards' request does not meet any of the criteria set out in paragraph 119 above, and while these should not be considered to be the only grounds on which he might accept that a request is vexatious he does not accept that the Ministers have provided valid alternative reasons that might apply in this case.

124. The main concerns of the Ministers in this case relate to the nature of the request and the issue of principle which they consider it raises. However, the Commissioner is unable to conclude that there is any stated provision, nor indeed implied policy intention, within FOISA or the EIRs which would preclude a request of this nature or which would allow an authority to decline to comply with such a request.

125. Accordingly, the Commissioner would not in all the circumstances have upheld the application of the provisions in section 14(1) of FOISA or its equivalent under the EIRs had the Ministers applied either of them in this case.

DECISION

FOISA

The Commissioner finds that the Scottish Ministers (the Ministers) did not deal with Mr Edwards' request for information in accordance with Part 1 of FOISA, in particular section 1(1).

The Commissioner finds that the Ministers misapplied the exemptions in sections 30(b)(i) and (ii) and 35(1)(g) of FOISA to the majority of the information under consideration. He accepts, however, that the information in the documents listed in paragraph 75 above was correctly withheld under section 30(b)(i) and (ii) of FOISA.

The Commissioner also finds that the Ministers were correct to withhold the information redacted from document T168 under section 38(1)(b) of FOISA.

The EIRs

Having concluded that the withheld information was at least in part environmental information as defined in regulation 2(1) of the EIRs, the Commissioner finds that the Ministers failed to comply with the requirements of the EIRs in dealing with Mr Edwards' request.

The Commissioner finds that (except in relation to the documents noted at paragraph 75 above) the Ministers were not entitled to refuse to make the environmental information available under the exceptions in regulations 10(4)(d) and (e) of the EIRs. The Commissioner therefore finds that by failing to make that information available the Ministers failed to comply with the requirements of regulation 5(1) of the EIRs.

Steps to be taken

The Commissioner requires the Ministers to provide Mr Edwards with the withheld information, other than that listed in paragraph 75 above and document T168, by 19 October 2008.

Appeal

Should either Mr Edwards or the 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
3 September 2008

Appendix

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 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.

(2) For the purposes of paragraph (a) of subsection 1, the following provisions of Part 2 (and no others) are to be regarded as conferring absolute exemption –

…

(e) in subsection (1) of section 38 –

…

(ii) paragraph (b) where the first condition referred to in that paragraph is satisfied by virtue of subsection (2)(a)(i) or (b) of that section.

14 Vexatious or repeated requests

(1) Section 1(1) does not oblige a Scottish public authority to comply with a request for information if the request is vexatious.

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

…

35 Law enforcement

(1) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice substantially-

…

(g) the exercise by any public authority (within the meaning of the Freedom of Information Act 2000 (c.36)) or Scottish public authority of its functions for any of the purposes mentioned in subsection (2);

…

(2) The purposes are-

(a) to ascertain whether a person has failed to comply with the law;

…

38 Personal information

(1) Information is exempt information if it constitutes-

…

(b) personal data and either the condition mentioned in subsection (2) (the "first condition") or that mentioned in subsection (3) (the "second condition") is satisfied;

(2) The first condition is-

(a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998 (c.29), that the disclosure of the information to a member of the public otherwise than under this Act would contravene-

(i) any of the data protection principles

…

(b) in any other case, that such disclosure would contravene any of the data protection principles if the exemptions in section 33A(1) of that Act (which relate to manual data held) were disregarded.

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 -

(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.

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

…

(d) the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data; or

(e) the request involves making available internal communications.

Data Protection Act 1998

1 Basic interpretative provisions

In this Act, unless the context otherwise requires –

…

"personal data" means data which relate to a living individual who can be identified –

(a) from those data, or

(b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,

and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual;

…

Schedule 1 – The data protection principles

Part I – The principles

1. Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –

   (a) at least one of the conditions in Schedule 2 is met, and

   (b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.

Schedule of documents

Documents under consideration

Document number
2 – 1st email only
3
4 - 1st 3 emails only
5 - 1st 2 emails only
6
11 – 1st 3 emails and draft only
12 – 1st 2 emails only
13 – 1st email only
18 – 1st 2 emails only
21 – emails only
22
23 – 1st email only
24 – 1st email only
26 – 1st 4 emails only
29 – 1st 3 emails only
30 – 1st 2 emails only
C40
C48
C50
T52
T53
T54 – page 1 only
T56
T61
T63
T68 – 1st 4 emails only.
T69 – 1st email only
T70 – letter only
T71
T72 – 1st 2 emails only
T73 – 1st 3 emails only
T74 – 1st email only
T75 – 1st email only
T76 – 1st email only
T77
T78
T79
T80

T81
T82 – 1st email only
T85 – 1st email only
T87
T88 – 1st email only
T89 – 1st 2 emails only
T90 – 1st 2 emails only
T91 – 1st 4 emails only
T92 – 1st email only
T93 – 1st email only
T94 – 1st email only
T95
T96 – 1st 2 emails only
T97
T98 – 1st email only
T99 – 1st email only
T100 – 1st email only
T104 – 1st email only
T107 – 1st 2 emails only
T109 – 1st email only
T110 – 1st email only
T111 – 1st email only
T112 – 1st email only
T113 – 1st email only
T115
T117 – 1st 2 emails only
T119 (considered outwith scope)
T120
T121 – 1st email only
T129 – 1st email only
T130
T132 – 1st email only
T135
T136 – 1st email and draft only
T138 – 1st email only
T141
T142
T143
T144
T147
T148
T149 – 1st 2 emails only
T150
T151 – 1st 2 emails only

T153
T155 – 1st 2 emails only
T159 – 1st email only
T160 – pages 1,2,5,8,9,12,13. Pages 10 and 11 considered outwith scope.
T163 (except last 2 pages which are outwith scope)
T164 (considered outwith scope)
T165
T168 – 2nd email only
T169 (outwith scope)
T172 – 1st email only
X1
X2
X3
X4
X5
X6
X7
X8
X9