

Decision Notice



Decision 083/2009 Mr Rob Edwards and the Scottish Ministers

Drafting the response to the UK Energy Review consultation

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Summary

Mr Rob Edwards, Environment Editor of the Sunday Herald, requested from the Scottish Ministers (the Ministers) information relating to the UK Government's Energy Review. The Ministers responded by releasing some information but withholding the remainder as internal communications excepted under regulation 10(4)(e) of the Environmental Information (Scotland) Regulations 2004 (the EIRs). Following a review, Mr Edwards remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that that the Ministers had partially failed to deal with Mr Edwards' request for information in accordance with the EIRs. The Commissioner required the Ministers to release most of the information withheld on the grounds that the public interest in disclosing this outweighed that in maintaining the exception. However, he concluded that a small number of documents had been properly withheld in terms of regulation 10(4)(e).

Relevant statutory provisions and other sources

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

The Environmental Information (Scotland) Regulations 2004 (the EIRs): regulations 2(1) (Interpretation) (definitions (b) and (c) of environmental information); 5(1) (Duty to make available environmental information on request) and 10(1) (2) and (4)(e) (Exceptions from duty to make environmental information available)

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

Background

1. This case is somewhat unusual in that Mr Edwards previously made an almost identical information request on 17 May 2006, which was considered by the Commissioner in *Decision 039/2008 Mr Rob Edwards and the Scottish Ministers*. The request under consideration in that Decision sought copies of all unpublished reports, memos and correspondence, whether draft or final, relating to the UK Government's energy review.



2. In Decision 039/2008, the Commissioner ordered the release of a small amount of the information, but found that the remainder had been properly withheld under regulation 10(4)(e) of the EIRs. However, the Commissioner stated in paragraph 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.”

3. On 11 March 2008 (the day after the issue of Decision 039/2008), Mr Edwards wrote to the Scottish Ministers, asking them to consider releasing the remaining documents relating to the 2006 UK Energy Review.
4. The Ministers responded to Mr Edwards on 12 May 2008. They released a number of documents to him but withheld the remainder, citing the exceptions in regulations 10(4)(d) and 10(4)(e) of the EIRs. (The letter actually referred to these exceptions erroneously as “sections” 12(4)(d) and (e), but it is clear to the Commissioner which exceptions were intended to be cited.)
5. On 19 May 2008, Mr Edwards wrote to the Ministers requesting a review of their decision. He drew the Ministers’ attention to the Commissioner’s comments in Decision 039/2008.
6. The Ministers notified Mr Edwards of the outcome of their review on 16 June 2008. They released an additional 16 documents, but upheld the decision to withhold the remainder in terms of regulations 10(4)(d) and (e) of the EIRs. For these documents, the Ministers maintained that the public interest in maintaining the exceptions outweighed that in the disclosure of the information.
7. On 9 July 2008, 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. By virtue of regulation 17 of the EIRs, Part 4 of FOISA applies to the enforcement of the EIRs as it applies to the enforcement of FOISA, subject to certain specified modifications.
8. 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

9. On 11 July 2008, the Ministers were notified in writing that an application had been received from Mr Edwards and were asked to provide the Commissioner with any information withheld from him. The Ministers provided copies of the information withheld and the case was then allocated to an investigating officer.
10. The investigating officer subsequently contacted the Ministers, giving them an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking them to respond to specific questions. In particular, the Ministers were asked to justify their reliance on any provisions of the EIRs they considered applicable to the information requested, and to comment on the public interest test.
11. The Ministers replied with their submissions on 10 November 2008. They advised that they no longer wished to rely on the exception in regulation 10(4)(d) of the EIRs, but wished to continue to rely only on the exception in regulation 10(4)(e).
12. The investigating officer invited Mr Edwards to comment on the case, particularly in relation to his views on why the public interest would be served by the disclosure of the information withheld. Mr Edwards replied with his submissions on 24 November 2008.

Commissioner's analysis and findings

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

Scope of decision

14. The exception in regulation 10(4)(d) is not considered in this Decision, as, during the investigation, the Ministers withdrew their reliance on it.
15. The Ministers' submissions stated that they wished to apply regulation 11(2) of the EIRs in respect of a telephone number included within document number 69. This exception applies to personal data, which, subject to certain conditions, is exempt from disclosure under the EIRs.
16. Mr Edwards confirmed during the investigation that he was content to exclude this telephone number from consideration. This matter has therefore not been considered further.

Section 39(2) of FOISA – Health, safety and the environment

17. In their letter of 10 November 2008, the Ministers indicated that they wished to rely on the exemption in section 39(2) FOISA.



18. The effect of this exemption is that environmental information, as defined in regulation 2(1) of the EIRs, is exempt information under FOISA. In effect, such information can then be considered solely under the EIRs, although it is subject to the public interest test in section 2(1) of FOISA.
19. The Commissioner's view in *Decision 039/2008: Mr Rob Edwards and the Scottish Ministers* was that the information was environmental. It involved policies relating to energy matters, and clearly falls within paragraphs (b) and (c) of the wide definition of environmental information set out in regulation 2(1) of the EIRs (parts (b) and (c) of the definition are reproduced in the Appendix to this Decision). The same information is involved in the present case, and the Commissioner remains of the view that it is environmental information. The Commissioner therefore concludes that Ministers were correct to rely on this exemption.
20. Since there is a separate legislative right to environmental information available to Mr Edwards, the Commissioner also accepts that the public interest in maintaining the exemption under section 39(2) of FOISA and dealing with the information requested under the EIRs outweighs any public interest there may be in considering the disclosure of the information under FOISA. In what follows, the Commissioner has therefore made his decision solely in terms of the EIRs.

Regulation 10(4)(e) – Internal communications

21. Under regulation 10(4)(e) of the EIRs, a Scottish public authority may refuse to make environmental information available to the extent that the request involves making available internal communications. The Ministers applied this exception to all of the remaining information withheld in this case.
22. This regulation reflects Article 4.1(e) of European Directive 2003/4/EC on public access to environmental information, and also Article 4.3(c) of the Convention on access to information, public participation in decision-making and access to justice in environmental matters, done at Aarhus, Denmark on 25 June 1998 (the Aarhus Convention).
23. As with all of the exceptions contained in regulation 10, a Scottish public authority applying this exception must interpret the exception in a restrictive way (regulation 10(2)(a)) and apply a presumption in favour of disclosure (regulation 10(2)(b)).
24. For information to fall within the scope of this exception, it need only be established that the information is an internal communication. Only if it is decided that the information is an internal communication is it necessary to consider the public interest test.
25. The documents in question are internal exchanges between Ministers and officials, and between officials. As in *Decision 039/2008*, the Commissioner accepts that all the documents under consideration clearly fall within the terms of regulation 10(4)(e) and are internal communications for the purposes of the EIRs.



Public Interest test

26. Regulation 10(1) of the EIRs provides that a Scottish public authority may refuse a request to make environmental information available if there is an exception to disclosure under regulations 10(4) or 10(5) and, in all the circumstances of the case, the public interest in making the information available is outweighed by that in maintaining the exception. The Commissioner must apply this test when considering whether the Ministers were justified in withholding the remaining documents.
27. The Commissioner must consider this test (and all relevant legal tests he considers in any decision) in terms of the circumstances that prevailed at the time when the Ministers notified Mr Edwards of the outcome of their review. The relevant point for this case is 15 May 2008, almost two years after the relevant point for the consideration of the same information in Decision 039/2008. (The relevant date in that case was 12 July 2006.)
28. The Ministers argued that releasing the remaining information would not inform public debate to any significant extent; nor would it add to what had already been put into the public domain. They also argued that it is important for there to be sufficient time and space for Ministers and officials to debate ideas freely and frankly in draft form before these can become robust, agreed policy. A fear of misinterpretation or misrepresentation arising from such disclosure would, they argued, have a detrimental effect upon policy formulation.
29. The Ministers also argued that, because the energy policy debate was continuing, the issues were still live, and release of the information could inhibit continuing policy-making in this and in related areas.
30. The Ministers explicitly recognised a public interest in the disclosure of this information, particularly as it concerns issues of continuing public concern and debate. However, they argued that the release of additional documents in their response to Mr Edwards' request clearly demonstrated their compliance with the presumption in favour of disclosure under the EIRs, and a willingness to re-assess positively information previously withheld.
31. Mr Edwards commented that the Energy Review had taken place in 2006 and had been superseded by a second UK Energy Review, and a new UK Government Energy Policy.
32. Mr Edwards also pointed out that, in Scotland, the Administration had changed, and thus many of the policy assumptions underlying the previous Review were now outdated. He argued that release of the relatively minor changes which he thought were likely to have been included within the information he had requested would be very unlikely to have the adverse effects the Ministers believed it would.
33. Mr Edwards argued that there is a strong public interest in showing the detailed thinking that went into a matter as nationally important as energy policy. Mr Edwards also disagreed that releasing the comments made by officials approximately two years previously would inhibit them from offering sound advice in future and, in his view, the Ministers' submissions on this point considerably underestimated their officials' capabilities.



34. The Commissioner notes that the Ministers released a number of documents to Mr Edwards in response to his information request (33 out of the 126 documents containing information falling within the scope of Mr Edwards' request were released in full, and a further five were released in a redacted format). The Commissioner accepts that, in disclosing this information, the Ministers demonstrated that, in order to comply with the presumption in favour of release in the EIRs, the balance of the public interest test required to be re-assessed in the light of circumstances at the time of the renewed request.
35. In coming to his own view on the public interest test, the Commissioner notes that at paragraph 42 of Decision 39/2008 he recognised a general public interest in making information held by public authorities accessible; enhancing the scrutiny of decision-making, and improving accountability and participation. He also acknowledged a more specific public interest in allowing scrutiny of the matters considered by the Ministers in drafting their response to the Energy Review.
36. While accepting that energy policy issues remain current, in the present case the Commissioner is unable to accept the Ministers' general argument about the continuing aspect of policy-making justifying withholding of all the remaining information. Policy making is not a seamless continuum. Even where an issue is kept under review distinct phases of formulation or development may be discernible, often reflecting the political, legal and economic context applicable to the policy matter at issue. As the Commissioner has previously noted in paragraph 51 of *Decision 057/2005 Mr William Alexander and the Scottish Executive*, intervening political events required reconsideration of policy and, in particular, whether a new Administration had a different policy on the matter in hand.
37. In this present case, the Commissioner has also considered the timing of the information request, and he is of the view that, rather than merely the passage of time on its own, the events of the 22 months between the first and subsequent requests for this information have a considerable bearing. These events are highly significant and include the new UK Energy Review; a new Prime Minister; the replacement of the previous coalition Scottish Administration with the new Scottish Government; and changes to the European and global energy and financial scenes.
38. In the present case, the arguments presented by Ministers against disclosure of the remaining documents must also be balanced against the public interest in knowing the process by which important policy developments are undertaken.



39. The Commissioner considers that, consistent with the presumption in favour of disclosure there is a discernible public interest in understanding the process by which the Scottish Administration created and finalised its response to the Energy Review in 2006, as well as in its content. This wider public interest includes factors such as knowledge of what policy options were deliberated upon; who was involved in the policy development process; and how the policy changed during this process. He also considers that the public interest in making this information available now generally outweighs that in maintaining the exception for internal communications, on the basis that the public interest in maintaining the exception has been eroded by the passage of time and events. The Ministers involved could no longer be adversely affected by disclosure of the information requested because they are no longer in office. Officials will be aware that the information relates to a past specific policy event, and are not likely to be substantially inhibited in drafting current policy as a result.
40. Applying these conclusions to the information which the Ministers have continued to withhold, the Commissioner has decided that the majority of the information should now be disclosed, with the exclusion of a few documents where the exchange may be regarded as frank or sensitive (as listed in paragraph 41 below). The Commissioner agrees that Ministers were correct to withhold them because of the risk of detriment to the policy-making process and to the provision of frank advice by officials, in which specific circumstances the public interest in disclosure is outweighed by that in maintaining the exception. In the Commissioner's view the public interest in understanding the issues considered when making a response to the Energy Review will have been very largely satisfied by the other information which has already been released and which he is now ordering the Ministers to disclose.
41. The Commissioner therefore orders the Ministers to release all of the information which has been withheld from Mr Edwards, with the exception of the information contained in documents 20, 70 and 117.
42. The telephone number (but no other information) contained in document 69 may be removed from that document prior to disclosure since it was excluded from consideration in this Decision.



DECISION

The Commissioner finds that the Scottish Ministers complied with the Freedom of Information (Scotland) Act 2002 (FOISA) in applying the exemption in section 39(2) of FOISA to the information which is the subject of Mr Edwards' application.

He also finds that the Ministers partially complied with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by Mr Edwards. He finds that by withholding the information in documents 20, 70 and 117, the Ministers complied with the EIRs.

However, by withholding the remainder of the information, the Commissioner finds that the Ministers misapplied regulation 10(4)(e) of the EIRs and consequently that they failed to comply with regulation 5(1) of the EIRs.

The Commissioner therefore requires the Ministers to provide Mr Edwards with a copy of all the remaining withheld information, except for documents numbered 20, 70 and 117 by 31 August 2009.

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
16 July 2009



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.

...

39 Health, safety and the environment

...

- (2) Information is exempt information if a Scottish public authority-
- (a) is obliged by regulations under section 62 to make it available to the public in accordance with the regulations; or
 - (b) would be so obliged but for any exemption contained in the regulations.

...



The Environmental Information (Scotland) Regulations 2004

2 Interpretation

(1) In these Regulations –

...

"environmental information" has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on

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....

- (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in paragraph (a);
- (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in paragraphs (a) and (b) as well as measures or activities designed to protect those elements;

...

5 Duty to make available environmental information on request

(1) Subject to paragraph (2), a Scottish public authority that holds environmental information shall make it available when requested to do so by any applicant.

...

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.