

Decision Notice



Decision 063/2008 Mr Rob Edwards and the Scottish Ministers

Correspondence between the Scottish Ministers, Scottish Natural Heritage
and the Scottish Environmental Protection Agency

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www.itspublicknowledge.info

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Summary

Mr Rob Edwards (Mr Edwards) requested copies of correspondence and documents between the Scottish Government's media and communication staff and their counterparts at Scottish Natural Heritage (SNH) and the Scottish Environment Protection Agency (SEPA) from the Scottish Ministers (the Ministers) over a set period. The Ministers disclosed some information at the response and review stages, and also during the actual investigation. Eventually only one document was withheld from Mr Edwards.

During the investigation, the Commissioner took the view that the remaining document identified was environmental information, and asked for the Ministers' comments as to whether the request should have been dealt with under the Environmental Information (Scotland) Regulations 2004. The Ministers did not agree that the information was environmental. However, they indicated that should the Commissioner continue to consider the case under the EIRS, they would wish to rely on section 39(2) of the Freedom of Information (Scotland) Act 2002 FOISA and upon the exception under regulation 10(4)(e) of the EIRs in withholding the information. However, following an investigation, the Commissioner found that the exception in regulation 10(4)(e) did not apply to the document and he required the Ministers to disclose it to Mr Edwards.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) (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 (Interpretation) (definition of "environmental information"); 5 (Duty to make available environmental information on request) and 10(1)(b), 10(2)(b) and 10(4)(e) (Exceptions from duty to make environmental information available)

Natural Heritage (Scotland) Act 1991 Schedule 1 (Constitution and proceedings of Scottish Natural Heritage-Incorporation and status) (paragraphs 1 and 2(1))

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.

Decision 218/2007 Professor A D Hawkins and Transport Scotland (the Hawkins Decision), 19 November 2007.

<http://www.itspublicknowledge.info/applicationsanddecisions/Decisions/2007/200600654.asp>



Background

1. On 30 August 2006, Mr Edwards wrote to the Ministers requesting the following information:

‘Copies of any emails, memos, reports, correspondence, minutes or other documents relating to discussions between the Executive’s [the Government’s] environment media and communications staff and their counterparts at Scottish Natural Heritage and the Scottish Environment Protection Agency over the last year’
2. The Ministers responded on 12 March 2007. The Ministers firstly apologised for the delay in their response and supplied Mr Edwards with some of the information which fell within the scope of his request. The Ministers also identified information which it refused to supply Mr Edwards on the basis that it was exempt under sections 25, 29(1)(a) and 30(b) of FOISA.
3. Later the same day, Mr Edwards wrote to the Ministers requesting a review of their decision. In particular, Mr Edwards informed the Ministers that he was not concerned with the information which was withheld under section 25 of FOISA, but queried the information withheld under sections 29(1)(a) and 30(b) of FOISA.
4. Mr Edwards did not receive a response to his request for review within the 20 working days set down by FOISA. As a result, he made an application to the Commissioner in respect of the failure to respond. This led to the Commissioner issuing a Decision 210/2007 on 8 November 2007, ordering the Ministers to respond to Mr Edwards’ request for review.
5. The Ministers subsequently notified Mr Edwards of the outcome of their review on 13 November 2007. In this response the Ministers overturned their reliance on section 30(b) of FOISA and supplied Mr Edwards with further documentation as a result. However, the Ministers maintained their reliance on section 29(1)(a) of FOISA in withholding the remaining documents.
6. On 28 November 2007, Mr Edwards wrote to the Commissioner’s Office, 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.
7. 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

8. On 10 December 2007, 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 which was still being withheld from him. The Ministers responded with the information requested and the case was then allocated to an investigating officer.
9. 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 which, as a result of regulation 17 of the EIRs, covers applications made under both the EIRs and FOISA) and asking it to respond to specific questions. The investigating officer also alerted the Ministers to the fact that, having considered the documents withheld in this case, the Commissioner considered that the documents contained environmental information.
10. The Ministers were asked to comment on this matter and provide submissions on whether they consider the information withheld to fall under the scope of any of the exceptions contained in the EIRs. The Ministers were also asked if they wished to rely on section 39(2) of FOISA.
11. In their response, the Ministers stated that they had released further documentation to Mr Edwards and it was only one document that they continued to withhold. The Ministers were not satisfied that the information withheld was environmental information for the purposes of the EIRs. However, the Ministers submitted that should the Commissioner disagree with their approach then they wished to withhold this document on the basis that section 39(2) of FOISA applied alongside regulation 10(4)(e) of the EIRs.

Commissioner's analysis and findings

12. In coming to a decision on this matter, the Commissioner has considered all the information and the submissions that have been presented by both Mr Edwards and the Ministers. The Commissioner 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 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 be dealt 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. Firstly, therefore, the Commissioner must determine whether the information withheld is environmental information. If it is, the Commissioner must go on to consider the Ministers' handling of the request in terms of the EIRs.
15. Environmental information is defined in regulation 2 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 document under consideration in this case did not fall within the scope of the definition of environmental information in regulation 2 of the EIRs. They stated that the focus of the document was a discussion of media opportunities for the Minister before, during and after a conference, which just happened to be about red squirrel conservation. The Ministers submitted that it contains no real information about the elements or factors listed in (a) or (b) of the definition of 'environmental information', nor is it about a measure or activity likely to affect those elements or factors in terms of section (c) of the definition.
17. The Ministers do acknowledge, however, that the outcome of the conference in question may well fall within the definition of environmental information, as it may have agreed measures, policies, etc. which would have an impact on red squirrel conservation.
18. The Ministers also suggested that there were limitations to the definition of 'environmental information' as demonstrated by the judgement of the European Court of Justice in case C-316/01. Although this judgement relates to the 1990 version of the EC Directive, the Ministers consider that some of the findings in this case are still relevant, i.e. that the Directive was not intended to give a general and unlimited right of access to all information held by authorities which has a connection, however minimal, with one of the environmental factors mentioned in the definition of environmental information.



19. While taking due account of the Ministers' submissions as to whether the information withheld is environmental, the Commissioner has considered fully the categories of environmental information as defined in regulation 2(1) of the EIRs.
20. The information reflects the ongoing presentation and communications strategy which relates to the conservation of the red squirrel in Scotland. The handling and promotion of this subject, with the resulting coverage will have a direct impact on the raising of public awareness in this area. The content of the media handling strategy could provide the public with an indication of the importance given to this subject by the Ministers. Further, when this document is considered in context, it directly relates to a subject matter which is clearly within the remit of the EIRs, principally regulation 2(c) and biological diversity. The Commissioner therefore considers that the information contained within this document falls within the definition of environmental information for the purposes of the EIRs.
21. As the Commissioner considers that the information requested by Mr Edwards is environmental information, the Ministers were correct in their application of section 39(2) of FOISA.
22. This exemption is subject to the public interest test in section 2(1)(b) of FOISA. The Commissioner's view is that, in this case, as there is a separate statutory right of access to environmental information, the public interest in maintaining this exemption and allowing access in line with the requirements of the EIRs outweighs the public interest in the disclosure of information under FOISA.
23. Having concluded that the information in question is environmental information, the Commissioner must consider whether the Ministers were correct in their application of 10(4)(e) of the EIRs to withhold the information.

Application of regulation 10(4)(e) – internal communications

24. 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.
25. This regulation directly reflects Article 4.1(e) of the 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). The regulation does not expand upon what is meant by internal communications.
26. As with all the exceptions under regulation 10, a Scottish public authority applying this exception must do so in a restrictive manner and apply a presumption in favour of disclosure (regulation 10(2)(b)). Even where the exception applies, the information must be released unless, in all the circumstances of the case, the public interest in making the information available is outweighed by that in maintaining the exception (regulation 10(1)(b)).



27. For information to fall within the scope of the exceptions, it need only be established that the information is an internal communication. Only if the Commissioner decides that a document is an internal communication will he be required to go on and consider the public interest test.
28. Although originally stating at the outset of this investigation that they were withholding one document from Mr Edwards, the Ministers later commented that the document is actually comprised of two distinct documents, i.e. a copy of a minute and a covering e-mail.
29. The first document is a minute conveying a Ministerial media handling plan for a range of announcements in the run up to the Red Squirrel Conservation in Scotland Conference in February 2006. The second document identified by the Ministers is a covering e-mail copying this minute to a variety of people including individuals within the Scottish Government, the Forestry Commission and SNH.
30. Following consideration of the content of these documents, the Commissioner concluded that as this minute was attached to a circulating email, it cannot be considered a separate document for the purposes of regulation 10(4)(e) of the EIRs. The Commissioner will therefore be dealing with the information withheld from Mr Edwards as one document.
31. It is clear from the content of the document that it has been circulated to individuals within the Scottish Government, SNH and the Forestry Commission. The Ministers submit that, although they are separate organisations, this document should be considered to be an internal communication. The Ministers provided further information on the relationship between SNH and the Scottish Government to support their reliance on regulation 10(4)(e).
32. The Ministers explained that SNH is a non-departmental public body established under the Natural Heritage (Scotland) Act 1991 (the 1991 Act) and so is legally a separate organisation from the Scottish Government. However, the Ministers submit that its functions include providing advice to Scottish Ministers on the development and implementation of a very wide range of policies for or affecting natural heritage. The Ministers also sponsor SNH under a framework set out in the Management Statement and Financial Memorandum. The Ministers submit that this makes clear the closeness of the working relationship between the Scottish Government and SNH on a wide variety of issues, which the Ministers describe as a 'partnership'. The Ministers submit that it would not be their normal administrative practice to disclose communications between the two organisations.
33. However, the Commissioner is required to interpret the exception in regulation 10(4)(e) in a restrictive way and to apply a presumption in favour of disclosure when considering the application of the exception.
34. Having considered the Natural Heritage (Scotland) Act 1991 (Schedule 1 paragraph 2 (1)), the Commissioner is in no doubt that SNH is body corporate in its own right, with its own legal personality. The SNH is not part of the Scottish Administration as defined in the Scotland Act 1998. The Commissioner is therefore satisfied that this document cannot be considered as an internal communication in the sense of being transferred or circulated within a discrete authority.



35. The Commissioner does not dismiss the possibility of cases where communications between two or more separate public authorities may be capable of being considered as internal communications for the purposes of regulation 10(4)(e), but expects an authority to be able to highlight particular aspects of the administrative and legal relationship between the two bodies to show why communications between them should be considered to be internal. This will include consideration, on a case-by-case basis, of matters such as the nature and context of the particular relationship and the nature of the communication itself.
36. The document in question, as stated previously, is primarily a Ministerial handling plan for a range of announcements in the run up to the Red Squirrel Conservation Conference. This document's primary focus is the *Ministerial* perspective to the media handling plan for not only this event but also the wider policy objectives. It is clear, therefore, that this document has been created independently of SNH and has been passed to SNH for information purposes only.
37. In this instance, the Commissioner has concluded that the document in question cannot be considered to be an internal communication for the purposes of the EIRs. For that reason, the Commissioner does not accept that the exception in regulation 10(4)(e) has been correctly applied in this case.
38. As the Commissioner has found that this exception in regulation 10(4)(e) of the EIRs does not apply to the information withheld in this case, he is not required to go on to consider the public interest under regulation 10(1) of the EIRs.
39. The Commissioner therefore concludes that the Ministers are not justified in withholding this document under the exception. The Commissioner therefore finds that the Ministers were in breach of regulation 5(1) of the EIRs in withholding this document and now require its release to Mr Edwards.



DECISION

The Commissioner finds that the Ministers failed to comply with the Environmental Information (Scotland) Regulations 2004 in responding to the information request made by Mr Edwards. The Ministers were incorrect in their application of regulation 10(4)(e) in withholding the document from Mr Edwards.

The Commissioner therefore requires the Ministers to supply Mr Edwards with a copy of the document in question, within 45 days after the date of intimation of this decision notice.

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
10 June 2008



Appendix

Relevant statutory provisions

The Environmental Information (Scotland) Regulations 2004

2 Interpretation

(1) In these Regulations –

[...]

"the Directive" means Directive 2003/4/EC of the European Parliament and of the Council on public access to environmental information and repealing Council Directive 90/313/EEC;

"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-

[...]
 - 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.

Freedom of Information (Scotland) Act 2002

1 General entitlement

- (1) A person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority.

2 Effect of exemptions

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

[...]



- 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.

[...]

Natural Heritage (Scotland) Act 1991

Schedule 1 Constitution and Proceedings of Scottish Natural Heritage

Incorporation and status

1 SNH shall be a body corporate and shall have a common seal.

2 (1) SNH shall not—

- (a) be regarded as a servant or agent of the Crown;
- (b) have any status, immunity or privilege of the Crown;
- (c) be exempt from any tax, duty, rate, levy or other charge whatsoever whether general or local,

and its property shall not be regarded as property of, or held on behalf of, the Crown.

[...]