

# Decision Notice



Decision 163/2010 Mr William Forbes and Transport Scotland

Decision to transfer responsibility for Glasgow Airport Rail Link

Reference No: 200901592

Decision Date: 13 September 2010

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**Kevin Dunion**

Scottish Information Commissioner

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## Summary

Mr Forbes requested from Transport Scotland certain information relating to the decision to transfer responsibility for the Glasgow Airport Rail Link (GARL) from Strathclyde Passenger Transport (SPT) to Transport Scotland. Transport Scotland responded by providing some information while withholding other information under various exemptions in FOISA. Following a review, during which Transport Scotland confirmed that the request should have been considered under the EIRs and continued to withhold information (now under various exceptions in the EIRs), Mr Forbes remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that Transport Scotland had been correct to deal with the information requested as environmental information and therefore subject to the EIRs.

He also found that whilst Transport Scotland correctly withheld much of the information under regulation 10(4)(e) (which relates to internal communications) and (5)(d) (which relates to the confidentiality of proceedings) of the EIRs, it had not been correct to rely upon regulation 10(4)(e), (5)(e) (which relates to commercial and industrial confidentiality) and (5)(f) (which relates to prejudice to the interests of persons providing information) of the EIRs in relation to certain items.

He required Transport Scotland to provide Mr Forbes with certain information previously redacted from documents it had provided.

## Relevant statutory provisions and other sources

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

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (Interpretation – definition of environmental information); 5(1) and (2)(b) (Duty to make environmental information available on request) and 10(1), (2), (4)(e), (5)(d), (e) and (f) (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

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1. Responsibility for delivering GARL lay initially with SPT, but was transferred to Transport Scotland in March 2008. The project was subsequently (September 2009) cancelled.
2. On 29 June 2009, Mr Forbes wrote to Transport Scotland with the following request for information:  
*This request relates to the decision process which led to Transport Scotland taking responsibility for the delivery of GARL from the SPT in March 2008. I would like to receive copies of the internal communications and reports which led up to the decision being taken in the first place. I would like to see the correspondence between Transport Scotland and SPT when the decision was first delivered together with the SPT responses.*
3. Transport Scotland responded on 29 July 2009 and provided Mr Forbes with information from seven documents, all of which had been redacted under various exemptions in FOISA. Transport Scotland also informed Mr Forbes that certain personal information had been redacted under the Data Protection Act 1998 (the DPA).
4. On 5 August 2009, Mr Forbes wrote to Transport Scotland requesting a review of its decision. In particular, Mr Forbes questioned the application of the various exemptions as they appeared to have been applied to the withheld information.
5. Transport Scotland notified Mr Forbes of the outcome of its review on 3 September 2009, indicating that it now considered his information request should have properly been dealt with under the EIRs and not FOISA. Transport Scotland also withdrew reliance on the DPA and, while releasing further information, continued to withhold the remainder (including information from certain additional documents it had identified in the course of the review). In withholding information, it relied on the exceptions in regulations 10(4)(e), 10(5)(e) and 10(5)(f) of the EIRs.
6. On 8 September 2009, Mr Forbes wrote to the Commissioner, stating that he was dissatisfied with the outcome of Transport Scotland's 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 Forbes 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

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8. Transport Scotland is an agency of the Scottish Ministers (the Ministers) and, in line with agreed procedures, the Ministers were notified in writing on 10 September 2009 that an application had been received from Mr Forbes and asked to provide the Commissioner with any information withheld from him. Transport Scotland responded with the information requested and the case was then allocated to an investigating officer.
9. The investigating officer subsequently contacted Transport Scotland, giving it an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking it to respond to specific questions. In particular, Transport Scotland was asked to justify its reliance on any provisions of FOISA and/or the EIRs it considered applicable to the information requested.
10. Transport Scotland responded, confirming that it was withholding certain information in terms of regulations 10(4)(e), 10(5)(e) and 10(5)(f) of the EIRs. Transport Scotland also indicated reliance on section 39(2) of FOISA, in that the information requested was environmental information and should properly be considered under the EIRs.
11. During the investigation, Transport Scotland also indicated that it was relying upon the exemption under regulation 10(5)(d) of the EIRs for certain information. It also argued that Mr Forbes' request was invalid, but later withdrew these arguments.
12. The submissions made by Mr Forbes and Transport Scotland, insofar as relevant, will be considered more fully in the Commissioner's analysis and findings below.

## Commissioner's analysis and findings

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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 Forbes and Transport Scotland and is satisfied that no matter of relevance has been overlooked.
14. Transport Scotland withheld all of the information contained in 11 documents and redacted certain information from a further six documents released to Mr Forbes, claiming that it was entitled to do so in terms of section 39(2) of FOISA and various exceptions under the EIRs.



### Section 39(2) of FOISA – environmental information

15. The Commissioner set out his thinking on the relationship between FOISA and the EIRs in some detail in *Decision 218/2007 Professor A D Hawkins and Transport Scotland* and need not repeat it in full here. In this case, Transport Scotland has claimed that the information withheld is exempt in terms of section 39(2) of FOISA, being environmental information for the purposes of the EIRs. For this exemption to apply, the information in question would require to be environmental information as defined in regulation 2(1) of the EIRs, which is reproduced in the Appendix below.
16. Given its subject matter (GARL) and having considered the actual content of the withheld information, the Commissioner acknowledges that it concerns the proposed construction of a significant piece of transport infrastructure and considers it to be information on measures and activities affecting, or likely to affect, the elements of the environment, in particular land and landscape. As such, the Commissioner is satisfied that it falls within the definition of environmental information set out in regulation 2(1) of the EIRs, in particular paragraph (c) of that definition.
17. The exemption in section 39(2) of FOISA provides, in effect, that environmental information as defined by regulation 2(1) of the EIRs is exempt from disclosure under FOISA (thereby allowing any such information to be considered solely in terms of the EIRs). This exemption is subject to the public interest test in section 2(1)(b) of FOISA. In this case the Commissioner accepts that the Ministers were correct to apply the exemption to the withheld information, given his conclusion that it is environmental information.
18. As there is a separate statutory right of access to environmental information available to the applicant in this case, the Commissioner also accepts that the public interest in maintaining this exemption and dealing with the request in line with the requirements of the EIRs outweighs any public interest in disclosure of the information under FOISA. The Commissioner is therefore satisfied that the information was properly withheld under section 39(2) of FOISA and has consequently proceeded to consider this case in what follows solely in terms of the EIRs.
19. Transport Scotland claimed that the withheld information was excepted from disclosure under the terms of regulations 10(4)(e); (5)(e); (5)(d) and (5)(f) of the EIRs. The Commissioner will first of all consider regulation 10(4)(e), and only where he considers that this exception does not apply will he go on to consider the other exceptions cited by Transport Scotland.

### Regulation 10(4)(e) of the EIRs

20. Transport Scotland contended that regulation 10(4)(e) as an exception applied in relation to the information in the 11 documents withheld in full and to the redactions made to three further documents. For information to fall within the scope of this exception, it need only be established that it is an internal communication (which the Ministers maintained was the case in respect of this information).



21. Having examined the withheld information, the Commissioner is content that the documents to which Transport Scotland has applied regulation 10(4)(e) are all internal communications for the purposes of the EIRs. The application of the exemption is, however, subject to the public interest test in regulation 10(1)(b).

*Public interest test – regulation 10(4)(e)*

22. The exception in regulation 10(4)(e) of the EIRs is subject to a public interest test set out in regulation 10(1)(b). Regulation 10(1) provides that a Scottish public authority may refuse a request to make environmental information available if there is an applicable exception to disclosure under regulation 10(4) or (5) and, in all the circumstances, the public interest in making the information available is outweighed by that in maintaining the exception. Further, regulation 10(2) of the EIRs specifies that in considering the application of the exceptions contained in regulation 10(4) and (5), the public authority shall interpret those exceptions in a restrictive way and apply a presumption in favour of disclosure.
23. Mr Forbes submitted that there was an overwhelming public interest in obtaining the true facts behind the money already spent on this project. Revealing what had already occurred might very well be embarrassing (he suggested), but he did not believe it would prevent Transport Scotland's from being able to "*obtain value for money for the public purse*" in the future. He argued that lessons learned from this exercise might well improve these prospects and allow the public to have more confidence, knowing that the mistakes already made had been identified and would be taken into account in its future operations. Mr Forbes also commented that there was already a massive overspend in the land acquisition required for this project, with indications that there was more to come as the design was finalised. He also contended that it was important that unnecessary public expenditure was not kept from public knowledge.
24. In his request for review, Mr Forbes also submitted that it was in the public interest to establish whether the commercial interests of Transport Scotland outweighed the need to examine available alternative designs and routes. He further commented that it would be in the public interest to ascertain whether his earlier criticism in relation to an aspect of the project was now being mirrored by Transport Scotland, and, if so, how long it had taken to react to that criticism.
25. In considering the public interest test, Transport Scotland acknowledged a clear public interest both generally in information relating to the GARL project and also in the specific detail. It went on to argue, however, that this was outweighed in this case by the need for Ministers and officials to candidly consider ongoing policy issues and explore options concerning a major infrastructure project without fear of early or premature release. It noted that many of the withheld documents contained candid assessments made by Transport Scotland officials on specific matters.



26. Transport Scotland further contended that some of withheld information was provided on the basis of confidentiality and that release would make third parties less likely to provide information (particularly where disclosure could have financial impact). It would also harm ongoing relations and consequently undermine the ability of Transport Scotland to operate as effectively in the public interest. Consequently, it considered the public interest in transparency to be outweighed by that in respecting the confidentiality of information supplied by third parties.
27. Transport Scotland also highlighted the public interest in ensuring that it had full knowledge of all relevant information. If there was concern about release of information provided by third parties it might only be provided with limited information, compromising its ability in this instance to effectively manage the transfer of responsibility for this project.
28. Finally, Transport Scotland submitted that disclosure of the fact that certain options had been considered (whether or not pursued) could generate harmful uncertainty for the planning of major capital investment projects. Even though the GARL project had been cancelled, the overriding public interest remained (in Transport Scotland's view) in protecting officials' ability to candidly consider options (and its own and others' economic interests, which might be engaged in future projects in a similar way) in a secure environment.
29. In all the circumstances of this case, having considered the withheld environmental information along with all relevant submissions, the Commissioner concludes on balance that the public interest in making the information, except for the information referred to in paragraphs 30 and 32 below, available is outweighed by that in maintaining the exception in regulation 10(4)(e) of the EIRs. Therefore, he considers Transport Scotland to have been justified in withholding the majority of the information to which it applied that exception. The Commissioner must note in this context that while the GARL project has since been cancelled, it remained under active development (and therefore the majority of the matters under consideration in the withheld information remained very much "live") at the time Transport Scotland dealt with Mr Forbes' information request and his request for review.
30. The Commissioner has reached a different conclusion, however, in respect of the text redacted in document 1, in respect of which he cannot accept that disclosure would (or would be likely to) have any of the harmful effects effect claimed by Transport Scotland. It sets out an intention which does not appear to be particularly unusual or surprising in the context of a major project of this kind, but rather simply prudent: indeed, there is a degree of public reassurance to be gained from knowing that such action was contemplated. In all the circumstances, the Commissioner is satisfied that the public interest in making this information available is not outweighed by that in maintaining the exception in regulation 10(4)(e). Since Transport Scotland did not apply any other exception to this redaction, the Commissioner concludes that this information was not correctly withheld in terms of the EIRs.



31. The Commissioner has also concluded that disclosure of the dates redacted under the heading, "Milestone Dates" in Annex B of document 5 would not (and would not be likely to) have any of the harmful effects Transport Scotland has argued and therefore were incorrectly withheld under regulation 10(4)(e). He can identify no reason why this information should be considered any more sensitive than that in the remainder of the table forming Appendix B, and no such reason has been brought to his attention by the Ministers. He must also, however, consider whether these dates were properly withheld under regulation 10(5)(e) or (f), as the Ministers have claimed.
32. Finally, the Commissioner notes that the information in the fourth bullet point on page 2 of document 7 was released to Mr Forbes within document 5 and therefore further release would not cause any inhibiting effect as claimed. He does not, therefore, consider it necessary to give that information further consideration in this decision.
33. In addition to the documents withheld under regulation 10(4)(e) of the EIRs, Transport Scotland also withheld the information in one document solely under regulation 10(5)(e) (redaction to document 8) and three documents (documents 9, 10 and 10a) under regulation 10(5)(d) and (f) of the EIRs. The Commissioner will now consider the application of regulation 10(5)(d) to the information withheld from documents 9, 10 and 10a.

#### **Regulation 10(5)(d) of the EIRs**

34. The exception in regulation 10(5)(d) provides that a Scottish public authority may refuse to make environmental information available to the extent that its disclosure would, or would be likely to, prejudice substantially the confidentiality of the proceedings of any public authority where such confidentiality is provided for by law. Transport Scotland withheld the information redacted from documents 9 and 10 under this exception, along with all the information in document 10a.
35. In its publication *The Aarhus Convention: an implementation guide*, the Economic Commission for Europe (the United Nations agency responsible for the convention which the EIRs are designed to implement) notes at page 59 that the convention does not comprehensively define "proceedings of public authorities", but suggests that one interpretation is that these may be proceedings concerning the internal operations of a public authority rather than substantive proceedings conducted by the public authority in its area of competence. The confidentiality under this exception must be provided for under national law.
36. Transport Scotland argued that the information referred to in paragraph 34 above related to proceedings in connection with the transfer of the GARL project. At the time of the request this was an ongoing project (and Transport Scotland considered elements of it to remain "live" when it made its submissions to the Commissioner) and therefore, in the authority's view, the relevant information would necessarily be confidential in nature. Transport Scotland drew attention to the Minute of Agreement dealing with the transfer of responsibility for the project (the MoA), which made explicit provision for confidentiality in respect of information relating to the project.





37. The Commissioner accepts that the communications which comprise the withheld information fall within the suggested definition of "proceedings of public authorities" set out in paragraph 35 above, noting the common interest of Transport Scotland and SPT in the matters to which the information relates (considered further below). For the exception in regulation 10(5)(d) to apply, however, the Commissioner must be satisfied that disclosure of the information would, or would be likely to, prejudice substantially the confidentiality of those proceedings. Firstly, he must be satisfied that the proceedings are confidential, such confidentiality being provided for by law.
38. In many cases where this exception will apply, there will be a specific statutory provision prohibiting the release of the information. However, the Commissioner considers that there may also be cases where the common law of confidence will protect the confidentiality of the proceedings. An aspect of this is the law relating to confidentiality of communications, which embraces the rules and principles applying to legal professional privilege.
39. Legal professional privilege is split into two aspects, that is litigation privilege and legal advice privilege. Litigation privilege applies to documents created in contemplation of litigation, while legal advice privilege covers confidential communications between lawyers and their clients made for the purpose of seeking or giving legal advice.
40. In this case, Transport Scotland argued that legal advice privilege applied to the withheld information.
41. Certain conditions must be fulfilled before legal advice privilege can apply to a communication. The information being withheld must relate to communications with a legal advisor (such as an advocate or a solicitor). The legal advisor must be acting in their professional capacity and the communications must occur in the context of a professional relationship with the client. The Commissioner accepts that such a process of procuring and receiving legal advice falls within the definition of "proceedings" considered above.
42. In this case the Transport Scotland argued that the principal document, document 10a, was prepared by lawyers and therefore was a legal document to which an expectation of confidentiality could be attributed. Consequently, it considered that the proceedings of the Scottish Government would be substantially prejudiced were such documents to be released.
43. The Commissioner is satisfied that the information in document 10a comprises independent legal advice obtained by SPT from solicitors acting in their professional capacity as legal advisors to SPT (SPT then acting as the Authorised Undertaker under the GARL Act 2007). It relates to contractual obligations novated to Transport Scotland when it became the Authorised Undertaker. Consequently, the Commissioner is satisfied that (by the time it dealt with Mr Forbes' information request and request for review) Transport Scotland had a common interest with SPT in the advice in document 10a. He is also satisfied that the information retained the quality of confidence at that time. In all the circumstances, therefore, he accepts that Transport Scotland was entitled to claim legal advice privilege in respect of this information, and consequently that the process of obtaining that advice was properly considered confidential for the purposes of regulation 10(5)(d).



44. The Commissioner has also considered the information redacted from documents 9 and 10. While he would not necessarily accept that this information fulfilled the requirements for legal advice privilege to apply, he has noted the general expectation of confidentiality in the MoA (although this does not prohibit disclosures made for the purpose of responding to a request under FOISA), along with the content of the information and the submissions received from Transport Scotland. He finds that, at the time Transport Scotland dealt with Mr Forbes' information request and request for review, the information had the necessary quality of confidence and was the subject of at least an implicit obligation of confidentiality. In the circumstances, he accepts that the information (and the aspects of the transfer process to which it related) were properly considered confidential under common law.
45. The Commissioner has also considered whether disclosure of this withheld information would, or would be likely to, prejudice substantially the confidentiality of proceedings he has identified. In this context, he has taken into consideration Transport Scotland's arguments to the effect that such prejudice would be caused to the sharing of information by third parties and to Transport Scotland's ability to co-operate with certain third parties. At the time Transport Scotland dealt with this request and request for review, he accepts that substantial prejudice to the confidentiality of the relevant proceedings of Transport Scotland would have been a likely consequence of disclosure. He therefore accepts that the information was properly excepted under regulation 10(5)(d) of the EIRs. He must, however, go on to consider the application of the public interest test in relation to all of the information withheld under this exception.

*Public interest test – regulation 10(5)(d)*

46. While acknowledging a general public interest in GARL related material, the Ministers argued that this was outweighed by the public interest in a public authority being able to undertake its proceedings, particularly in terms of governance, without the constant concern that material relating to confidential proceedings was likely to be placed in the public domain. The public interest, it suggested, did not lie in compromising the ability of a public authority to discharge effectively business undertaken on the understanding of confidentiality. Mr Forbes' arguments on the public interest are set out above, in the consideration of regulation 10(4)(e).
47. As the Commissioner has noted in a number of previous decisions, the courts have long recognised the strong public interest in maintaining the right to confidentiality of communications between legal adviser and client on administration of justice grounds. Many of the arguments in favour of maintaining confidentiality of communications were discussed in a House of Lords case, *Three Rivers District Council and others v Governor and Company of the Bank of England (2004) UKHL 48*, and the Commissioner will apply the same reasoning to communications attracting legal professional privilege generally. More generally, he considers there to be a strong public interest, also recognised by the courts, in the maintenance of confidences. Consequently, while he will consider each case on an individual basis, he is likely to order the release of privileged communications (and confidential communications generally) in highly compelling cases only.



48. As he has indicated in previous decisions, the Commissioner accepts that it might on occasion be in the public interest to require the disclosure of confidential material where it would make a significant contribution to debate on a matter of public interest or the scrutiny of decision making processes (including those in respect of the expenditure of substantial public funds). In this context, he has taken into account the submissions received from Mr Forbes. While Mr Forbes clearly has a very strong personal interest in this matter, the Commissioner accepts that there is a wider public interest in the development of this project. Against this, however, there is clearly the very strong public interest in maintaining the right to confidentiality of communications between legal adviser and client on administration of justice grounds and the need for public authorities to undertake its proceedings in confidence where applicable. On balance, the Commissioner has determined, in all the circumstances of this case, that the public interest in making this information available is outweighed by the public interest in maintaining the exception under regulation 10(5)(d).
49. The Commissioner is therefore satisfied that Transport Scotland was correct to withhold information from documents 9, 10 10a under regulation 10(5)(d) of the EIRs. Having reached this conclusion, he does not find it necessary to consider this information further in relation to any other exception.

#### **Regulation 10(5)(f) of the EIRs**

50. Transport Scotland relied upon regulation 10(5)(f) in relation to the “Milestone Dates” redacted from document 5.
51. Regulation 10(5)(f) states that a Scottish public authority may refuse to make environmental information available to the extent that its disclosure would, or would be likely to, prejudice substantially the interests of the person who provided the information where that person -
- (i) was not under, and could not have been put under, any legal obligation to supply the information;
  - (ii) did not supply it in circumstances such that it could, apart from these Regulations, be made available; and
  - (iii) has not consented to its disclosure.
52. From the submissions made by Transport Scotland, the Commissioner is not satisfied that the “Milestone Dates” redacted from document 5 are information to which regulation 10(5)(f) could be said to apply. Indeed, he has difficulty identifying the relevance of these submissions to the information in question. On the basis of the arguments he has been presented with, he can see no reason why the dates in question should be considered to have been supplied by a third party: if anything, they are presumably the outcome of discussion between Transport Scotland and SPT (and possibly other third parties). In the circumstances, the Commissioner cannot accept that he is entitled to conclude that this information was properly withheld in terms of regulation 10(5)(f) of the EIRs.



### Regulation 10(5)(e) of the EIRs

53. Transport Scotland also submitted that the redaction made to document 8 and the “Milestone Dates” redacted from document 5 were withheld under regulation 10(5)(e) of the EIRs.
54. Regulation 10(5)(e) of the EIRs provides that a Scottish public authority may refuse to make environmental information available to the extent that its disclosure would, or would be likely to, prejudice substantially the confidentiality of commercial or industrial information where such confidentiality is provided for by law to protect a legitimate economic interest.
55. The Commissioner fully considered the application of regulation 10(5)(e) of the EIRs in *Decision 033/2009 Mr Paul Drury and East Renfrewshire Council* and does not intend to repeat that here. There the Commissioner concluded that, before regulation 10(5)(e) can be engaged, authorities must consider the following matters:
- Is the information commercial or industrial in nature?
  - Does a legally binding duty of confidence exist in relation to the information?
  - Is the information publicly available?
  - Would disclosure of the information cause, or be likely to cause, substantial harm to a legitimate economic interest?
56. As with the application of regulation 10(5)(f), it is not entirely clear to the Commissioner how the arguments advanced by Transport Scotland in respect of regulation 10(5)(e) are of relevance to the “Milestone Dates” or the information redacted from document 8. While these arguments may be apposite in respect of other elements of withheld information (which the Commissioner has in any event accepted as having been properly withheld under other exceptions), he has been presented with no specific reasons why the above tests should be considered to have been met in respect of the information he is considering here. In the absence of such specific arguments, it is not obvious why the general thrust of Transport Scotland’s case in relation to this exception (which focuses on confidential negotiating strategies and the like) should be considered relevant to that information. Consequently, he is not persuaded that the information is commercial or industrial in nature, that a legally binding duty of confidence exists in relation to it, or that its disclosure would cause, or be likely to cause, substantial harm to a legitimate economic interest.
57. The Commissioner is therefore not satisfied that the information comprising the “Milestone Dates” in Annex B of Document 5 and the redaction from document 8 was correctly withheld under regulation 10(5)(e) of the EIRs.
58. In conclusion, the Commissioner finds that Transport Scotland correctly withheld information in terms of regulation 10(4)(e) and regulation 10(5)(d) as outlined above. He also finds, however, that Transport Scotland incorrectly withheld the redaction made to document 1 (under regulation 10(4)(e), the “Milestone Dates” in Annex B of document 5 (under regulation 10(4)(e), 10(5)(e) and 10(5)(f)) and the redaction made to document 8 (under regulation 10(5)(e)), all as detailed above.



## DECISION

The Commissioner finds that Transport Scotland complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) and, in part, with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by Mr Forbes.

The Commissioner finds that Transport Scotland dealt with Mr Forbes' request for information in accordance with Part 1 of FOISA by applying the exemption in section 39(2), on the basis that the information requested was environmental information and therefore subject to the EIRs.

He also finds that whilst Transport Scotland correctly withheld the majority of the withheld information under regulation 10(4)(e) and 10(5)(d) of the EIRs, it incorrectly relied upon regulation 10(4)(e), 10(5)(e) and 10(5)(f) of the EIRs in relation to certain information (and thereby failed to comply with regulation 5(1)).

The Commissioner therefore requires Transport Scotland to provide Mr Forbes with the information redacted from documents 1 and 8, and the "Milestone Dates" redacted from Annex B of document 5, by 29 October 2010.

## Appeal

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Should either Mr Forbes or Transport Scotland 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**  
**13 September 2010**



## Appendix

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### 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 –

...

- (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

-

- (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.
- (2) The duty under paragraph (1)-  
...
  - (b) is subject to regulations 6 to 12.

## 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.
- (5) A Scottish public authority may refuse to make environmental information available to the extent that its disclosure would, or would be likely to, prejudice substantially-  
...
  - (d) the confidentiality of the proceedings of any public authority where such confidentiality is provided for by law;





- (e) the confidentiality of commercial or industrial information where such confidentiality is provided for by law to protect a legitimate economic interest;
- (f) the interests of the person who provided the information where that person-
  - (i) was not under, and could not have been put under, any legal obligation to supply the information;
  - (ii) did not supply it in circumstances such that it could, apart from these Regulations, be made available; and
  - (iii) has not consented to its disclosure; or

...