



Scottish Information
Commissioner

**Decision 025/2007 Mr Rob Edwards and the
Scottish Executive.**

*Request for a copy of information considered by ministers on the
proposed trial reintroduction of the European beaver*

**Applicant: Rob Edwards
Authority: Scottish Executive
Case No: 200503234
Decision Date: 8 February 2007**

**Kevin Dunion
Scottish Information Commissioner**

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Decision 025/2007 – Mr Rob Edwards and the Scottish Executive

Request for a copy of information considered by Ministers on the proposed trial reintroduction of the European beaver – information withheld under regulation 10(4)(e) of the Environmental Information (Scotland) Regulations 2004

Relevant Statutory Provisions and other Sources

Environmental Information (Scotland) Regulations 2004 regulations 5(1) (Duty to make available environmental information upon request); 10(4)(e) (Exceptions from duty to make environmental information available).

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

Facts

Mr Edwards requested from the Scottish Executive (the Executive) all reports, documents, minutes and correspondence, not already in the public domain, considered by Ministers in coming to their decision to reject the proposed trial reintroduction of the European Beaver. The Executive refused to release the information, citing regulation 10(4)(e) of the Environmental Information (Scotland) Regulations 2004 (the EIRs.) Upon requesting a review of that decision, the Executive released an annex of factual information. Mr Edwards remained dissatisfied with the Executive's response and applied to the Scottish Information Commissioner of a decision.

Following an investigation, the Commissioner found that the Executive had dealt with Mr Edwards' request for information in accordance with the requirements of the EIRs in that it had correctly applied regulation 10(4)(e) of the EIRs in excepting from release the information Mr Edwards had requested.



Background

1. On 2 September 2005 Mr Edwards applied to the Executive for copies of all reports, documents, minutes and correspondence, not already in the public domain, considered by Ministers in coming to their decision to reject the proposed trial reintroduction of the European Beaver.
2. On 20 October 2005 the Executive responded stating that, as the request was complex and voluminous, a further 20 working days had been required to deal with it (as is allowed by regulation 7 of the EIRs). However, the only information relevant to the request was a minute from an official to a minister. This was being excepted from release under regulation 10(4)(e) of the EIRs as it comprised an internal communication.
3. On 24 October 2005 Mr Edwards requested a review of the Executive's decision.
4. On 24 November 2005 the Executive responded to Mr Edwards, upholding the original decision to refuse the information under regulation 10(4)(e) of the EIRs but also releasing a factual annex.
5. On 7 December 2005 Mr Edwards applied to me for a decision as to whether the Executive had dealt with his information request in accordance with the requirements of the EIRs.
6. The case was allocated to an investigating officer. Mr Edwards' application was validated by establishing that he had made a valid information request to a Scottish public authority as defined in the EIRs and had applied to me only after asking the public authority to review its response to his request.

The Investigation

7. The investigating officer contacted the Executive in terms of section 49(3)(a) of FOISA (as applied by regulation 17 of the EIRs), seeking its comments on the application and further information in relation to this case (in particular the information requested by Mr Edwards). The Executive responded on 13 January 2006.



Submissions from the Executive

8. The Executive stated that after an extensive search the only material considered relevant to Mr Edwards' request was a minute of 5 July 2005 to the Deputy Minister for Environment and Rural Development.
9. This minute was claimed to be environmental information as defined by the EIRs and, as an internal communication, it was considered excepted from the duty to make environmental information available under regulation 10(4)(e) of the EIRs.
10. The Executive submitted that the substantive issue to be considered, therefore, was the whether the public interest in maintaining the exemption outweighed that in making the information available (the exception in regulation 10(4)(e) is subject to the public interest test required by regulation 10(1)(b) of the EIRs).
11. The Executive argued that Ministers and officials required a secure environment within which to consider policy issues and that decisions must be taken on the basis of advice given without reserve. The disclosure of internal advice might lead to officials giving advice orally rather than in writing. This, in turn, could lead to poor decision making and that would not be in the public interest.

Submissions for the applicant

12. Mr Edwards was of the view that once a decision by Ministers was made there was no need to keep the advice provided in coming to that decision secret.

The Commissioner's Analysis and Findings

FOISA or EIRs?

13. Regulation 2(1)(c) of the EIRs defines environmental information as including "(c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect elements... as well as measures or activities designed to protect those elements."
14. The information in question here is analysis and advice which relates to environmental policy and the possible reintroduction of a species of beaver. I am therefore satisfied that the information was correctly dealt with under the EIRs rather than FOISA.



Regulation 10(4)(e)

15. Regulation 10(4)(e) of the EIRs states:-

“A Scottish public authority may refuse to make environmental information available to the extent that the request involves making available internal communications.”
16. This is the first occasion on which I have to come to a decision on an application in which this exception has been given for not disclosing the information requested.
17. The exception does not expand upon what is meant by internal communications. The wording of the regulation directly reflects Article 4.1(e) of the relevant European directive (Directive 2003/4/EC on public access to environmental information), as well as Article 4.3(c) of the Aarhus Convention.
18. The purpose of the provision of this exception is discussed in guidance offered by a number of sources. Variously these raise issues as to whether the information relates to personal opinions expressed by officials, the confidentiality of the information communicated, or the notion of private space for official thinking. So far as these issues are engaged, then they would be considered when giving weight to public interest arguments for and against disclosure.
19. In order for information to fall within the scope of this exception, it need only be established that the information is an internal communication. In this case it is my view that this test is met. The information at issue is a paper submitted by a Scottish Executive official to a Scottish Executive Minister. Information has been communicated internally within the authority. (I am aware that there are views as to the extent to which a communication can be regarded as internal, if it involves communication between authorities, or even more widely. However that is not at issue in this case and I do not propose to address it here.)
20. However, the authority is only permitted to refuse a request for such information if, in all the circumstances, the public interest in making the information available is outweighed by that in maintaining the exception. An important feature of the EIRs is that, in considering the application of the exception, the authority shall apply a presumption in favour of disclosure.
21. I have fully considered the points on the public interest made by the Executive and Mr Edwards.



22. The Executive argued that “Ministers and officials require a secure environment within which they can consider policy issues without having to take into account the fact that such advice will *prematurely* (my emphasis) be put into the public domain”. However, Mr Edwards has made the point that the decision to refuse the licence application had been made at the time of his request and therefore release of the advice cannot impact upon the decision of the Minister. The Executive appears to accept that point. I have not given weight to the argument that avoiding premature release is in the public interest in this case.
23. However the Executive’s argument for withholding the information appears to relate to the release of any advice at any time. It states in its submission to me that “The Scottish Executive does not consider that the release of internal advice provided to Ministers is in the public interest.” This is not qualified with respect to circumstance, which is what the Regulation requires, nor balanced by any countervailing public interest in disclosure.
24. The Executive amplifies its position by stating that “We take the strong view that the release of internal advice to Ministers will have a harmful effect on the way future decisions are made and that the overwhelming public interest is in ensuring that such decisions are made on the basis of free and frank advice without regard to the fact that such advice will be published.”
25. Again this stance is not qualified in any way. It is a categorical statement that the release of advice (any advice, not this particular advice) will have (not may, or is likely to have) harmful effects. The consequence of accepting such a position would be that the EIRs would be read as allowing that any internal communications which comprise advice are excepted and it is in the public interest not to disclose the information.
26. This is not a view which I share. The notion of a blanket, absolute exception which is afforded to a type of information appears inconsistent with the EIRs. Authorities can take into account that the exception is available, but need always to consider whether, in the circumstances of the specific request, that the information should be disclosed in the public interest.
27. My decision in this case is based upon the public interest in the release of this specific advice.
28. In favour of disclosure is that the issue concerns a matter of public interest, that release of the information would aid further understanding of why a decision was taken to reject an application from the Executive’s own advisors on natural heritage and that this decision was now taken and therefore could not be affected by release.



29. Against release is the fact that much information about the decision was in the public domain. Additionally, following review of the original response to Mr Edwards' request, detailed background material which was supplied to Ministers was provided to him. Consideration needs also to be given as to the extent to which it is in the public interest to afford some measure of space in which officials and Ministers can discuss issues to do with options and consequences from a decision.
30. In this specific case and having read the documents I am of the view that the balance of public interest lies in withholding the information. I accept that it would be interesting to know what exactly was said to the Minister regarding the application. However that is not the same as being in the public interest. The public interest lies in understanding the decision and enhancing the accountability of the Executive. This has been very substantially achieved by the information which is in the public domain and crucially by the release of the background paper. The advice to Ministers (and the draft of the background paper) does not address more, or vary from, the matters of substance. The language may be different from the publicly available material, but the issues considered are the same, and it is clear how the Executive arrived at its decision.
31. It could well be in the public interest to release such information in other cases, but in this case I am of the view that it is fair to allow some space for the Executive to be frank in its internal deliberation and to consider the consequences of alternative courses of action, and in the circumstances of this case I conclude that the balance of public interest is in withholding the information.

Decision

I find that the Scottish Executive dealt with Mr Edwards' request for information in accordance with the requirements of the Environmental Information (Scotland) Regulations 2004 (EIRs) in that it correctly applied regulation 10(4)(e) of the EIRs in excepting from release the information Mr Edwards had requested .



Appeal

Should either Mr Edwards or the Scottish Executive wish to appeal against my 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 of receipt of this notice.

Kevin Dunion
Scottish Information Commissioner
8 February 2007



APPENDIX

Relevant Statutory Provisions

Environmental Information (Scotland) Regulations 2004:

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

(...)

- (4) A Scottish public authority may refuse to make environmental information available to the extent that-

- (e) the request involves making available internal communications(...)