

# Decision Notice



Decision 044/2009 Mr Rob Edwards of the Sunday Herald and the Scottish Ministers

Nuclear waste

Reference No: 200601048  
Decision Date: 03 April 2009

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## Summary

Mr Rob Edwards, Environment Editor of the Sunday Herald (Mr Edwards) requested from the Scottish Ministers (the Ministers) copies of all documents contained in a specified file relating to nuclear waste disposal. The Ministers provided some documents but withheld others under the terms of a number of exemptions set out in the Freedom of Information (Scotland) Act 2002 (FOISA). Mr Edwards remained dissatisfied after this decision was upheld following a review, and he applied to the Commissioner for a decision.

Following an investigation, the Commissioner concluded that the information under consideration was environmental information and so he considered the case under the terms of the Environmental Information (Scotland) Regulations 2004 (the EIRs).

The Commissioner found regulations 2(2) and 10(4)(d) had been misapplied by the Ministers. However, he found that all of the documents withheld were internal communications, and so excepted from disclosure under regulation 10(4)(e). After consideration of the public interest test, the Commissioner required disclosure of the information specified in the schedule of documents in Appendix B of this decision to Mr Edwards. The Commissioner found that the Ministers acted in accordance with the EIRs by withholding the remaining information.

## 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) (Effect of exemptions); 39(2) (Health, safety and the environment).

Environmental Information (Scotland) Regulations 2004 (EIRs): regulations 2(1) and 2(2) (Interpretation) (definitions of “environmental information” and when information is “held”); 5(1) and (2)(b) (Duty to make environmental information on request); 10(1), (2) and (4)(d) and (e) (Exceptions from duty to make environmental information available).

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

## Other sources

*Decision 218/2007 Professor A D Hawkins and Transport Scotland (the Hawkins Decision)*  
<http://www.itpublicknowledge.info/applicationsanddecisions/Decisions/2007/200600654.asp>



The Aarhus Convention: an implementation guide (the Aarhus Convention Implementation Guide):  
<http://www.unece.org/env/pp/acig.pdf>

## Background

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1. Before setting out the details of Mr Edwards' information request, it may be helpful to provide some background information on Nirex. Nirex was established in 1982 to research, develop and operate radioactive waste facilities on behalf of the nuclear industry. In the 1980s, it was asked by the Government to identify possible sites for use as deep geological repositories for radioactive waste. 500 sites were originally identified, and these were later narrowed down to a short list. A site close to Sellafield was selected by Nirex for the establishment of an underground repository. However, Nirex's proposals were rejected by the Government in 1997 following a planning enquiry, leading to the termination of the programme as a whole.
2. Nirex, known as the Nuclear Industry Radioactive Waste Executive, became a limited company United Kingdom, Nirex Ltd in 1985. The ownership of Nirex was transferred from the nuclear industry to the UK Government in April 2005, and then to the UK's Nuclear Decommissioning Authority (NDA) in November 2006. Nirex's staff and functions were integrated into the NDA in April 2007, at which point Nirex ceased trading as a separate entity. Nirex's role continues through the activities of the Radioactive Waste Management Directorate of the NDA.
3. On 14 October 2005, Mr Edwards emailed the Ministers requesting a copy of all documents contained within the file IMG/3/3: Nirex Repository. Mr Edwards requested the contents of a number of other files at the same time, but this decision will be concerned only with the request for file IMG/3/3.
4. On 10 November 2005 and 13 January 2006, the Ministers wrote to Mr Edwards advising him that due to the substantial number of documents contained within the files he had requested, it would be providing a delayed response.
5. On 27 March 2006, the Ministers wrote to Mr Edwards in response to his request for information. They apologised for their delayed response and released some information from the IMG/3/3 file. The Ministers withheld the remaining information, maintaining that some information was not held by them for the purposes of FOISA (in terms of section 3(2)(a)(ii)) and other documents were exempt from disclosure under sections 25(1), 28(1), 29(1)(a), 29(1)(b), 30(b) and 30(c) of FOISA.
6. On 29 March 2006, Mr Edwards emailed the Ministers requesting a review of their decision. In particular, Mr Edwards commented that it was difficult for him to judge whether the public interest would favour disclosure of the withheld documents as he had not seen these. He asked the Ministers to review the documents to consider whether the public interest be in favour of release.



7. On 18 April 2006, the Ministers wrote to Mr Edwards advising him that, following a review, they had upheld their decision withhold the remaining information on the grounds previously specified.
8. On 12 June 2006, Mr Edwards wrote to the Commissioner, stating that he was dissatisfied with the outcome of the Ministers' review and applying for a decision in terms of section 47(1) of FOISA (which, in terms of regulation 17 of the EIRs, applies for the purposes of the EIRs as it applies for the purposes of FOISA, subject to minor modification).
9. Mr Edwards' application was made in respect of the Ministers' responses to six of the requests that were made on 14 October 2006. However, as noted above, this decision will solely consider the Ministers' handling of the request for the contents of file IMG/3/3.
10. The case was allocated to an investigating officer and the application 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

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11. On 22 June 2006, the Ministers were notified in writing that an application had been received from Mr Edwards and were invited to comment on the application in terms of section 49(3)(a) of FOISA. The Ministers were asked to provide specified items of information required for the purposes of the investigation, which would initially address Mr Edwards' six requests together.
12. In particular, the investigating officer asked the Ministers to supply a schedule listing the documents that were released to Mr Edwards and those withheld, showing which exemption was being applied to each document. The investigating officer also asked the Ministers to comment as to whether the information under consideration was environmental information; the reasons for the delay in responding to Mr Edwards' request; and the basis for the Ministers' claim that certain information was not held by them in terms of section 3(2)(a)(ii) of FOISA (on the grounds that it was held in confidence, having been supplied by the UK Government).
13. The Ministers' response was provided on 4 August 2006. This explained that they had considered carefully whether Mr Edwards' requests should be treated under FOISA or the EIRs but that they had concluded that the bulk of the information contained in the relevant files was not environmental. They acknowledged that there was some environmental information within the files, but explained that they had concluded that it would be more appropriate to consider the requests under FOISA rather than the EIRs.



14. The investigating officer subsequently asked the Ministers to provide copies of all information withheld from within file IMG/3/3. The Ministers were advised that it was possible that the Commissioner would conclude that the EIRs should have been applied to this information and so they were asked to confirm which exception(s) or other provisions within the EIRs they would have applied to each withheld document if they had considered this under the EIRs. The Ministers provided this information in a letter dated 21 September 2006, confirming that they would apply regulations 2(2), 10(4)(d), 10(4)(e), 10(3) and 11(2) of the EIRs if the Commissioner concluded that it was environmental information.
15. On 27 September 2006, the investigating officer emailed Mr Edwards to confirm that he accepted the withholding of personal information of third party individuals from the documents by the Ministers and did not require this to be considered in the decision. Mr Edwards's response confirmed this, but noted that he did want to see the names of officials concerned in any situation where these had been redacted, and any other substantive redactions.
16. Following the issue of *Decision 218/2007 Professor A D Hawkins and Transport Scotland* (the Hawkins Decision), which set out in detail the Commissioner's views on the relationship between FOISA and the EIRs, the investigating officer advised the Ministers that the Commissioner had reached the view that the information contained within the IMG/3/3 file was likely to be environmental information as defined in Regulation 2 of the EIRs. The Ministers were asked whether they wished to rely upon the exemption in section 39(2) of FOISA in relation to information that the Commissioner judged to be environmental information in this case. The Ministers' response confirmed that they would wish to rely on this exemption to any information that the Commissioner found to be environmental information.

## Commissioner's analysis and findings

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

### Documents under consideration

18. Appendix B contains a schedule of the documents contained in the file IMG/3/3. This schedule forms part of this decision. It lists the documents which were released and withheld in response to Mr Edwards' information request. Those released in full have not been considered in this decision, but they are included within the schedule for the sake of completeness.
19. As detailed above Mr Edwards accepted that personal information of members of the public, such as the names and addresses of correspondents, could be withheld by the Ministers and so documents have not been considered any further where the only information withheld is of this type. The documents excluded from further consideration on this basis are those numbered 1 to 9, 15A and 22.



20. A number of items have also been excluded from consideration on the basis that they duplicate items considered elsewhere within this decision. Those not considered on this basis are 11, 16, 17, 27, 30 and 40.
21. Document 42C is a published report entitled: "The Radioactive Waste management Advisory Committee's: Initial Recommendations on the long Term Management of Intermediate Level Radioactive Waste Following Rejection of the UK Nirex Rock Characterisation Facility Planning Application "Rethinking Disposal". This document (to which a number of the other documents under consideration relate) will be referred to as 'the Report' within this decision.

### FOISA or EIRs?

22. When Mr Edwards made his initial request to the Ministers on 14 October 2005 he asked for the information under the terms of both FOISA and the EIRs. The Ministers considered his request and provided their response in terms of FOISA.
23. Environmental information is defined in regulation 2 of the EIRs (the definition is reproduced in full in the Appendix to this decision). 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.
24. As noted above, the Ministers informed the Commissioner that they did not consider the bulk of the information contained within the file under consideration to be environmental information, although they acknowledged that some of it was. They had judged that FOISA was the appropriate regime under which to consider Mr Edwards' request.
25. However, when asked to do so, the Ministers did provide details of how they considered Mr Edwards' request would have been responded to under the terms of the EIRs.
26. While the investigation in this case was ongoing, the Commissioner issued the Hawkins decision, which sets out the Commissioner's thinking on the relationship between FOISA and the EIRs in some detail. Broadly, the Commissioner's general position on the interaction between the two regimes is as follows:
  - The definition of what constitutes environmental information should not be viewed narrowly, but in line with the definition in regulation 2(1) of the EIRs.
  - There are two separate statutory frameworks for access to environmental information and an authority is required to consider any request for environmental information under both FOISA and the EIRs.
  - Any request for environmental information therefore **must** be dealt with under the EIRs.
  - In responding to a request for environmental information under FOISA, an authority may claim the exemption in section 39(2).



- If the authority does not choose to claim the section 39(2) exemption, it must deal with the request fully under FOISA, by providing the information, withholding it under another exemption in Part 2, or claiming that it is not obliged to comply with the request by virtue of another provision in Part 1 (or a combination of these).
  - The Commissioner is entitled (and indeed obliged), where he considers a request for environmental information has not been dealt with under the EIRs, to consider how it should have been dealt with under that regime.
27. When asked to comment further in the light of the Hawkins decision, the Ministers confirmed that, were the Commissioner to conclude that the information under consideration in this case was environmental information, then they would wish to apply the exemption in section 39(2) of FOISA to it.
28. The Commissioner has reviewed all documents under consideration in this decision carefully in relation to the definition of environmental information. He has noted the Ministers' point that the information generally relates to the formulation of government policy, but he has had regard to the subject matter of this policy. The documents are all concerned with issues around the topic of nuclear waste disposal and how this should be taken forward in the light of the decision to reject Nirex's application to develop a facility at Sellafield in Cumbria.
29. Given the subject matter of the policy concerned, the Commissioner has concluded that the information withheld relates to measures (including policy, plans and activities) that would affect or would be likely to affect the elements of the environment (such as soil, land, and landscape) or the factors (in particular, of course, radioactive waste) referred to in parts (a) and (b) of the definition in regulation 2.
30. As such, the Commissioner is satisfied that all of the information under consideration in this case is environmental information under the terms of part (c) of the definition of environmental information. Some of the information would also fall within the scope of parts (a) and (b) of the definition, as a result of it relating directly to the state of the elements of the environment, or to factors (specifically radioactive waste) that affect or are likely to affect those elements.

### **Section 39(2) of FOISA**

31. Having reached this conclusion, the Commissioner is also satisfied that the information under consideration is exempt from disclosure under the terms of section 39(2) of FOISA. This technical exemption provides that information that is environmental information for the purposes of regulation 2 of the EIRs is exempt information under FOISA (thereby allowing the request to be considered solely in terms of the EIRs).
32. This exemption is subject to the public interest test required by section 2(1)(b) of FOISA. The Commissioner's view is that, 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. Given this conclusion, this decision has been considered solely under the terms of the EIRs.



33. The exceptions or other provisions within the EIRs that have been applied by the Ministers are listed for each document within the schedule in Appendix B. The Commissioner has considered these provisions in turn in what follows.

**Regulation 2(2) (Supplied by a Minister of the Crown or UK Government department)**

34. The Ministers have claimed that they do not hold documents 12, 13 29 and 32 for the purposes of the EIRs, on the basis that regulation 2(2) applies.
35. This regulation provides that information is held for the purposes of the EIRs where it is in the possession of the public authority concerned (having been produced or received by it), or where the information is held by another person on behalf of the authority, but only where the information has not been supplied by a Minister of the Crown or Department of the UK Government and held in confidence.
36. The intention of regulation 2(2) of the EIRs is to enable a public authority to withhold information if it is provided in confidence from the UK Government.
37. The Ministers' submissions (which were made in relation to the similar provision within section 3(2)(a)(ii) of FOISA, but which have been considered in relation to regulation 2(2)) stated that the documents concerned were sent with some sort of marking such as "restricted – policy" and/or they relate to the development of UK government policy. The Ministers stated that they receive such information on the understanding that it will be treated in confidence and will not be divulged to third parties without agreement.
38. In this case the Commissioner does not accept that the provisions within section 2(2) of the EIRs apply. He notes that the documents concerned all predate devolution, and they were passed from one department of the UK government (the Department of Environment, Transport and the Regions) to another (the Scottish Office). The documents in this case could only relate to UK Government policy because there was no separate Scottish Government at the time.
39. The Commissioner does not consider the provisions of regulation 2(2) to be able to apply in such circumstances. Rather they will apply where information has been passed outwith the UK government to a Scottish public authority in circumstances that create an obligation of confidentiality. He notes that there is no overt reference to an expectation of confidence on the part of the supplying department upon the other. While the presence of a restricted marking might create some expectation about the scope for wider circulation of a document, this might equally have an internal purpose within Government, rather than an external purpose as a marker of confidentiality.





40. The Commissioner is aware that the Scottish Ministers rather than the Scottish Office were the holders of the information concerned by the time of Mr Edwards' request. This is because the Ministers are the statutory successor to the majority of the functions of the Scottish Office following devolution. The Commissioner does not accept that transfer of the information as part of the devolution process concerned would be the "supply" of that information in the sense that is relevant for the application of regulation 2(2); nor that such supply could create an obligation of confidence to any other person if none existed before then.
41. In the circumstances, the Commissioner has concluded that all of documents 12, 13, 29 and 32 are held for the purposes of the EIRs, and that the Ministers wrongly applied regulation 2(2) of the EIRs in this case. The Commissioner has considered the application of exceptions to these documents in what follows below.

#### **Regulation 10(4)(e) (Internal communications)**

42. Regulation 10(4)(e) provides that an authority may refuse to make environmental information available to the extent that the request involves making available internal communications.
43. 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). The regulation does not expand upon what is meant by internal communications.
44. As with all the exceptions under 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)). 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)).
45. 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.
46. The Ministers have applied this exemption to all of the documents that remain under consideration in this case. In most cases, the Commissioner agrees that they are clearly internal communications within and between departments of the UK Government, prior to devolution, and so the exemption in section 10(4)(e) was correctly applied.



47. The Commissioner has noted that some of the documents concerned include communications and draft documents exchanged with the Radioactive Waste Advisory Committee (RWMAC), which was established by the Government in 1978 to provide independent advice to Ministers on matters concerning the management of radioactive waste. The Commissioner understands this Committee to be a separate public authority, distinct from all UK Government departments. Such status is evidenced, for example by the separate listing of RWMAC within Schedule 1 of the Freedom of Information Act 2000 (which lists the public authorities to which that law applies)).
48. However, the Commissioner has also considered the nature of the relationship between RWMAC and Government, whereby RWMAC, until its work ceased in 2004, would undertake an annual programme of work commissioned by the Government.
49. The Aarhus Convention Implementation Guide states  

"The public authority may refuse to disclose... materials 'concerning internal communications,' but only when national law or customary practice exempts such materials. The Convention does not clarify what is meant by "customary practice" and this may differ according to the administrative law of an implementing Party. For example, for some Parties "customary practice" may apply only to those materials covered by evidence of established norms of administrative practice."
50. The Commissioner accepts that, when these documents were created and exchanged in the late 1990s, it would have been customary practice for UK Government departments and RWMAC to consider the type of exchanges concerned to be internal communications. This is not to say that all communications from RWMAC to Government would have been such. As the Commissioner has noted in previous decisions, consideration needs to be given 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.
51. In this case, having reviewed the particular documents concerned, and noted the relationship between the relevant bodies along with the purpose and content of the communications, the Commissioner is satisfied that those originating from RWMAC can also be considered internal communications for the purposes of regulation 10(4)(e).
52. Having considered all the withheld documents in detail, the Commissioner is satisfied that all documents meet the requirements of regulation 10(4)(e) of the EIRs, in that they are internal communications

#### **Consideration of the public interest (10(1)(b)) of regulation 10(4)(e)**

53. Having found all relevant documents to be exempt in terms of regulation 10(4)(e), the Commissioner is required to consider the public interest test required by regulation 10(1) of the EIRs in relation to these documents. This specifies that a public authority may only withhold information to which an exception applies where, in all the circumstances, the public interest in making the information available is outweighed by the public interest in maintaining the exception.



54. The Ministers comments on the public interest were made in relation to the exemptions initially cited under FOISA. However, they have also been considered fully in relation to the exception in regulation 10(4)(e).
55. Mr Edwards has emphasised the difficulties in providing arguments concerning the public interest without access to the withheld information. He has not provided detailed arguments on the public interest, but asked the Commissioner to consider whether the public interest test was misjudged by the Ministers.
56. At this point, the Commissioner would note that he has considered (as he is required to do in any decision) the application of exemptions to the information under consideration and the balance of public interest in the circumstances that existed at the time when the Ministers notified Mr Edwards of the outcome of their review. A significant amount of time has passed in this case and the relevant point is April 2006. The Commissioner has disregarded the passage of time and any events after that point when considering the public interest test below.
57. In reaching their conclusion that the public interest favoured the maintenance of the exception in regulation 10(4)(e) of the EIRs, the Ministers emphasised the strong public interest in high quality decision-making. They submitted that Ministers and officials need to be able to rigorously debate and explore all options, however unpalatable, to identify their merits and demerits and possible implications. They suggested that their candour in so-doing will be affected by an assessment of whether the content of their discussions will be disclosed in the future, when it might undermine or constrain the government's views on settled policy, or those under development. As such, they suggested that disclosure might limit full and frank discussion of policy between Ministers and officials. They also suggested that "inappropriate disclosure" might distort public perceptions of the advice of officials and to affect the impartiality of the advice provided.
58. The Ministers submitted that there is a strong public interest in maintaining the integrity of free and frank advice of the sort under consideration in this case. They maintained the public interest is also in ensuring that, where necessary, advice in areas of ongoing policy development is able to take place in a non-public arena.
59. The Ministers maintained that where the information requested relates to an important process (such as discussion and advice leading up to the publication of a report) there can be a public interest in the protection of the process itself. They suggested that the public interest in protecting internal communications should be applied where the effect of disclosure would be the suppression of effective communication, for example because advice would be oral instead of written down in future.
60. The Ministers also maintained that the public interest lies in preserving open communications with the UK government.



61. The Ministers have also submitted that the timescales involved in the development of policy in this area means that events which happened many years ago still impact today and will do so for years to come. They stated that issues can take decades to resolve and often involve the same players, in the UK and overseas, so the importance of developing and maintaining good relationships is essential.
62. The Commissioner has noted all of the points made by the Ministers. He has also recognised that, although almost a decade had passed between the time when the documents under consideration were created and April 2006 (the date of the Ministers' review response), the formulation of policy regarding the management of nuclear waste was ongoing across the UK throughout that period. Indeed, many of the questions asked in 1997 regarding how and where to store nuclear waste still remain unresolved.
63. Nonetheless, the Commissioner does consider the age of the documents to be a relevant factor when addressing the public interest in this case. In many cases, the documents relate to the issues raised in the particular time of their creation, where Nirex's plans to develop a deep repository for nuclear waste at Sellafield were rejected. The Commissioner takes the view that, in many cases, the sensitivity that would once have held in relation to these documents would have diminished significantly by the time of Mr Edwards' request. A number of the documents relate to a report which has been in the public domain for many years, and to matters that have since moved on.
64. Government policy on nuclear waste disposal is one of substantial and significant general public interest, which has implications for health and safety, the protection of the environment, and the sustainability of nuclear power as a future energy source. The Commissioner recognises that disclosure of these documents could contribute to understanding of the development of policy in this area in a key time period. Given the Ministers' observation that policy in this area develops over long time periods, disclosure of the information in this case could contribute to the understanding of the background to current debates (and those at the time of Mr Edwards' request and review) on the questions concerned.
65. Overall, therefore, the Commissioner has concluded that there is and was at the relevant time a strong public interest in the disclosure of the information under consideration. This is particularly the case where the information would aid understanding of the development of government policy on nuclear waste and the contribution made by the (then) Scottish Office as the predecessor to the Scottish Ministers. The Commissioner considers that the Ministers have failed to give appropriate weight to this public interest in disclosure when considering Mr Edwards' request.
66. While the Commissioner recognises that there will be cases where the public interest favours the protection of processes of policy formulation, internal discussion and drafting, and he has weighed this public interest against that favouring disclosure, he has concluded for a number of the documents under consideration that this public interest is outweighed in this case by that in disclosure of the information under consideration. The Commissioner does not accept, particularly given the passage of time between their creation and Mr Edwards' request, that the disclosure of these documents would lead to the level of harm to either relationships or the policy making process suggested by the Ministers.



67. However, the Commissioner has not concluded that the public interest favours disclosure in every case. He has concluded that the public interest favours maintaining the exception in regulation 10(4)(e) in relation to a very limited number of documents. The final versions of some of these have already been published or made available to Mr Edwards. In these cases, the Commissioner has concluded that the contribution to understanding disclosure would make is outweighed by the public interest in allowing a degree of privacy for the drafting process. In other cases material was drafted but not utilised as an expected Parliamentary activity did not take place. There is no particular public interest in the content of these such that disclosure would outweigh the public interest in allowing officials to draft material in the expectation that, if it is not used, it would not normally be disclosed.
68. The Commissioner has also concluded that the public interest favours the protection of the privacy of a member of the public who is named in one of the documents.
69. The Commissioner's conclusions on the public interest are set out in relation to each documents within the schedule in Appendix B. Where the Commissioner has found that the public interest favours the maintenance of the exception, he finds that the Ministers acted in accordance with the EIRs by withholding this information.

#### **Regulation 10(4)(d) (Information in the course of completion)**

70. Most of the documents to which the Ministers applied this exemption were found to have been correctly withheld under regulation 10(4)(e). The Commissioner has not considered the exception in regulation 10(4)(d) in relation to these items, as indicated by "n/c" (not considered) in the schedule in Appendix B.
71. The Commissioner has considered this exception only in relation to document 24. This is a submission provided by RWMAC to the Secretary of State for Scotland.
72. Regulation 10(4)(d) of the EIRs provides an exception from disclosure where the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data.
73. The Commissioner does not accept that this exception applies to document 24. The document concerned is a complete submission – it is not a draft or piece of work with preliminary, incomplete data.
74. Undoubtedly the submission formed the basis of a subsequent published report but the submission was not made as a draft report. Rather it was a full and complete submission to the Secretary of State. The subsequent report which was published in 1997, went through a separate drafting process – in fact document 33 which has been withheld by the Scottish Ministers is a draft of that report.
75. The Commissioner cannot accept that document 24 related at the time of Mr Edwards' information request or the Government's review to unfinished documents, material that remained in the course of completion, or incomplete data.



76. For this reason, the Commissioner has concluded that the Ministers misapplied this exception to document 24.

### **Conclusion**

77. Having found that the Ministers misapplied regulation 2(2), the exception in regulation 10(4)(d) and that it also misapplied the public interest test in relation to regulation 10(4)(e) to the documents specified in the schedule in Appendix B, the Commissioner now requires these documents to be disclosed to Mr Edwards.

## **DECISION**

The Commissioner finds that the Scottish Ministers partially failed to comply with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in withholding certain information requested by Mr Edwards. The Commissioner has found that the Ministers misapplied regulations 2(2), 10(4)(d) and 10(4)(e) to some of the information requested by Mr Edwards, and in refusing to supply this information failed to comply with regulation 5(1).

The information identified in the schedule of documents in Appendix B to this decision should be supplied to Mr Edwards by 18 May 2009.

The Commissioner finds that the Ministers complied with the EIRs in withholding the remaining information under consideration, on the basis that the exception in regulation 10(4)(e) applied and the public interest in maintaining that exception outweighed the public interest in the disclosure of the information.

## **Appeal**

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Should either Mr Edwards or the Scottish 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**  
**03 April 2009**



## Appendix A

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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 –

(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.

#### 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);

(2) For the purpose of these Regulations, environmental information is held by a Scottish public authority if it is-

- (a) in its possession and it has been produced or received by that authority; or
- (b) held by another person on that authority's behalf,

and, in either case, it has not been supplied by a Minister of the Crown or department of the Government of the United Kingdom and held in confidence.

## 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-  
...
  - (d) the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data; or
  - (e) the request involves making available internal communications.



## Appendix B - Schedule of documents

No.	Document Type	Exceptions cited by the Ministers	Exception Upheld? Y/N	Public interest in favour of disclosure	Release or withhold	Comments
1	letter	10(3)&11(2)	N/A	N/A	N/A	Redacted version released – Mr Edwards accepted personal information should not be released
2	fax	10(3)&11(2)	N/A	N/A	N/A	As above
3	fax	10(3)&11(2)	N/A	N/A	N/A	As above
4	attachment to document 9 - letter	10(3)&11(2)	N/A	N/A	N/A	As above
5	attachment to document 9 - minute	10(3)&11(2)	N/A	N/A	N/A	As above
6	attachment to document 9 - minute	10(3)&11(2)	N/A	N/A	N/A	As above
7	attachment to document 9 - minute	10(3)&11(2)	N/A	N/A	N/A	As above
8	attachment to document 9 - hand-written note	10(3)&11(2)	N/A	N/A	N/A	As above
9	minute	10(3)&11(2)	N/A	N/A	N/A	As above
10	fax	10(4)(e)	10(4)(e) - Y	Partial	Release	Redact name of member of the public before release
11	attachment to 10: draft letter	10(4)(d)&(e)	N/A	N/A	N/A	Excluded from consideration in decision as duplicate of document 14 which contains additional hand-written notes
12	faxed minute	2(2) and 10(4)(e)	2(2) – N 10(4)(e) - Y	Yes	Release	N/A
13	attachment to 12:	2(2), 10(4)(d)&(e)	2(2) - N 10(4)(e) – Y 10(4)(d) – n/c	No	Withhold	N/A
14	draft letter	10(4)(d)&(e)	10(4)(e) – Y 10(4)(d) n/c	No	Withhold	N/A
15	file notes	10(4)(e)	10(4)(e) - Y	No	Withhold	N/A

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No.	Document Type	Exceptions cited by the Ministers	Exception Upheld? Y/N	Public interest in favour of disclosure	Release or withhold	Comments
15A	E-mail	10(3)&11(2)	N/A	N/A	N/A	Redacted version released – Mr Edwards accepted personal information should not be released
16	minute	10(4)(e)	N/A	N/A	N/A	Excluded from consideration in decision as duplicate of document 26 which contains additional hand-written notes.
17	attachment to 16: draft letter	2(2), 10(4)(d)&(e)	N/A	N/A	N/A	Excluded from consideration in decision as duplicate of document 13.
18	2 covering faxes & newspaper article	10(4)(e)	10(4)(e) - Y	Yes	Release	N/A
19	draft letter	10(4)(d)&(e)	10(4)(e) – Y 10(4)(d) – n/c	No	Withhold	N/A
20	minute	10(4)(e)	10(4)(e) - Y	No	Withhold	N/A
21	file note	10(4)(e)	10(4)(e) - Y	No	Withhold	N/A
22	letter	EIR 10(3)&11(2)	N/A	N/A	N/A	Redacted version released – Mr Edwards accepted personal information should not be released
23	letter	10(4)(e)	10(4)(e) - Y	Yes	Release	N/A
24	attachment to 23: –submission	10(4)(d)&(e)	10(4)(e) - Y 10(4)(d) – N	Yes	Release	N/A
25	file note	10(4)(e)	10(4)(e) - Y	Yes	Release	N/A
26	minute	10(4)(e)	10(4)(e) - Y	Yes	Release	
27	draft letter	2(2), 10(4)(d)&(e)	N/A	N/A	N/A	Excluded from consideration in decision as duplicate of document 13.
28	file note	10(4)(e)	10(4)(e) - Y	Yes	Release	N/A
29	fax and manuscript notes	2(2) and 10(4)(e)	2(2) - N 10(4)(e) - Y	Yes	Release	
30	attachment to 29: letter -	2(2) and 10(4)(e)	N/A	N/A	N/A	Excluded from consideration in decision as duplicate of document 32.

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No.	Document Type	Exceptions cited by the Ministers	Exception Upheld? Y/N	Public interest in favour of disclosure	Release or withhold	Comments
31	attachment to 29: report cover	N/A	N/A	N/A	N/A	Excluded as released.
32	letter	2(2) and 10(4)(e)	2(2) - N 10(4)(e) - Y	Yes	Release	N/A
33	Draft report	10(4)(d)&(e)	10(4)(e) - Y 10(4)(d) -n/c	No	Withhold	N/A
34	file note	10(4)(e)	10(4)(e) - Y	Yes	Release	N/A
35	file note	10(4)(e)	10(4)(e) - Y	Yes	Release	N/A
36	minute	10(4)(e)	10(4)(e) - Y	Yes	Release	N/A
37	covering fax with manuscript message	10(4)(e)	10(4)(e) - Y	Yes	Release	N/A
38	attachment to 37: letter	10(4)(e)	10(4)(e) - Y	Yes	Release	N/A
39	minute	10(4)(e)	10(4)(e) - Y	Yes	Release	N/A
40	Minute	10(4)(e)	N/A	N/A	N/A	Excluded from consideration in decision as duplicate of document 41.
40A	attachment to 40: draft press release	10(4)(d)&(e)	10(4)(e) - Y 10(4)(d) -n/c	No	Withhold	N/A
41	minute	10(4)(e)	10(4)(e) - Y	Yes	Release	
42	attachment to 41: draft press release	10(4)(d)&(e)	10(4)(e) - Y 10(4)(d) -n/c	No	Withhold	N/A
42A	Letter	N/A	N/A	N/A	N/A	Excluded as released.
42B	Attachment to 42A - press release	N/A	N/A	N/A	N/A	Excluded as released.
42C	Attachment to 42A - Final Report	N/A	N/A	N/A	N/A	Excluded as released.
42D	Broadcast report	N/A	N/A	N/A	N/A	Excluded as released.
42E	Fax	N/A	N/A	N/A	N/A	Excluded as released.
42F	Attachment to 42E: Broadcast report	N/A	N/A	N/A	N/A	Excluded as released.
42G - K	Press cuttings	N/A	N/A	N/A	N/A	Excluded as released.
43	faxed press cutting (released) with manuscript notes	EIR 10(4)(e)	10(4)(e) - Y	No	Withhold	Article released but handwritten notes withheld.
44	Press cutting	N/A	N/A	N/A	N/A	Excluded as released.

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No.	Document Type	Exceptions cited by the Ministers	Exception Upheld? Y/N	Public interest in favour of disclosure	Release or withhold	Comments
45	E-mail	N/A	N/A	N/A	N/A	Excluded as released.
46	Attachment to 46	N/A	N/A	N/A	N/A	Excluded as released.
47	minute	N/A	N/A	N/A	N/A	Excluded as released.