

Decision Notice



Decision 056/2008 Mr Rob Edwards and the Scottish Ministers

Background reports, memoranda and correspondence considered by the Ministers in response to the Hickman Report on the Inquiry into the M74 Completion Scheme

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www.itspublicknowledge.info

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Summary

Mr Edwards submitted an information request to the Scottish Ministers (the Ministers) for all of the background reports, memoranda and correspondence considered by the Ministers in response to the Hickman Report on the M74 Inquiry. In their response, the Ministers confirmed that they held the information he had requested, but that they were relying on the exemptions in sections 29 and 30 of the Freedom of Information (Scotland) Act 2002 (FOISA) to withhold the information from him.

The Ministers upheld this decision on review with the exception of one document, which they disclosed in part. Mr Edwards remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the Ministers should not have dealt with Mr Edwards' request solely under FOISA, but should, instead, have considered the request under the Environmental Information (Scotland) Regulations 2004 (the EIRs), on the basis that the information being withheld from him was environmental information.

Following an investigation, which considered both FOISA and the EIRs, the Commissioner found that some of the information which had been withheld from Mr Edwards should have been released to Mr Edwards. The information to be disclosed to Mr Edwards is specified in Appendices 2 and 3 to this decision.

Relevant statutory provisions and other sources

Environmental Information (Scotland) Regulations 2004 regulations 2 (Interpretation) (definition of "environmental information"); 4(1) (Active dissemination of environmental information); 6(1)(b) (Form and format of information); 10(1), (2), (4)(e) and (5)(b) (Exceptions from duty to make environmental information available) and 17 (Enforcement and appeal provisions)

The Freedom of Information (Scotland) Act 2002 (FOISA) sections: 1(1) (General entitlement); 2 (Effect of exemptions); 29(1)(a), (b) and (c), (4) and (5) (Formulation of Scottish Administration policy etc); 30 (Prejudice to effective conduct of public affairs); 36(1) (Confidentiality) and 39(2) (Health, safety and the environment)

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: Article 4, paragraph 3(c)

The full text of each of these provisions is reproduced in Appendix 1 to this decision. Appendices 1, 2 and 3 (Appendices 2 and 3 are referred to below) form part of this decision.



The Scottish Ministers' Guidance for Scottish Public Authorities and Interested Parties on the Implementation of the EIRs

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

Decision 182/2006 Mr Bruce Sandison and the Fisheries Research Services
(<http://www.itspublicknowledge.info/applicationsanddecisions/Decisions/2006/200601180.asp>)

Background

1. On 25 March 2005, Mr Edwards wrote to the Ministers and requested all of the background reports, memoranda and correspondence considered by them in response to the Hickman Report on the M74 Inquiry. Mr Edwards advised the Ministers that he was making his information request under FOISA and the EIRs.
2. The Ministers replied on 26 April 2005, confirming that they held the information Mr Edwards had requested, but that they were not willing to release this to him, and were relying on the exemptions in sections 29(1)(a),(b) and (c) and 30(a),(b) and (c) of FOISA.
3. On 27 April 2005, Mr Edwards wrote to the Ministers requesting a review of their decision. At the request of the Ministers, he subsequently clarified that he was dissatisfied with their original decision as he did not consider that advice to the Ministers needed to be kept secret after a policy decision had been made on the matter concerned.
4. The Ministers notified Mr Edwards of the outcome of their review on 6 June 2005. The Ministers advised him that they had upheld their original decision to withhold the requested information from him, apart from part of one document which they were willing to release subject to the redaction of one sentence, for which they were relying on an additional exemption, i.e. the exemption in section 36(1) of FOISA.
5. On 7 June 2005, Mr Edwards wrote to the Commissioner's Office, stating that he was dissatisfied with the outcome of the Ministers' review and applying to the Commissioner for a decision.
6. The application was validated by establishing that Mr Edwards had made a request for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its response to that request.



Investigation

7. A letter was sent by the investigating officer to the Ministers on 17 June 2005, asking the Ministers for their comments on the application. The Ministers were asked to provide, amongst other items, a copy of all of the information which had been withheld, confirmation of which exemptions they were relying on for not disclosing the information to Mr Edwards and an analysis of the public interest test where applicable.
8. A response was received from the Ministers on 18 July 2005. Within this response, the Ministers advised that certain information relating to the reasoning for the Ministers' decision on the M74 completion scheme was (and remains) publicly available in the decision letter on the Scottish Government website; as such they were relying on section 25(1) of FOISA in relation to this information. The Ministers also provided submissions on their application of the exemptions under sections 29(1)(a) to (c), 30(a) to (c) and 36(1) of FOISA.
9. Following correspondence from the investigating officer, the Ministers provided additional submissions on 8 September 2006 and 5 October 2006, in which they identified additional exemptions under FOISA which they were relying on to withhold information in one particular document (document 24). These additional exemptions are contained in sections 33(1)(b), 36(1) and 38(1)(b) of FOISA.
10. Having examined the information which had been withheld from Mr Edwards, the Commissioner took the view that it could be regarded as environmental information. The request, and the information withheld in relation to that request, concern a roads development which is likely to affect and impact on the environment in the surrounding area where it is intended to be built. As a result, the Ministers were asked to provide an explanation as to why they dealt with Mr Edwards' request under FOISA and not the EIRs.
11. The Ministers provided a response on 5 July 2007. In this response, the Ministers advised that they had considered whether the information request should be dealt with under the EIRs or FOISA, and while they had reached the view that the EIRs may apply to a proportion of the information which was withheld, they took the view that the bulk of the information was not actually environmental information and was more about the Ministers' internal processes in respect of the M74 completion scheme. As a result, the Ministers concluded that it would be more appropriate to deal with the request under FOISA. The Ministers were also of the view that the outcome of dealing with the request under the EIRs as opposed to FOISA would have been much the same, given that where they had relied on the exemptions in sections 29 and 30 of FOISA for withholding information, the information would also have been capable of being withheld under regulation 10(4)(e) of the EIRs as it constitutes 'internal communications'. The Ministers also submitted that the public interest considerations would be the same in either case.



Submissions from Mr Edwards

12. In his application to the Commissioner, Mr Edwards clearly outlined his concerns as to the Ministers' contention that advice to Ministers should remain secret after a decision has been taken.
13. Mr Edwards also provided the Commissioner with a submission as to why, in his view, there is a public interest in release of the withheld information.
14. In coming to a decision on this matter, the Commissioner has considered all of the information and the submissions that have been presented to him by both Mr Edwards and the Ministers and he is satisfied that no matter of relevance has been overlooked.

Commissioner's analysis and findings

Background information

15. As noted above, Mr Edwards requested information relating to the Ministers' response to the Report produced following a public local inquiry (PLI) into the M74 Completion Scheme.
16. The M74 Completion Scheme concerns the proposal by the Ministers to construct a six lane motorway approximately five miles long, extending the M74 from the junction at Fullerton Road on the eastern side of Glasgow near Carmyle to link up with the M8 motorway south of the Kingston Bridge. It would be the largest urban motorway built in Scotland since the M77 and one of the most expensive engineering projects contemplated, with costs in 2005 estimated at between £375-500 million.
17. The proposal was controversial, attracting objections from local residents and businesses as well as from national organisations concerned about environmental, economic and social impacts. Approximately 340 individuals and organisations lodged objections to the proposed motorway and, in addition, there were 42 objections to the associated compulsory purchase order by businesses or persons having an interest in the land proposed for acquisition. Five members of the Scottish Parliament also lodged objections.
18. A PLI into the proposals was held between 1 December 2003 and 3 March 2004 conducted by Mr Richard Hickman, an Inquiry Reporter for the Ministers. The purpose of the inquiry was to consider the objections which had been submitted in relation to the draft Special Road Orders and Environmental Statement which had been drawn up in connection with the proposed M74 Completion Scheme.



19. A report was produced at the end of this PLI (“the Hickman Report”), in which the Reporter came to the view that “looking at all the policy, transport, environmental, business, and community disadvantages of the proposal as a whole, it is concluded that the proposal would be very likely to have very serious undesirable results; and that the economic and traffic benefits of the project arising from the transfer of future jobs from other parts of Scotland would be much more limited, more uncertain, and (in the case of the congestion benefits) probably ephemeral. It is therefore concluded that the public benefits of the proposal would be insufficient to outweigh the considerable disadvantages that can be expected.”¹ The recommendation by the Reporter, made in July 2004, was that the proposal should not be authorised and the compulsory purchase order should not be confirmed.
20. However, in March 2005, the Scottish Ministers published their decision in which they indicated that they did not accept the Reporter’s main conclusions and recommendations. The Ministers set out their own conclusions that the scheme has clear advantages (in respect of reduced congestion on the M8 and local roads, social inclusion benefits resulting from reduced traffic on local roads, significant wider economic benefits, job creation in the local area and certain air quality improvements), all of which they consider had not been given sufficient weight by the Reporter. In their Decision letter of 24 March 2005 they authorised the making of the M74 Special Road Orders, and the construction of the scheme.
21. It is the background reports, memoranda and correspondence considered by the Ministers in making their response to the Hickman Report which Mr Edwards is seeking.

FOISA v EIRs

Whether the EIRs apply to the information requested

22. The Commissioner firstly needs to determine whether some or all of the information which has been withheld is environmental information. The information requested concerns the background reports, memoranda and correspondence relating to the Ministers’ response to the Hickman Report. That response is set out in the Ministers’ letter of 25 March 2005. The Ministers’ conclusions are set out in an Annex to that letter which reflects the matters addressed in the Hickman Report. The Ministers therefore comment upon Transport: Strategic Issues and Mode Share; Traffic Implications; Physical, Environmental and Community Impacts; Airborne Emissions; Geo-Technical, Mining and Contaminated Land; Economic Impact and Regeneration; Formal Objections to the Proposed Compulsory Purchase Order and, finally, Performance Against Scottish Executive and Local Government Commitments Objectives and Policies (which includes *inter alia* matters such as traffic congestion; environmental protection, environmental justice; airborne emissions and CO2 emissions).

¹ Roads (Scotland) Act 1984; Acquisition of Land (Authorisation Procedure) (Scotland) Act 1947 M74 Special Road (Fullerton Road to West of Kingston Bridge) Orders - Report of Public Local Inquiry Into Objections: Summary of main contents of report
<http://www.scotland.gov.uk/Publications/2005/03/20752/53467>



23. The Ministers' letter is clearly strongly addressed to environmental matters and, whether in part or in full, constitutes environmental information. At the very least, this raises the prospect that the background reports etc are also related to environmental matters and may constitute environmental information.
24. The Commissioner has considered the documents at issue in this case. Some of these documents contain information which can readily be seen to be environmental information – such that the content is directly concerned with, for example, measurement of CO2 emissions or air quality impacts. However, other paragraphs or even other whole documents do not have such an explicit focus. The question then is whether this other information can and should be regarded as environmental. This is not a simple matter.
25. The argument can be made that even if the primary issue is environmental, not all of the information need or can be regarded as such. It is possible to envisage information which is to do with purely administrative or financial processes which are related to, but remote from, environmental matters.
26. However, it is also clear to the Commissioner that information which in isolation may not be regarded as environmental, can and should be regarded as having that quality when read in context. So, for example, if a document says simply “Approval is given” then it has no explicit environmental content. However, if it is then understood that the approval is to permit the construction of a power station or the disposal of wastes then the environmental import is clear and the information can be regarded as environmental
27. This is a matter which the Commissioner considered in *Decision 182/2006 Mr Bruce Sandison and the Fisheries Research Services* where he decided that an address was environmental information, as it formed an integral part of a response to a request which was concerned with the incidence of escapes of farmed salmon. Of itself, an address is not likely to be environmental information, but in respect of that particular request and in the context of the other information to which it related, it was so.
28. In this present case, it was argued on behalf of the Ministers that the information related to the internal processes of the Scottish Executive in proceeding with the M74 Completion scheme and not to specific environmental issues.
29. The Ministers acknowledged that a limited amount of the information withheld was environmental but argued that it could be dealt with under FOISA, particularly as there was no detriment to the applicant by this course of action.
30. In support of their view, the Ministers have cited the guidance which they published on dealing with requests under the EIRs, i.e. the Scottish Ministers' Guidance for Scottish Public Authorities and Interested Parties on the Implementation of the Environmental Information (Scotland) Regulations 2004 (the Guidance). Paragraphs 10 and 11 of the Guidance reads as follows:



10 Where parallel regimes are potentially applicable, the FOISA will apply unless information is environmental information, to which the [EIRs] regime will apply instead. If the information is personal data, the Data Protection Act 1998 will apply instead. There should be no overlap. (...)

11 An authority should decide under which regime a request falls most appropriately. In general, it may be most practical and transparent to deal with the request entirely under the appropriate regime. If a larger request appears to fall into environmental information and other information it may be possible to deal with parts under the [EIRs] and FOISA regimes. However, care should be taken to avoid confusion e.g. of the precise provisions of the regimes where the regimes differ in detail. Whichever information regime is used, the DPA requirements for personal data will need to be met.

31. The Commissioner takes the view that the process of decision making on such an environmentally significant scheme is environmental information. It is clear to the Commissioner that documentation of the processes which considered the environmental, legal and administrative components of bringing such a scheme to fruition should be regarded as information encompassed by regulation 2(c) of the EIRs as relating to measures (including administrative measures), such as policies, legislation, plans and programmes affecting or likely to affect the environment. In this case the information is largely concerned with the preparation and drafting of the Ministers' response to the Hickman Report. This includes observably environmental information concerned with specific aspects of the Report, such as emissions or loss of habitat. It also includes internal memoranda seeking and submitting comment on drafts, agreeing procedures and schedules for coming to a decision. In the context of the request (which sought to understand how this controversial decision was arrived at) and in the context of the significant environmental impact which this scheme would have in the wake of such as decision, the Commissioner regards all of this information as environmental.
32. However, even if the Commissioner is wrong in this view and that only some of the information should be regarded as environmental (as acknowledged by the Ministers), he does not agree that it is open to the authority or to him, to consider all of the information at issue under FOISA alone. As the Commissioner has concluded in another case (*Decision 218/2007 Professor A D Hawkins and Transport Scotland*):
- “... the Ministers are mistaken in their belief that they can choose to deal with environmental information under FOISA instead of EIRs and in that respect their guidance, although well intentioned, is misleading. (I should say, in passing, that this guidance was published by the Scottish Government in September 2005. It replaced earlier guidance on the Environmental Information Regulations 1992 as amended by the Environmental Information (Amendment) Regulations 1998. The guidance acknowledges, in paragraph 8, that it “is **not** (original emphasis) legally binding. Only the Scottish Information Commissioner and the courts can give an authoritative decision on the interpretation of the regulations.” Unlike the *Code of Practice on the Discharge of Functions by Scottish Public Authorities under the Environmental Information (Scotland) Regulations 2004* which was formally laid before Parliament, in July 2006, after consultation with me, the Guidance has no statutory basis.)



33. During the course of this investigation, the investigating officer notified the Ministers of the Commissioner's conclusion that Mr Edwards' information request should have been dealt with under the EIRs rather than FOISA and invited the Ministers to comment on this.
34. Further submissions were provided to the investigating officer in July and August 2007, in which the Ministers advised that they remained of the view that they had been correct to deal with Mr Edwards' information request under FOISA and that it would not be appropriate to change it to the EIRs. The latter submission focussed on a number of other cases under consideration where the Commissioner had questioned whether the Ministers had been correct to deal with requests under FOISA rather than under the EIRs. With regards to those cases (and, presumably, also in relation to Mr Edwards' application), the Ministers argued that if the Commissioner remained of the view that the request should have been dealt with under FOISA, he should issue a decision notice stating that the Ministers had been incorrect to deal with the request under FOISA and that the applicants should then be asked to make a new information request under the correct legislation.
35. The Commissioner subsequently dealt with the relationship between FOISA and the EIRs in *Decision 218/2007 Professor A D Hawkins and Transport Scotland* (referred to above), setting out his understanding of the situation at some length. 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 wide definition of environmental information given in regulation 2(1) of the EIRs
 - There are two separate 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) (where this happens, the Commissioner is likely to find that the exemption applies and should be maintained, although this will depend on the circumstances of each case)
 - If the authority does not choose to claim the section 39(2) exemption, it must, in addition, 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



36. The Commissioner also considers that he is entitled to come to a decision on the application before him without having to first issue a decision which simply considers whether the Ministers relied on the correct legislation in responding to Mr Edwards' request.
37. In this case, the Ministers have agreed that at least part of the information which has been withheld is environmental information. However, to summarise their arguments, they consider that the majority of the information is in fact non-environmental (and is therefore subject to FOISA) and that, in any event, given that there was no detriment to Mr Edwards in dealing with the request under FOISA, they are entitled to make a judgement as to which regime it would be most appropriate to apply. The Ministers consider that the Commissioner is only entitled to question their judgement if the effect of choosing a particular regime is likely to be detrimental to Mr Edwards.
38. The Commissioner agrees that, in this particular case, there may be little detriment to Mr Edwards in having his request considered under FOISA. However, he does not accept that he is only entitled to question a public authority's judgement where there will be detriment to the applicant.
39. When making his information request, Mr Edwards asked that his request be dealt with under FOISA or the EIRs. When he made an application to the Commissioner for a decision, he made no reference to either regime (nor was he under an obligation to do so). Instead, he made it clear that he simply wished to appeal against the refusal by the Ministers to provide the information that he had sought.
40. An application made to the Commissioner under FOISA or the EIRs will take the same format – regulation 17(1) of the EIRs makes it clear that the provisions of Part 4 of FOISA (Enforcement) shall apply for the purposes of the EIRs as they apply for the purposes of FOISA, subject to certain modifications specified in regulation 17(2).
41. Under regulation 5 of the EIRs, any request for environmental information (as defined in regulation 2) must be considered under the EIRs. Consequently, when the Commissioner comes to determine an application which he considers to involve environmental information, he must consider whether the request has been dealt with in line with the EIRs. Where the Commissioner finds that it has not, then he must issue a decision stating that the authority did not deal with the request in accordance with the EIRs. The decision notice must also, in line with section 49(6) of FOISA (read in conjunction with regulation 17 of the EIRs), specify:
 - the provision of the EIRs with which the authority has failed to comply
 - the respect in which it has so failed
 - the steps which the Commissioner considers the authority must take to comply with the provision in the EIRs and
 - the time within which those steps must be taken.



42. It is therefore clear to the Commissioner that where he considers that a request for environmental information has not been dealt with in line with the EIRs (e.g. because FOISA exemptions have been applied to the information rather than exceptions under the EIRs), he is not restricted to deciding that the request has been dealt with under the wrong legislation, but is entitled, indeed obliged, to go on to consider the manner in which the public authority failed to deal with the information request, etc. Clearly, as has been the case here, before issuing a decision, the Commissioner will seek submissions from the public authority as to whether it now considers that it failed to apply the correct regime and, if so, what exceptions it would have applied.
43. In passing, the Commissioner notes the decision of the (UK) Information Tribunal in Kirkaldie and the Information Commissioner². This involved an information request made to Thanet District Council under the (UK) Freedom of Information Act 2000 (the 2000 Act). The District Council refused to provide information to Mr Kirkaldie and he made an application to the Information Commissioner for a decision as to whether he was entitled to receive the information. The Information Commissioner considered the matter under the 2000 Act and upheld the decision of the public authority. Mr Kirkaldie subsequently appealed to the Information Tribunal.
44. The Tribunal considered that the request was for environmental information and that it should therefore have been dealt with under the (UK) Environmental Information Regulations 2004 (the 2004 Regulations). However, the Tribunal went further and decided that it was entitled to come to a decision as to whether the information was subject to any of the exceptions in the 2004 Regulations.
45. In paragraph 44 of its decision, the Tribunal recognised that it would be possible for a public authority (and, presumably, for the Commissioner) to switch between an exemption in the 2000 Act and an exception in the 2004 Regulations, providing that a similar exemption or exception applied.
46. As noted above, the Commissioner provided the Ministers with an opportunity to comment on whether the case would have been more appropriately dealt with under the EIRs than FOISA. The Ministers responded that they considered that while the request was partially to do with environmental information, the majority of the request was not. They also commented that even if they had dealt with the request under the EIRs they would have found the information to be exempt in terms of one particular exception of the EIRs.
47. The implication of the Commissioner's conclusions as set out in the Hawkins Decision for his consideration of Mr Edwards' current request is that, given that the Ministers have not relied on the exemption in section 39(2) of FOISA, and given that the Commissioner considers that the withheld information is environmental information, he must go on to consider the Ministers' handling of the request both in terms of the EIRs and FOISA.

²[http://www.informationtribunal.gov.uk/Files/ourDecisions/Mr%20M%20S%20Kirkaldie%20v%20Information%20Commissioner%20\(4%20July%202006\)v8307.pdf](http://www.informationtribunal.gov.uk/Files/ourDecisions/Mr%20M%20S%20Kirkaldie%20v%20Information%20Commissioner%20(4%20July%202006)v8307.pdf)



48. During the investigation, the Ministers stated that they wished to rely on the exception contained in regulation 10(4)(e) of the EIRs in respect of the information which he considered would fall within the definition of environmental information. However, the Ministers changed their minds during the investigation and subsequently advised the Commissioner that they did not wish to rely on any exception under the EIRs, but wished instead to rely solely on the exemptions they had already relied on under FOISA.
49. In the circumstances, however, it is the Commissioner's intention to consider the information which has been withheld from Mr Edwards under those exceptions in the EIRs which are similar to those exemptions cited by the Ministers in FOISA. The Commissioner will then go on to consider the exemptions that the Ministers relied upon for withholding the information under FOISA.
50. As a result, where the Ministers have relied on the exemptions in sections 29 and 30 of FOISA, the Commissioner has (in line with the earlier submission from the Ministers) considered the withheld information under regulation 10(4)(e) of the EIRs.
51. The Ministers withheld a very small amount of information under section 36(1) of FOISA. Although the Commissioner did not receive submissions on this point from the Ministers, he takes the view that in this case the relevant, similar exception is also that contained in regulation 10(4)(e) of the EIRs.
52. The Ministers also relied on two further FOISA exemptions to withhold a small amount of information from Mr Edwards, i.e. section 38(1)(b) (there is a almost identical exception in regulation 11(2) of the EIRs) and section 33(1)(b) (there is a similar exception contained in regulation 10(5)(e)). However, given the Commissioner's findings in relation to regulation 10(4)(e), he has not considered it necessary to go on to consider either of these exceptions in this decision.
53. It should be noted that the Ministers also relied on the exemption in section 25 of FOISA (Information otherwise accessible) for the information which is contained in the final paragraph of document 24. During the course of the investigation, the investigating officer, with the agreement of the Ministers, provided Mr Edwards with details of where this information was published. Consequently, the Commissioner does not intend to comment on the information in the final paragraph of document 24 in this decision notice or consider the Ministers' reliance on section 25 of FOISA (or, indeed, the effect of regulation 6(1)(b) of the EIRs) to this information.

Information outwith the scope of the request

54. Before going on to consider whether any of the exceptions in the EIRs or exemptions in FOISA apply to the information which has been withheld from Mr Edwards, the Commissioner needs to consider whether the information which has been withheld actually falls within the scope of Mr Edwards' request.



55. Having reviewed the documents in question, the Commissioner is of the opinion that the information contained in documents 16, 17 and 18 does not fall within the scope of Mr Edwards' request. The information in these documents relates to the manner in which the Ministers responded to a request for a copy of the Hickman Report and contains no information impacting on the Ministers' response to the Hickman Report or their decision on the M74. As a result, these documents are not considered further in this decision.
56. The Commissioner also considered whether the briefing note attached to document 38 fell within the scope of Mr Edwards' request. This document is dated 8 April 2005, which was after the date of the decision letter being issued, and after the date on which Mr Edwards made his information request. However it is attached to a covering e-mail dated 8 March 2005 and the contents of the briefing note clearly inform document 42, which is dated 9 March 2005. Therefore, the Commissioner concludes that the briefing note is simply misdated and comes within the scope of the request.

Consideration of the information under Regulation 10(4)(e)

57. Regulation 10(4)(e) of the EIRs exempts internal communications from release.
58. The exception under regulation 10(4)(e) does not expand upon what is meant by internal communications.
59. In its response to Mr Edwards, the Ministers withheld information contained in 69 documents. The Ministers have relied on the exemptions in sections 29 and 30 of FOISA for withholding all of this information. Apart from the information contained in documents 16, 17 and 18 (which the Commissioner has found to be outwith the scope of Mr Edwards' request) and the parts of document 6 (Annexes A [apart from one sentence], B and C), which the Ministers released to Mr Edwards following their review of its decision, and the final paragraph in document 24, the Commissioner intends to consider the rest of the withheld documents under regulation 10(4)(e) of the EIRs.
60. Having read and considered this information, the Commissioner is satisfied that all of it falls within the definition of internal communications for the purposes of regulation 10(4)(e) of the EIRs.
61. However, it is not enough simply to conclude that information can be withheld because it is an internal communication. Regulation 10(2) of the EIRs requires the authority to interpret the exceptions in a restrictive way and to apply a presumption in favour of disclosure. For example, the authority may recognise that whilst the request involves making available internal communications, no real harm would come of that and, therefore, should, given the requirements of regulation 10(2), disclose the information, without claiming the exception at 10(4)(e) and then going on to consider the public interest in disclosure. As the Ministers have not considered the information under the EIRs, it can only be presumed that this process has not explicitly been followed. However, as much of the information has been withheld under FOISA in a belief that substantial harm would occur from disclosure, then it can perhaps be assumed that the Ministers would have concluded, even having considered the requirements of regulation 10(2), that the exception at 10(4)(e) justified refusal.



Public Interest

62. Under regulation 10(1)(b), all of the exceptions provided for by regulation 10(4) and (5) of the EIRs are subject to the public interest test. Therefore, although the Commissioner is satisfied that the information which has been withheld falls within the definition of “internal communications”, he is required to go on to consider whether, in all the circumstances of the case, the public interest in making the information available is outweighed by that in maintaining the exception.
63. The Ministers have submitted that the public interest in disclosure of the documents which they withheld under sections 29 and 30 of FOISA (regulation 10(4)(e) is the equivalent exception in the EIRs) would not outweigh the public interest in maintaining the exemption. As mentioned already, the Ministers have asserted that the public interest considerations would be the same in relation to their application of FOISA and the EIRs.
64. The case advanced by the Ministers is essentially that, in publishing their decision letter on the M74 Completion project, i.e. their response to the Hickman Report, they recognised the strong public interest in this proposal and sought to inform public debate on the issue. However, having done so, the Ministers argue that they should be afforded the best possible advice to enable them to make such a decision and also that they should be entitled to have space to conduct a rigorous assessment of their policies in reaching a decision. The Ministers have also submitted that release of the information in this case would lead to a perceived risk of internal discussions being made publicly available in sensitive circumstances. As a result of this, the Ministers are of the view that this would diminish the quality of such discussions to the detriment of future decision making, which would not be in the public interest.
65. Mr Edwards has argued that the Ministers’ decision to overturn the recommendation of the Inquiry Reporter on the matter of the M74 extension scheme is of enormous public interest, given that the Scottish Government’s policy on this matter has a wide ranging impact on social, economic and environmental policy. In his submission, Mr Edwards states that while he can understand that policy deliberations should remain secret while decisions are in the process of being taken, he does not understand why this level of secrecy should remain after important decisions have been made, as in this case. Mr Edwards contends that the public interest should lie in disclosing as much as possible of the deliberations that resulted in the decision being taken.
66. In coming to his view on where the balance of the public interest lies, the Commissioner believes that there are three significant considerations which tip the balance more in favour of making the information available than not and these three considerations are taken into account in the balancing exercise which follows below, along with the Ministers’ arguments as to why the information should not be disclosed on public interest grounds.



67. Firstly, the M74 Completion scheme is of considerable national and local significance, involving large sums of public money. The potential for environmental, social and economic consequences has attracted heated public argument. The public interest in transparency and accountability is strong in such cases. The Commissioner recognises the argument advanced by the Ministers that by requiring a full PLI and by publishing a detailed Annex in support of their decision they have sought to meet that public interest. In some instances, where there would be harm from disclosure, the Commissioner has concluded that the public interest in disclosure does not outweigh that harm, because the extent to which this improves accountability and transparency is not significant and does not warrant the harm which the limited benefit from disclosure would require. However, in many other instances, the Commissioner has taken the view that the harm would be limited or the public interest in disclosure would outweigh any harm.
68. This is particularly so because of the second feature of this case, which is that the decision to approve the scheme by the Ministers was contrary to the recommendations contained in the Hickman Report. There is a strong argument that the fullest possible understanding of how that decision came about and who was involved in that process needs to be given. This means that there is a public interest in the disclosure of relatively run of the mill documents, as these aid the understanding of who was involved in the decision making process and when. It also means that even if there might be some sensitivity about other documents in terms of what was submitted or discussed, the public interest in disclosure outweighs the limited harm which might ensue.
69. Finally, such harm would be significantly reduced in this instance because the decision to approve the scheme had been made before Mr Edwards submitted his request. Indeed, his request was prompted by the decision. To that extent, the harm envisaged by the Ministers would not be to the process of considering options and receiving advice in this particular case (which might have occurred if, say, the request had been made a month or so earlier), but is a more general concern about the impact which disclosure might have on policy making and advice giving in the future. The Commissioner considered that this would be very limited. From his reading of the documents, it is clear that Ministers and officials were well aware of the need to be careful about what could properly be taken into account when considering the Reporter's findings and recommendations. Submissions were made which were clearly intended to be (and in large part became) the source material compiled in the final decision letter and its annex. Exchanges between and comments from Ministers and their officials were careful and measured. The Commissioner can see little harm in, and a positive benefit to, the public interest in disclosing some of this material. However, there are still instances where it is appropriate to recognise that the sensitivity of the exchanges (often more to do with the process of finalisation or what should be excluded from consideration) warrants withholding the information, and while there is a public interest in having an insight into these deliberations it is not such that it merits the harm which might be likely to ensue.



70. There are other instances where the Commissioner takes the view that the information should not be made available. The Commissioner believes that there is no particular public interest in making the drafts of the decision letter available, on the basis that any public interest in the disclosure of such drafts would be outweighed by the inhibition which would, or would be likely to, occur to the rough drafting process from such a disclosure. The Commissioner is also of the view that there is a public interest in allowing the Ministers to seek candid internal legal advice to guide and inform the process of deliberation. The Commissioner does not accept that the public interest that exists in disclosure of the advice in this case is sufficient to outweigh the inhibition that would be caused to Ministers seeking such candid advice in future.
71. On occasion, the internal exchanges between officials are expressed in a frank manner which is not reflected in subsequent, more considered, material submitted to Ministers or circulated more widely amongst colleagues. Although there is some public interest in seeing all of the material which informed the decision making process, the import of these documents is not sufficient and the subsequent public interest in making this type of information available is outweighed by the public interest in allowing Ministers and officials to have uninhibited exchanges.
72. It is clear that some of the information withheld from Mr Edwards is the same as, or substantially similar to, that which has already been put into the public domain. As a result, it is the Commissioner's view that the information contained in documents 53, 57, 58, 61 and 68 should be released. Where the Commissioner accepts that there may be some stylistic or language differences between these documents, he is satisfied that the issues which have been considered are the same as those detailed in the decision letter. Therefore, the Commissioner is satisfied that the public interest in making the information in these documents available is not outweighed by that in maintaining the exception in regulation 10(4)(e) of the EIRs.
73. Having considered the information in the other documents withheld from Mr Edwards, it is clear that certain of the information in the following documents is the same or substantially similar to that recorded in the decision letter. In addition, there is other information contained within these documents, which the Commissioner considers, on balance, would inform public debate if it were to be released. These documents are; 2, 6 (except Annex D), 10, 12, 28 (except Annex D), 42 and 65 (with minor redaction). The Commissioner considers that release of certain of the information in these documents would aid the public's understanding of why the Ministers reached the decision they did in response to the Hickman Report and that the public interest in making this information available outweighs that in the maintenance of the exception. There is also some information within these documents, in particular document 12 and part of document 65, which does not appear in the decision letter, but which would, in the Commissioner's opinion, allow further informed public debate on the matter and show what factors the Ministers took into account in coming to their decision and again, on balance, the Commissioner finds that the public interest in making this information available is not outweighed by that in maintaining the exception in regulation 10(4)(e) of the EIRs.



74. The information withheld by the Ministers in documents 1 (e-mail 20 December 2004), 4, 5, 9, 13, 30, 31, 32, 35, 40, 45, 54, 59, 63, 64 and 67 relates to the preparation and composition of the decision letter which was issued by the Scottish Ministers and the arrangement of meetings to discuss the preparation, content and status of the decision letter. The public interest in understanding the process by which the Ministers took the decision to go against the recommendations contained in the Hickman Report in this case would be informed by the release of this information. Therefore, on balance, the Commissioner finds that the public interest in making the information contained in these documents available is not outweighed by that in maintaining the exception in regulation 10(4)(e) of the EIRs.
75. By contrast, however, the Commissioner finds that documents 1 (e-mail 15 December), 3, 7, 8, 11, 19, 26, 27, 29, 33, 34, 36, 37, 38, 39, 41, 43, 44, 47, 56, 66 which are also related to the preparation of the decision letter should not be made available, as the public interest in the gaining information about the process does not outweigh the public interest in avoiding inhibition to the internal exchanges.
76. Document 14 does not deal with the drafting of the decision, but rather is an internal communication concerning what information can be given externally as to when a final Ministerial decision may be made and the consequences of further delay. The Commissioner does not believe that its disclosure would be in the public interest, on balance, and not to the extent necessary to justify the inhibition to such internal communication which might ensue. Therefore, the Commissioner finds that, on balance, the public interest in making the information in document 14 available is outweighed by that in maintaining the exception in regulation 10(4)(e) of the EIRs.
77. Document 15 relates to a Parliamentary Question which was tabled by Rosie Kane MSP in February 2005 regarding whether the Ministers had received the report from the PLI into the M74 proposals. It also includes information on the response made to Ms Kane and the background information provided to the Minister who made the response. The background information draws upon information in the public domain and the response was published on 10 February 2005. The Commissioner can see no harm from disclosure, and finds that the public interest in making the information available is not outweighed by that in maintaining the exception.
78. Document 20 provides some insight into the factors considered by the Ministers in reaching a decision on how to respond to the Hickman Report and also contains detailed advice to Ministers on a particular subject area. Document 21 also contains advice to Ministers on how best to respond to the Hickman Report. With regard to these two documents, the Commissioner takes the view that the public interest in not inhibiting the provision of options to Ministers in order to come to an informed decision outweighs the public interest in release of the information to inform public debate. Therefore, on balance, the Commissioner finds that the public interest in making the information in documents 20 and 21 available is outweighed by that in maintaining the exception in regulation 10(4)(e) of the EIRs.



79. Document 22 contains information regarding certain environmental factors which the Ministers took into account in coming to their decision. This information expands on that which is recorded in the decision letter, and the Commissioner considers that release of this information would not affect discussions on this matter in future. On balance, therefore, the Commissioner finds that the public interest in making the information in document 22 available is not outweighed by that in maintaining the exception in regulation 10(4)(e) of the EIRs.
80. The information contained in document 23 contains a candid assessment of an issue submitted by an official, which did not feature in the composition or Ministerial approval of the decision letter. On balance, therefore, the Commissioner finds that the public interest in making the information in document 23 available is outweighed by that in maintaining the exception in regulation 10(4)(e) of the EIRs.
81. As the Commissioner has already indicated above, Mr Edwards now has the information contained in the last paragraph of document 24, so he will not consider this paragraph in this decision notice. However, in considering the remainder of document 24, the Commissioner accepts that there would be a public interest in release of the remaining information in this document, on the basis that it highlights a difference between it and a paragraph of the decision letter. However, this public interest has, in the Commissioner's view, to be balanced against the fact that this document reveals sensitive information about the circumstances of particular businesses trading in the area of the proposed development and that release of this information could impact adversely on these businesses. In balancing the public interest considerations in the remainder of document 24, therefore, it is the Commissioner's view that the public interest in making the information available is outweighed by that in maintaining the exception in regulation 10(4)(e) of the EIRs.
82. The information which is contained in document 46 relates to discussions on what should be included in the final decision letter and which parties require to be consulted, and the Commissioner considers that the balance of the public interest lies in maintaining the exception in regulation 10(4)(e) of the EIRs.
83. Documents 48 and 52 contain information regarding the preparation of questions and answers which were to be provided when the decision letter was issued. In the Commissioner's view, whilst the release of the information in these documents would only add a limited amount to the public's understanding of why the Ministers took the decision they did, the information does indicate what factors were considered in reaching this decision. Furthermore, the content of the information is of no particular sensitivity. On balance, therefore, the Commissioner finds that the public interest in making the information contained in documents 48 and 52 available is not outweighed by that in maintaining the exception in regulation 10(4)(e) of the EIRs.



84. Documents 47a and 62 contain largely the same information, apart from a covering email in document 62, which, in the Commissioner's view, does not contain anything of particular substance which would inform the public interest in this matter. The information in documents 47a and 62 relates to the provision of an update to Ministers on the situation concerning the M74 completion scheme. The information is not particularly sensitive, but, as it is a Cabinet document, and Ministerial approval for the submission appears not to have been given by the time of Mr Edwards' request, on balance the Commissioner takes the view that the public interest in making the information contained in documents 47a and 62 available is outweighed by that in maintaining the exception in regulation 10(4)(e) of the EIRs in relation to these documents.
85. The information contained within documents 49, 50, 55 and 60 is similar, in that it relates to minutes of meetings which records comments on how the Ministers will respond to the Hickman Report and information on how the issuing and promulgation of their response would be handled. There is a public interest in disclosing this information, but there is a countervailing public interest in allowing Ministers to exchange such views in finalising a mutually agreed position. On balance the Commissioner finds that the public interest in making the information in documents 49, 50, 55 and 60 available is outweighed by that in maintaining the exception in regulation 10(4)(e) of the EIRs.
86. Document 51 "fleshes out" information recorded in the decision letter and disclosure would provide the public with an insight into the Ministers' wider proposals in relation to this policy area. On balance, therefore, the Commissioner is satisfied that the public interest in making the information in document 51 available is not outweighed by that in maintaining the exception in regulation 10(4)(e) of the EIRs.

Legal Advice

87. As noted above, the Ministers relied on the exemption in section 36(1) of FOISA for withholding information in several documents from Mr Edwards. The Commissioner considers that in this case the legal advice falls within the definition of internal communications and he has therefore not considered it under a separate exception (although it may, for example, also have fallen under the exception contained in regulation 10(5)(b) of the EIRs, which concurs with his approach in decision 096/2006 *Mr George Waddell and South Lanarkshire Council*).
88. The Ministers applied the exemption in section 36(1) of FOISA to documents 7, 8, 20, 21, 25, 56 and 66 in their entirety and to parts of documents 6 and 24 (last paragraph on the first page).



89. In justifying their assertion that the exemption in section 36(1) of FOISA should be maintained, the Ministers argued that it is important that legal advice which has been given to Ministers and officials is completely comprehensive and that this takes into account all pertinent issues and arguments, in order to ensure that decisions are made on a fully informed basis. The Ministers have also argued that it would not be in the public interest to disclose legal advice as this might mean that the provision of legal advice in the future may not be made on a proper, fully informed basis, nor communicated to clients in such a full and frank manner as is presently the case. The Ministers contend that the strength of the public interest in protecting legal advice is widely recognised, and is particularly important in relation to advice from a Law Officer.
90. The Commissioner is satisfied that the documents which contain legal advice (listed in paragraph 88) fall within the scope of the exception in regulation 10(4)(e) of the EIRs. Where legal advice comes from internal legal advisers, it is clear that the communication is purely internal. However, in this case, some of the legal advice has come from external sources. In coming to a decision as to whether external legal advice falls within the definition of “internal communications”, the Commissioner has looked to the origin of the phrase in paragraph 3(c) of Article 4 of the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, otherwise known as the Aarhus Convention. This permits environmental information to be excluded from disclosure where the material concerns internal communications where such an exemption is provided for in national law or customary practice.
91. The Commissioner is satisfied that the phrase “internal communications” covers legal advice given from an external legal advisers and not only from in-house legal advisers. Given that the common law provides for information to be privileged where it constitutes advice between a legal adviser and client, or documents which have been prepared in contemplation of litigation, and given that legal professional privilege is a key element in the administration of justice, the Commissioner is satisfied that legal advice is a type of communication where exemption is provided for in national law or customary practice. Accordingly, he is satisfied that all of the legal advice, apart from the information which has been redacted from Annex A of document 6 (the rest of which was released to Mr Edwards and the same information is present in Annex A of document 28) which has been exempted by the Ministers under section 36(1), is also excepted by virtue of regulation 10(4)(e).
92. Having considered the redacted information from Annex A of document 6, the Commissioner is not satisfied that it would be exempt under the exception in regulation 10(4)(e) of the EIRs. The Ministers have advised the Commissioner that this information was provided to them by their own solicitors in the course of their professional duties. Where the Commissioner is satisfied that the information which has been redacted from this document does relate to legal advice which has been provided by the Ministers’ own solicitors, he is of the view that by disclosing a summary of the legal advice that it received from its solicitors to Mr Edwards, in terms of the disclosure of the remaining information in Annex A to document 6, the Ministers have waived their right to legal professional privilege in this case. As such, the Commissioner does not consider that the protection normally provided to this type of information remains in place for this particular piece of advice.



93. The Commissioner also considered whether the information in Annex A would be excepted in terms of regulation 10(5)(b). However, having considered the innocuous contents of the information, he is not satisfied that disclosure of the information would, or would be likely to, prejudice substantially the course of justice, etc. As a result the Commissioner is not satisfied that this information in Annex A of document 6 is subject to the exception in regulation 10(4)(e) of the EIRs.

Public interest

94. Where the Commissioner is satisfied that the information listed in paragraph 88 is excepted by virtue of regulation 10(4)(e) of the EIRs, he must, of course, go on to consider whether, in all the circumstances, the public interest in making the information available is outweighed by that in maintaining the exception.
95. As noted above, the Ministers provided the Commissioner with submissions to justify their view that the public interest in disclosure of this information would not outweigh the public interest in maintaining the exemption. The Ministers have asserted, separately, that the public interest considerations would be the same in relation to its application of FOISA and the EIRs and the Commissioner will therefore take these arguments into account in considering where the public interest lies in relation to the disclosure (or non-disclosure) of the legal advice.
96. In previous decisions where the Commissioner has examined the application of section 36(1) of FOISA (e.g. *096/2007 Mr John Sexton and the Scottish Executive*), he has concluded that there will always be a strong public interest in maintaining the right to confidentiality of communications between legal adviser and client. This conclusion is supported by the fact that 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 the House of Lords case, *Three Rivers District Council and others v Governor and Company of the Bank of England* (2004) UKHL 48.
97. While the Commissioner recognises that release of this legal advice may inform the public as to what considerations the Ministers took into account in reaching a decision and in finalising the decision letter, the Commissioner is of the view that the public interest in allowing Ministers to have access to full, frank and comprehensive legal advice on which to base an informed decision is greater.
98. The Commissioner also accepts the assertions of the Ministers that it would not be in the public interest to disclose the legal advice, as this would mean that the provision of legal advice in future may not be made on a proper, fully informed basis, nor would it be communicated by legal Counsel to clients in a full and frank manner.
99. Having considered all the submissions in this matter, the Commissioner is of the view that, in this case, the public interest in disclosing all of the information listed in paragraph 88 (except for part of document 6, which is not considered to be excepted by virtue of regulation 10(4)(e) or regulation 10(5)(b)) is outweighed by that in maintaining the exception in regulation 10(4)(e) of the EIRs.



100. The Commissioner has summarised, in Appendix 2 to this decision, his findings in relation to whether information is exempted under the EIRs and, for reasons set out earlier in the decision notice, will now go on to consider whether any of the information withheld from Mr. Edwards should have been withheld under FOISA.

Consideration of Mr Edwards' request under FOISA

101. As noted above, the Ministers did not apply the exemption under section 39(2) of FOISA when considering Mr Edwards' request. Instead, they withheld the information under a mixture of nine separate exemptions in FOISA, which have been listed earlier in the decision. The Commissioner will consider these exemptions, as necessary, below.
102. As the Commissioner considers that the information in documents 16,17 and 18 which have been withheld from Mr Edwards does not come within the scope of his request, he will not consider these further. Nor will the Commissioner consider the final paragraph in document 24 as Mr Edwards has been given details of where this information has been published.

Section 36(1) – Confidentiality

103. Section 36(1) of FOISA exempts information in respect of which a claim to confidentiality of communication could be maintained in legal proceedings. One type of communication which falls into this category is communications which are subject to legal professional privilege. Legal professional privilege can itself be split into two categories – legal advice privilege and litigation privilege (also known as communications *post litem motam*). It is the first of these categories, legal advice privilege, which has been claimed by the Ministers in this case. It generally covers communications between lawyers and their clients, where legal advice is sought or given.
104. In this case, the Ministers have relied on the exemption in section 36(1) for withholding all of the information in seven documents and some information in two further documents. The Commissioner has summarised the Ministers' arguments in relation to withholding legal advice above.
105. The Commissioner has considered the information which the Ministers have withheld from Mr Edwards on the basis of the exemption in section 36(1) and accepts that documents 7, 8, 20, the first paper in document 21 (for reasons set out below, he has not considered the second paper in document 21 under section 36(1)), paragraph 3 on the first page of document 24, documents 25, 56 and 66 all contain legal advice which was being or had been provided to the Ministers on various aspects of the M74 completion scheme, either by their own internal legal advisers or from external legal advisers. There is nothing to suggest that the privilege in the legal advice has been waived in respect of the documents and the Commissioner is therefore satisfied that they comprise information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings. As a result, the Commissioner accepts that this information is exempt in terms of section 36(1) of FOISA.



106. However, the Commissioner does not accept that the information which the Ministers have withheld in document 6 is exempt in terms of section 36(1) of FOISA. The Commissioner accepts that the information which has been redacted from Annex A of document 6, which the Ministers chose to release to Mr Edwards, appears to be legal advice given to the Ministers by their own legal advisers. As the Commissioner has indicated already in paragraph 92, it is his view that the Ministers have waived their right to legal professional privilege in relation to this piece of advice. Consequently, the advice is not information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings and is not exempt in terms of section 36(1) of FOISA.
107. As a result, the Commissioner accepts that most of the legal advice is exempt in terms of section 36(1) of FOISA.

The public interest test

108. The exemption in section 36(1) is subject to the public interest test contained in section 2(1)(b) of FOISA and the Commissioner must go on to consider whether, in all the circumstances of the case, the public interest in disclosing the withheld information is outweighed by the public interest in maintaining the exemption.
109. The Commissioner has already summarised the Ministers' arguments on the public interest as it relates to the legal advice withheld from Mr Edwards.
110. As the Commissioner has mentioned already at paragraphs 94 to 100 above, where he considered the application of the public interest test to this information under the EIRs, it is his view that the public interest in withholding this information is not outweighed by the public interest in disclosure of the legal advice.
111. As the Commissioner is satisfied that the documents mentioned in paragraph 103 above would be exempt under section 36(1) of FOISA, he will not consider these documents any further in this Decision Notice.
112. However, the Commissioner does not uphold the Ministers' reliance on the exemption in section 36(1) in respect of the redacted information in Annex A of document 6. As the Ministers have not relied on any other exemption in respect of this redacted information the Commissioner requires them to release this to Mr Edwards.

Section 29(1)(b) – Ministerial communications

113. The Ministers have also claimed that sixteen of the withheld documents are exempt from disclosure under section 29(1)(b) of FOISA.
114. Section 29(1)(b) of FOISA provides that information held by the Scottish Administration is exempt if it relates to Ministerial communications. The definition of "Ministerial communications" is contained within section 29(4) of FOISA and the definition of "Minister" is defined in section 29(5), both of which are reproduced in the Appendix to this decision.



115. For the information to fall under this exemption there must be a communication between Ministers. The Commissioner accepts that this exemption is not limited to direct written communication between Ministers, such as a letter or e-mail from one Minister to another, but that it could also cover records of discussions between Ministers.
116. Of the sixteen documents exempted under section 29(1)(b), one of these (document 17) falls outwith the scope of Mr Edwards's request, for reasons set out earlier. Therefore, the Commissioner does not consider it here.
117. Of the remaining documents, the Commissioner accepts that documents 9, 19, 21 (the second document only was considered as the first has already been found to be exempt under section 36(1)), 26, 27, 28 (apart from Annexes A [apart from one sentence], B and C which have already been disclosed to Mr Edwards by the Ministers), 32, 33, 37 (third email in document only), 39, 44, 48, 49, 50 and 60 contain emails which have been exchanged between Ministers, or officials who were acting on the Ministers' behalf. Some of these documents also contain meeting minutes or advice on the response to be made to the Hickman Report which were passed between Ministers or officials acting on the Ministers' behalf.
118. Consequently, the Commissioner is satisfied that the exemption in section 29(1)(b) of FOISA applies to these documents. However, this exemption is a qualified exemption, and so the Commissioner must now turn to consider the public interest test required by section 2(1)(b) of FOISA.

Public Interest Test

119. As outlined above, when considering the application of the public interest test, the Commissioner must consider whether, in all the circumstances of the case, the public interest in disclosure of the information is outweighed by that in maintaining the exemption in section 29(1)(b) of FOISA.
120. The submissions provided by the Ministers in justification of their view that the public interest in disclosure of the information withheld under section 29(1)(b) would be outweighed by the public interest in maintaining the exemption have been discussed in respect of the application of the public interest test with regard to the exception in regulation 10(4)(e) of the EIRs. This is fully discussed, together with the submissions made by Mr Edwards in paragraphs 62-86 above. The Commissioner stands by the views expressed in these paragraphs in respect of his consideration of the public interest test in respect of the information he has found to be exempt under section 29(1)(b).



121. Having taken into consideration the public interest submissions which have been presented to the Commissioner by both the Ministers and Mr Edwards, the Commissioner has reached the same conclusions in respect of the information in the withheld documents mentioned in paragraph 116 above as he has explained in paragraphs 73 (in respect of document 28 only), paragraph 74 (in respect of documents 9 and 32), paragraph 75 (in respect of documents 19, 26, 27, 33, 37,39 and 44) paragraph 78 (in respect of the second paper in document 21 as he has found the first paper in document 21 to be exempt under section 36(1)), paragraph 83 (in respect of document 48 only) and paragraph 85 (in respect of documents 49, 50 and 60 only) above, and he does not intend to comment on these further here.
122. Therefore, the Commissioner finds, on balance, that the Ministers were correct, having considered the public interest test, to maintain the exemption in section 29(1)(b) for withholding the information in documents 19, 21 (second document only), 26, 27, 33, 37 (third email only), 39, 44, 49, 50 and 60. The Commissioner also finds that the Ministers were correct to maintain the exemption in section 29(1)(b) for the information in Annex D which they withheld in document 28.
123. As the Ministers have also relied on other exemptions in FOISA for withholding information in document 28, the Commissioner will consider these below.

Section 30(b)(i) and (ii) – Prejudice to effective conduct of public affairs

124. The Ministers have argued that the exemptions in sections 30(b)(i) and (ii) of FOISA apply to all of the documents which have been withheld in this case. However, where the Commissioner has found information to be exempt under either section 36(1) or section 29(1)(b), he will not consider these further in this decision notice.
125. The exemptions in sections 30(b)(i) and (ii) provide that information is exempt if its disclosure under FOISA would, or would be likely to, inhibit substantially the free and frank provision of advice or the free and frank exchange of views for the purposes of deliberation. These are qualified exemptions, and so are subject to the public interest test required by section 2(1)(b).
126. The Ministers put forward similar arguments in respect of both of the exemptions in section 30(b) and the Commissioner will therefore consider them together. The Ministers have asserted that it is important that Ministers feel free to share opinions on what might be difficult or controversial policy issues in the expectation that they can do so in private so that an agreed policy can be reached, presented and implemented.
127. The Ministers have argued that disclosure of the internal provision of free and frank advice or the exchange of views for the purposes of deliberation would substantially inhibit the provision of, and the quality of, such future dialogue.
128. In the course of this investigation, the Ministers made additional, general submissions on that the application of the exemptions in section 30(b)(i), intended to be of relevance to various cases under consideration by the Commissioner (including this one).



129. The Commissioner has addressed these additional, general submissions already in paragraphs 23 to 31 of his *Decision 089/2007 Mr James Cannell and Historic Scotland*. As these new arguments which have been submitted by the Ministers are not specific to the information under consideration, the Commissioner does not intend to discuss them further here, other than to confirm that he has considered them fully, together with the original submissions that the Ministers provided in this case, in reaching his decision on the applicability of the exemptions in section 30(b) of FOISA.
130. The main consideration in determining whether this exemption applies is not whether the information constitutes the provision of advice or an exchange of views – although this will be of relevance in many cases – but rather whether the release of the information would, or would be likely to, have the substantially inhibiting effect required for the exemption to apply. The Commissioner expects authorities to be able to demonstrate a real risk or likelihood that actual harm will occur at some time in the near (certainly the foreseeable future), not simply that harm is a remote possibility. Also, the harm in question, which the Ministers envisage, should take the form of substantial inhibition from expressing advice or the provision of an opinion or exchange of views in as free and frank a manner as would be the case if disclosure were not to be expected to follow. The word “substantial” is important here: the degree to which a person will or is likely to be inhibited in expressing themselves has to be of some real and demonstrable significance.
131. As the Commissioner has noted in previous decisions, e.g. *Decision 014/2008 Mr John McIntosh and Transport Scotland*, it cannot necessarily follow from the Commissioner requiring release of one particular piece of information in particular circumstances that information of that general variety will require to be disclosed routinely in the future. In considering these exemptions, the Commissioner will always look at the actual information in the context of a particular case.
132. In considering the withheld information, and taking into account the submission made by the Ministers, the Commissioner notes that at the time of Mr Edwards’ request for review, a final decision had been taken by the Ministers on whether the draft road orders should be confirmed, and what response should be made to the Hickman Report. The Commissioner also notes that the submissions made by the Ministers as to the specific harm which would be caused by disclosure are very general and are not specific to the information under consideration. The Ministers appear to consider that any future discussions or provisions of advice would be substantially prejudiced by disclosure of this information.
133. Having considered the information which the Ministers have applied these exemptions to, the Commissioner is satisfied that only part of document 1, which concerns the provision of advice and views on responding to the report from Mr Hickman, is exempt under both sections 30(b)(i) and (ii) on the basis that release of this information would, or would be likely to have, a substantially inhibiting effect in future. These are free and frank exchanges between officials. However the remainder of the information is not sensitive, consisting of brief e-mail exchanges circulating material relevant to the consideration of the Hickman Report, and consequently it is the Commissioner’s view that the substantial inhibition test required to qualify for this exemption is not met.



134. The information in documents 2, 4, 5, 6, 10, 12, 28, 42 and 65 constitutes the provision of advice or the exchange of views and contain a lot of information which is the same or substantially similar to that recorded in the Ministers' decision letter. Whilst these documents also contain other information which does not appear in the decision letter, the Commissioner does not consider that release of all of that information at the time of Mr Edward's request for review would have, or would have been likely to have had, the effect of inhibiting substantially the provision of advice or the exchange of views as set out in sections 30(b)(i) and/or (ii), given that the matter on which the discussion was based (responding to the Hickman Report) had reached a conclusion and a decision at the time of Mr Edwards' request for review (the decision letter was finalised on 24 March 2005, and made publicly available on 30 March 2005). Therefore, appropriate discussions had taken place and all factors had been explored by the Ministers. The Commissioner does not consider that release of some of the information in these documents would be likely to affect discussions on this matter in future. The information that the Commissioner considers can be disclosed is the same as that identified already regarding his consideration of the EIRs.
135. The Commissioner also considers that none of the information in documents 57, 58, 61 and 68 is exempt under section 30(b)(i) or (ii). These documents relate to the provision of advice or an exchange of views, but the Commissioner does not agree that the effect, or likely effect, of disclosure of this information would be to inhibit substantially the provision of free and frank advice or an exchange of views in future. These documents contain information which is exactly the same or substantially similar to the information which was in the decision letter placed in the public domain. As a result, the Commissioner cannot agree that to release the same information would, or would be likely to, cause substantial inhibition, as the Ministers have obviously been content to release the same information in the decision letter. Where there is also other information contained in covering emails, it is routine, and if released would not, and would not be likely to, inhibit substantially either the free and frank provision of advice or the free and frank exchange of views for the purposes of deliberation. Therefore, the Commissioner cannot uphold the Ministers' reliance on these exemptions in relation to these documents.
136. Similarly, the Commissioner does not agree with the Ministers' application of these exemptions to the information contained in documents 30, 31, 35, and 64. These documents do not contain any information by way of advice or the provision or exchange of views. The information in these documents is of a routine nature and the Commissioner is not satisfied that release of any of this information would, or would be likely to, cause the substantial inhibition expected by section 30(b)(i) and (ii). As a result, the Commissioner does not agree that this information would come within the scope of either or both of these exemptions.



137. Documents 13, 15, 22, 40, 45, 51, 52, 59, 63 and 67 contain the provision of advice or an exchange of views, but the Commissioner does not consider that release of this information would, or would be likely to, inhibit substantially the provision of advice or exchange of views for the purposes of deliberation. Document 13 concerns advice regarding the number of instances where the Ministers have overturned the recommendation of an inquiry reporter in a case regarding infrastructure work. As this advice relates to decisions which have been taken in the past, and the fact that there was an intention in the email that this information be noted for future press lines, the Commissioner does not accept that release of this information in response to this request would, or would be likely to, inhibit substantially the provision of advice or exchange of views for the purposes of deliberation.
138. Document 14 concerns frank advice concerning a letter which has been received by the Ministers questioning when a decision on the M74 would be taken. In this case, the Commissioner considers disclosure would, or would be likely to, inhibit substantially the free and frank provision of advice or exchange of views for the purposes of deliberation.
139. Document 15 concerns covering emails and copies of a written answer and background note relating to the written parliamentary question by Rosie Kane MSP. The Commissioner does not accept that the information which is contained in this document, if released, would, or would be likely to, cause the substantial inhibition required by either section 30(b)(i) or (ii). The information is largely factual information, and the Commissioner does not consider that there is anything of such substance recorded here that would inhibit Ministers or officials from recording this type of information in future. Furthermore, a response was made to this in February 2005, prior to Mr Edwards' information request.
140. Document 22 relates to advice which has been given concerning environmental mitigation measures that could be considered in respect of the development of the road. This information contains proposals which were not finalised, but the Commissioner does not consider that release of the information contained within this document would, or would be likely to, inhibit substantially the provision of advice or the free and frank exchange of views for the purposes of deliberation on such issues in future.
141. Document 23 contains advice on a sensitive matter which did not feature in the Ministers' conclusions. In light of this, the Commissioner accepts that to release this information at the time of Mr Edwards' request for review would, or would have been likely to, have caused the required substantial inhibition.
142. Documents 32, 40, 45, 54, 59, 63 and 67 are all routine emails concerning the progression of the draft and final decision letter. The Commissioner does not consider that there is anything of substance within these documents which, if released, would mean that Ministers or officials would not record information in this way in future, or would inhibit them substantially from discussing information in this way in future. Therefore the Commissioner does not consider that the disclosure of this information would, or would be likely to, cause the necessary level of substantial inhibition.



143. Document 51 contains advice and views on a recommended press line on the announcement of the M74 extension. The Commissioner does not accept that this, if disclosed, would or would be likely to cause the required level of substantial inhibition, given that it must have been reasonably expected that this information might be placed in the public domain. The briefing note attached to document 51 contains largely factual information about the project and the intention behind it and the Commissioner does not accept that there is any information in the briefing, which would, if released, mean that Ministers and Officials would not discuss or record this information in future. Accordingly, the Commissioner does not consider that the disclosure of document 51 would, or would be likely to, cause the necessary level of substantial inhibition.
144. Documents 48 and 52 contain advice and views on the way in which the announcement on the Ministers' decision on the Hickman Report would be handled. Given that this decision letter was completed and released to Ministers prior to Mr Edwards' request for information being submitted, the Commissioner cannot uphold the arguments of the Ministers that release of this email would, or would be likely to, inhibit substantially discussions or the provision of advice on this matter in future.
145. Accordingly, the Commissioner is satisfied that the following documents withheld under the exemptions in section 30(b)(i) and (ii) were correctly withheld (i.e. documents 1 (part) 3, 11, 14, 23, 24, 29, 34, 36, 37 (not third email as this is exempt under section 29(1)(b)), 38, 41, 43, 46, 47, 47A, 53, 55, 62, 65 (certain information only)) on this basis. The Commissioner has come to this conclusion on basis of the content and context of the information and the submissions advanced by Ministers.
146. The exemptions in section 30(b)(i) and (ii) are subject to the public interest test require by section 2(1)(b) of FOISA. The Commissioner must now apply this test to the information which he has found to have been correctly withheld.

Public interest test

147. As mentioned already, when considering the application of the public interest test, the Commissioner must consider whether, in all the circumstances of the case, the public interest in disclosure of the information is outweighed by that in maintaining the exemptions in sections 30(b)(i) and (ii) of FOISA.
148. The submissions provided by the Ministers in justification of their view that the public interest in disclosure of the information withheld under the exemptions in sections 30(b)(i) and (ii) would be outweighed by the public interest in maintaining these exemptions have been discussed in respect of the public interest test with regard to the exception in regulation 10(4)(e) of the EIRs. The Commissioner stands by the views that he has expressed previously, in respect of his consideration of the public interest test regarding information he has found to be exempt under sections 30(b)(i) and (ii).



149. In respect of the parts of the information that the Commissioner considers would be exempt under sections 30(b)(i) and (ii) in documents 1 (part), 3, 6 (part), 11, 14, 23, 24, 29, 34, 36, 37 (not third email as this is exempt under section 29(1)(b)), 38, 41, 43, 46, 47, 47A, 55, 62, 65 (certain information only), he accepts that in these cases the public interest in allowing Ministers and officials to have space to seek and obtain advice and views on which to make a decision, and to be able to consider these fully, outweighs the public interest arguments, put forward by Mr Edwards, in disclosing the information. Accordingly he finds that the Ministers were correct to rely on these exemptions for withholding this information.

Section 29(1)(a) – Formulation of Scottish Administration policy etc

150. In terms of section 29(1)(a) of FOISA, information held by the Scottish Administration is exempt information if it relates to the formulation or development of government policy. This is another qualified exemption, which means that even if the exemption applies, the application of this exemption is subject to the public interest test required by section 2(1)(b) of FOISA.
151. For information to fall under the exemption in section 29(1)(a), it must relate to government policy, which can be defined as the development of options and priorities for Scottish Ministers, who will subsequently determine which options should be translated into political action and when.
152. The Ministers have submitted that they consider that all of the documents which have been withheld from Mr Edwards relate to the formulation or development of government policy in respect of the M74 Completion Scheme. As the Commissioner has accepted that certain documents, and particular information in some documents, is either exempt under section 36(1), 29(1)(b) or 30(b)(i) and (ii), he will not consider these documents further here. The Commissioner's consideration of the application of this exemption will therefore be focussed on all of the information in documents 2, 4, 5, 6, 12, 13, 15, 22, 28, 30, 31, 32, 35, 38, 40, 45, 48, 51, 52, 53, 54, 57, 58, 59, 61, 63, 64, 67 and 68, and certain of the information in documents 1, 10, 28, 42 and 65.
153. In their submissions, the Ministers argued that Ministers and Officials need to be afforded space to conduct a rigorous assessment of their policies. While the Ministers accept that part of their consideration of their policies can be an open and thorough inquiry process, they also argue that there is a need for private internal deliberation on the relevant policy issues.
154. The Ministers are concerned that if the withheld information were to be released, this would lead to a perceived risk of internal discussions being made publicly available in sensitive circumstances. This, the Ministers assert, would result in a diminishing of the quality of such discussions, would be detrimental to future decision making and would inhibit the internal deliberation of issues.



155. Having considered the information in question, the Commissioner is not satisfied that the information in documents 15, 30, 31, 35, 40, 45, 51, 52, 54 and 59 relates to the formulation or development of Scottish Administration policy. The information in these documents is concerned variously with administrative arrangements for meetings or press briefings, responding to external letters regarding progress on the report and drafting a response to a Parliamentary Question on progress of the decision letter. There is no information in these documents which constitutes the generation of options or recommendations regarding how policy should be formulated or taken forward.
156. The Commissioner is satisfied, however, that the information which he has considered in documents 1, 2, 4, 5, 6, 10, 12, 13, 22, 28, 32, 42, 48, 53, 57, 58, 61, 63, 64, 65, 67 and 68 does relate to the formulation and development of Scottish Administration policy given that these documents contain the provision of advice or discussion of ideas regarding how the policy on the M74 Completion Scheme can be taken forward. Therefore the Commissioner accepts that the Ministers were correct to rely on the exemption in section 29(1)(a) in respect of these.
157. As noted above, the exemption in section 29(1)(a) of FOISA is a qualified exemption which means the exemption is subject to the public interest test. The Commissioner will now go on to consider where the public interest lies in relation to this information. The Commissioner has already set out, on a number of occasions in this decision, the requirements of the public interest test contained in section 2(1)(b) of FOISA.

Public interest

158. When considering the application of the public interest test in section 2(1)(b) in respect of information which is exempt under section 29(1)(a) of FOISA, it is necessary to bear in mind the terms of section 29(3) of FOISA, which requires that the Scottish Administration must have regard to the public interest in the disclosure of factual information which has been used, or is intended to be used, to provide an informed background to the taking of a decision.
159. It is apparent from reading the decision letter which was put into the public domain by the Ministers on 30 March 2005, that a decision was reached by the Ministers on whether the road orders for the M74 Completion Scheme should be confirmed and set in motion, and what response should be made to the Hickman Report, by the time that Mr Edwards had submitted his information request.
160. In their submissions, the Ministers have asserted that, by making publicly available their detailed reasoning behind the decision made (i.e. through making the decision letter publicly available), they have had due regard to the public interest in making available the statistical and factual background to their decision.



161. However, that is not the same as considering the public interest in the release of factual information contained within the documents withheld which may have informed that decision but which is not replicated at all or in full in the decision letter. Documents 2, 6, 42, 58, 61 and 65 contain pertinent factual information and in the Commissioner's view, on balance, the public interest would be served by release as the Commissioner can see little or no public benefit in withholding the information.
162. The submissions provided by the Ministers in justification of their view that the public interest in disclosure of the information withheld under section 29(1)(a) would be outweighed by the public interest in maintaining the exemption have been discussed in respect of the application of the public interest test with regard to the exception in regulation 10(4)(e) of the EIRs. This has been fully discussed, together with the submissions made by Mr Edwards previously, in this decision notice. Again the Commissioner stands by the views expressed in respect of his consideration of the public interest test in respect of the information he has found to be exempt under section 29(1)(a), taking account of the requirements of section 29(3).
163. Where the Ministers have relied on further exemptions for the information in these documents the Commissioner will consider these now.

Section 29(1)(c) – the provision of advice by law officers

164. Section 29(1)(c) provides that information held by the Scottish Administration is exempt from disclosure if it relates to the provision of advice by any of the Law Officers or any request for the provision of such advice. Section 29(1)(c) is another qualified exemption, which means that even if the exemption applies, the public interest test required by section 2(1)(b) of FOISA must be considered.
165. The term "Law Officers" is defined in section 29(4) as meaning the Lord Advocate, the Solicitor General for Scotland, the Advocate General for Scotland, the Attorney General, the Solicitor General and the Attorney General for Northern Ireland.
166. The Ministers have applied this exemption to documents 4 and 67 in their entirety.
167. Having considered the information in documents 4 and 67, the Commissioner cannot uphold the Ministers' reliance on this exemption. As the Commissioner has clearly set out at paragraph 165 above, the definition of the term "Law Officers" is very clear. It is apparent from reading the information in these documents that it concerns advice which was provide by the then Office of the Solicitor to the Scottish Executive (OSSE). This office does not fall within the definition of "Law Officers" and so the Commissioner cannot agree with the Ministers' conclusion here.
168. Therefore the Commissioner finds that documents 4 and 67 are not exempt in terms of section 29(1)(c). Given that the Commissioner has found that section 29(1)(c) does not apply, he is not required to go on to consider the public interest test in section 2(1)(b).



Section 30(a) – collective responsibility of Scottish Ministers

169. Section 30(a) of FOISA exempts information if its disclosure would, or would be likely to, prejudice substantially the maintenance of the convention of the collective responsibility of the Scottish Ministers. As with the other exemptions in section 30, the exemption is subject to the public interest test required by section 2(1)(b) of FOISA.
170. The concept of collective ministerial responsibility is a long-standing constitutional convention, which is not regulated by statute, but is formalised in the Scottish Ministerial Code (<http://www.scotland.gov.uk/Resource/Doc/158641/0043036.pdf>), which provides guidance on the convention.
171. The Ministers have applied this exemption to document 28.
172. In the Commissioner's *decision 056/2007 Mr Paul Hutcheon and the Scottish Executive*, he noted that in order to rely on the exemption in section 30(a), the Scottish Ministers are required to do more than assert that the documents contain views expressed by a Minister and therefore should be protected. They are required to show that disclosure would, or would be likely to, prejudice substantially the maintenance of the convention of the collective responsibility of the Scottish Ministers.
173. In order to judge whether disclosure of information would have such an effect, the Commissioner needs to consider what the information reveals about the Ministers' views and the context in which they were expressed. The Commissioner has therefore considered matters such as whether the views expressed were at variance with the final policy, and whether the information reveals disagreement among Ministers.
174. The Commissioner finds that only the covering e-mail of 8 March 2005 on behalf of the Minister for Transport, is relevant to the exemption. (The remainder of Document 28 is an attachment which is elsewhere dealt with as Document 6, none of which touches upon matters relevant to collective Cabinet responsibility.)
175. Having considered the content of the e-mail the Commissioner does not accept that disclosure of the information would, or would be likely to, prejudice substantially the maintenance of the convention of the collective responsibility of the Scottish Ministers. It provides straightforward and helpful terms of reference for a meeting which was due to be held concerning the final Ministerial decision on the M74 Completion scheme, and if it were to be disclosed, this would demonstrate the regard for proper procedure attending that meeting. In addition, there is no Ministerial view expressed here or any differing view or dissenting view of a Minister to that included in the final decision letter. As a consequence, the Commissioner cannot uphold the Ministers' reliance on this exemption in relation to this information.
176. As the Commissioner has not found that the exemption in section 30(a) applies to the information in document 28, he is not required to go on to consider the application of the public interest test as it relates to this exemption.



Section 30(c) – the effective conduct of public affairs

177. In terms of section 30(c) of FOISA, information is exempt if its disclosure would *otherwise* (i.e. otherwise than under any of the exemptions in section 30(a) or (b) of FOISA) prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs. The exemption in section 30(c) is a qualified exemption, which means that it is subject to the public interest test laid down by section 2(1)(b) of FOISA.
178. As the Commissioner has said in previous decisions (see for example *Decision 105/2007 Paul Hutcheon and the Scottish Executive*) he expects any public authority citing this exemption to show what specific harm would be caused to the conduct of public affairs by release of the information in question. The risk of damage being caused by release of this information would have to be real or very likely, not hypothetical. The harm caused would require to be significant and not marginal, and it would have to occur in the near (and certainly the foreseeable) future rather than in some distant time.
179. The Ministers have relied on this exemption for withholding the information in document 28.
180. As the Commissioner has indicated above, he will consider only the information that he has found not to be exempt under any of the previously considered exemptions in relation to section 30(c).
181. In providing justification for its reliance on the exemption in section 30(c), the Ministers have advanced the same arguments as those detailed earlier for consideration of section 30(a), 30(b)(i) and 30(b)(ii). The test under section 30(c) is that disclosure of information under FOISA would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs. As the Ministers have relied on the same arguments for withholding document 28 under the exemptions in sections 30(a), 30(b)(i), 30(b)(ii) and 30(c), it is difficult for the Commissioner to accept that the same arguments can apply to information which is being withheld under each of these exemptions, given that factors other than the provision of advice or exchange of views should be taken into account in consideration of the application of section 30(c).
182. Having considered the relevant information in document 28, for similar reasons that the Commissioner has expressed in his consideration of this information under the exemptions in sections 30(b)(i) and (ii) and 30(a), the Commissioner does not agree that release of this information would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs. The Commissioner does not believe that release of the information would prevent or inhibit Ministers or officials from establishing proper procedure for meetings of Ministers, nor would the advice provided for those meetings be reduced in quality by the release of the information relevant to that meeting in this case. Therefore the Commissioner does not uphold the Ministers' reliance on this exemption.



183. As the Commissioner has found that the exemption in section 30(c) does not apply to the information in document 28, he is not required to go on to consider the application of the public interest test as it relates to this exemption.

Other exemptions cited by the Ministers

184. As the Commissioner has found document 24 to be exempt under sections 36(1) and 30(b)(i) and (ii) he has not considered the other exemptions applied by the Ministers to this document.

DECISION

In this decision, the Commissioner has considered a request for information that he has judged to be environmental information as defined by regulation 2 of the Environmental Information (Scotland) Regulations 2004 (EIRs). As set out above, authorities are obliged to consider such requests in accordance with the requirements of both the EIRs and the Freedom of Information (Scotland) Act 2002 (FOISA). The Commissioner's decision therefore has considered whether the Scottish Ministers (the Ministers) have acted in accordance with each of these laws.

EIRs

The Commissioner has found that some of the information withheld by the Ministers is not excepted under the EIRs and that, in withholding this information, the Ministers failed to comply with the EIRs. The Commissioner's conclusions on the applicability of exceptions contained in the EIRs are set out above and are summarised in Appendix 2 to this decision

FOISA

The Commissioner has also found that the Ministers did not comply with Mr Edwards' request for information fully in accordance with Part 1 of FOISA. By withholding certain information under exemptions in FOISA, the Commissioner finds that the Ministers did not comply with section 1(1) of FOISA. The Commissioner's conclusions on the applicability of the exemptions contained in FOISA are set out above and are summarised in Appendix 3 to this decision.

Steps to be taken

The Commissioner's conclusions under FOISA and the EIRs are the same. Appendices 2 and 3 to this decision set out which information the Ministers must disclose to Mr Edwards in order to comply with this decision. This information must be disclosed to Mr Edwards within 45 days after the date of intimation of this decision notice.



Appeal

Should either Mr Edwards or the Ministers wish to appeal against this decision, there is an appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days after the date of intimation of this decision notice.

Kevin Dunion
Scottish Information Commissioner
8 May 2008



Appendix

Relevant statutory provisions

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);



4 Active dissemination of environmental information

- (1) A Scottish public authority shall take reasonable steps to organise and keep up to date the environmental information, relevant to its functions, which it holds and at least the types of information listed in paragraph (2), with a view to the active and systematic dissemination of that information to the public and shall make that information progressively available to the public by electronic means unless it was collected before 14th February 2003 and is not available in electronic form.

6 Form and format of information

- (1) Where an applicant requests that environmental information be made available in a particular form or format, a Scottish public authority shall comply with that request unless –
 - (...)
 - (b) the information is already publicly available and easily accessible to the applicant in another form or format.

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-
- (...)
- (b) the course of justice, the ability of a person to receive a fair trial or the ability of any public authority to conduct an inquiry of a criminal or disciplinary nature;
- (...)

17 Enforcement and appeal provisions

- (1) The provisions of Part 4 of the Act (Enforcement) including schedule 3 (powers of entry and inspection), shall apply for the purposes of these Regulations as they apply for the purposes of the Act but with the modifications specified in paragraph (2).
- (2) In the application of any provision of the Act by paragraph (1) any reference to –
- (a) the Act is deemed to be a reference to these Regulations;
- (b) the requirements of Part 1 of the Act is deemed to be a reference to the requirements of these Regulations;
- (c) a Scottish public authority is deemed to be a reference to a Scottish public authority within the meaning of these Regulations;
- (d) the code of practice under section 60 or 61 of the Act (issue of a code of practice by the Scottish Ministers) is deemed to be a reference to any code of practice issued under regulation 18(1);
- (e) sections 29 (formulation of Scottish Administration policy), 31(1) (national security and defence), 32(1)(b) (international relations), 34 (investigations by Scottish public authorities and proceedings arising out of such investigations), 36(1) (confidentiality) and 41(b) (communications with Her Majesty etc. and honours), in section 52(1)(b) (exception from duty to comply with certain notices) of the Act is deemed to be reference to regulations 10(4)(e) and 10(5)(a), (b), (d) and (e);
- (f) a notice under section 21(5) or (9) (review by a Scottish public authority) of the Act is deemed to be a reference to a notice under regulation 16(4); and
- (g) the period allowed in section 21(1) of the Act is deemed to be a reference to the period specified in regulation 16(4).



Freedom of Information (Scotland) Act 2002

1 General entitlement

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

2 Effect of exemptions

- (1) To information which is exempt information by virtue of any provision of Part 2, section 1 applies only to the extent that –
 - (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.
- (2) For the purposes of paragraph (a) of subsection 1, the following provisions of Part 2 (and no others) are to be regarded as conferring absolute exemption –
 - (a) section 25;
 - (b) section 26;
 - (c) section 36(2);
 - (d) section 37; and
 - (e) in subsection (1) of section 38 –
 - (i) paragraphs (a), (c) and (d); and
 - (ii) paragraph (b) where the first condition referred to in that paragraph is satisfied by virtue of subsection (2)(a)(i) or (b) of that section.

29 Formulation of Scottish Administration policy etc.

- (1) Information held by the Scottish Administration is exempt information if it relates to –
 - (a) the formulation or development of government policy;
 - (b) Ministerial communications;
 - (c) the provision of advice by any of the Law Officers or any request for the provision of such advice

[...]



(4) In this section-

"government policy" means-

- (a) the policy of the Scottish Administration; and
- (b) in relation to information created before 1st July 1999, the policy of the Government of the United Kingdom;

"the Law Officers" means the Lord Advocate, the Solicitor General for Scotland, the Advocate General for Scotland, the Attorney General, the Solicitor General and the Attorney General for Northern Ireland;

"Ministerial communications" means any communications between Ministers and includes, in particular, communications relating to proceedings of the Scottish Cabinet (or of any committee of that Cabinet); and

"Ministerial private office" means any part of the Scottish Administration which provides personal administrative support to a Minister.

(5) In the definitions of "Ministerial communications" and "Ministerial private office" in subsection (4), "Minister" means a member of the Scottish Executive or a junior Scottish Minister.

30 Prejudice to effective conduct of public affairs

Information is exempt information if its disclosure under this Act-

- (a) would, or would be likely to, prejudice substantially the maintenance of the convention of the collective responsibility of the Scottish Ministers
- (b) would, or would be likely to, inhibit substantially-
 - (i) the free and frank provision of advice; or
 - (ii) the free and frank exchange of views for the purposes of deliberation; or
- (c) would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs.

36 Confidentiality

(1) Information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings is exempt information.

[...]



39 Health, safety and the environment

[...]

- (2) Information is exempt information if a Scottish public authority –
- (a) is obliged by regulations under section 62 (*Power to make provision in relation to environmental information*) 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.
- (

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

Article 4 Access to Environmental Information

Paragraph 3(c):

The request concerns material in the course of completion or concerns internal communications of public authorities where such an exemption is provided for in national law or customary practice, taking into account the public interest served by disclosure.



Appendix 2

Schedule of Documents as considered under exceptions in the EIRs

Notes: The Scottish Ministers cited a number of exemptions under sections 29 and 30 of FOISA. For ease of reference, the Commissioner has chosen simply to refer to them as “s.29 & 30” in this particular appendix. The abbreviation “n/c” means “not considered”. This Appendix should be read in conjunction with the relevant paragraphs in the Decision above.

Doc No	Description of document	Exemptions cited by the Ministers under FOISA – summary	Equivalent exception in EIRs	P.I in making available outweighs exception? Yes/No	Release/Withhold
1	Email dated 20 December 2004 M74 Completion Project, Glasgow Email dated 15 December 2004	s.29 & s.30	Reg 10(4)(e) - upheld	Yes No	Release Withhold
2	Response to M74C PLI Report	s.29 & s.30	Reg 10(4)(e) - upheld	Yes	Release
3	Minute dated 23 December 2004. M74 SPECIAL ROAD ORDERS	s.29 & s.30	Reg 10(4)(e) - upheld	No	Withhold
4	Email dated 23 December 2004 at 10:12hrs M74 Decision letter draft.	s.29 & s.30	Reg 10(4)(e) - upheld	Yes	Release
5	Email dated 23 December 2004 at 11:06hrs IMMEDIATE M74	s.29 & s.30	Reg 10(4)(e) - upheld	Yes	Release
6	Submission to Minister for Transport. M74 COMPLETION PROJECT, GLASGOW (Annex A – except for one sentence – B and C have already been released)	s.29 & s.30	Reg 10(4)(e) – upheld	Yes (Certain information)	Release all except Annex D

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Doc No	Description of document	Exemptions cited by the Ministers under FOISA – summary	Equivalent exception in EIRs	P.I in making available outweighs exception? Yes/No	Release/Withhold
		s.36(1)	Reg 10(5)(b) – not upheld		
7	Email 29 December 2004 at 10:23hrs M74 completion – Road Orders and CPO	s.29 & s.30 s.36(1)	Reg 10(4)(e) – upheld	No	Withhold
8	Email 30 December 2004 at 17:10hrs. M74 completion-Road Orders and CPO	s.29 & s.30 s.36(1)	Reg 10(4)(e) – upheld	No	Withhold
9	Email 10 January 2005 at 11:37hrs M74 COMPLETION PROJECT, GLASGOW	s.29 & s.30	Reg 10(4)(e) - upheld	Yes	Release
10	Minute M74 SPECIAL ORDERS: REPORT OF THE PLI: ASSESSMENT OF REPORT: ENVIRONMENTAL MATTERS INCLUDING REMEDIATION	s.29 & s.30	Reg 10(4)(e) – upheld	Yes	Release
11	Email 18 January 2005 at 11:30hrs M74 TRAFFIC	s.29 & s.30	Reg 10(4)(e) - upheld	No	Withhold
12	Briefing for M74 25 January 2005	s.29 & s.30	Reg 10(4)(e) – upheld	Yes	Release
13	Email 2 February 2005 at 10:40hrs Procedures Committee Minute	s.29 & s.30	Reg 10(4)(e) - upheld	Yes	Release

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Doc No	Description of document	Exemptions cited by the Ministers under FOISA – summary	Equivalent exception in EIRs	P.I in making available outweighs exception? Yes/No	Release/Withhold
14	Email 4 February 2005 at 12:38hrs M74 Decision	s.29 & s.30	Reg 10(4)(e) - upheld	No	Withhold
15	Email 7 February 2005 at 10:04hrs PQ-S2W-13774-Rosie Kane	s.29 & s.30	Reg 10(4)(e) - upheld	Yes	Release
16	Email 9 February 2005 at 12:09hrs M74 Completion – Freedom of Information Request submission	n/c			Outwith scope of request
17	Email 11 February 2005 at 09:36hrs M74 Completion – Freedom of Information Request	n/c			Outwith scope of request
18	Email 16 February 2005 at 14:25hrs M74 Completion – Freedom of Information Request	n/c			Outwith scope of request
19	Email 16 February 2005 at 18:19hrs A(96)T Fochabers/Musstodloch bypass	s.29 & s.30	Reg 10(4)(e) - upheld	No	Withhold
20	Email 24 February 2005 at 11:09hrs Tolling of Trunk Roads and Motorways	s.29 & s.30 s.36(1)	Reg 10(4)(e)- upheld	No	Withhold
21	Minute to First Minister. STATUTORY DECISION MAKING – M74 DECISION	s.29 & s.30 s.36(1)	Reg 10(4)(e) - upheld	No	Withhold
22	Minute. Are there any additional environmental mitigation measures that could be considered?	s.29 & s.30	Reg 10(4)(e) - upheld	Yes	Release
23	Email 28 February 2006 at 09:57hrs M74 Tolling.	s.29 & s.30	Reg 10(4)(e) - upheld	No	Withhold



Doc No	Description of document	Exemptions cited by the Ministers under FOISA – summary	Equivalent exception in EIRs	P.I in making available outweighs exception? Yes/No	Release/Withhold
24	Email 28 February 2005 at 15:01hrs M74 completion - CPO (Mr Edwards already has the information contained in the final paragraph of this document)	s.29 & s.30 s.33 s.36(1) s.38	Reg 10(4)(e) - upheld n/c n/c n/c	No	Withhold
25	Note by Counsel for the Scottish ministers re Decision Letter for M74 Special Road (Fullerton Road to West of Kingston Bridge) Orders	s.29, s 30 and s.36(1)	Reg 10(4)(e) upheld	No	Withhold
26	Email 7 March 2005 at 13:58hrs M74 -urgent	s.29 & s.30	Reg 10(4)(e)- upheld	No	Withhold
27	Email 7 March 2005 at 18:09hrs Ministerial discussion on the M74	s.29 & s.30	Reg 10(4)(e) - upheld	No	Withhold
28	Email 8 March 2005 at 16:09hrs Ministerial discussion on the M74 (Annex A – one sentence)	s.29 & s.30	Reg 10(4)(e) – upheld	Yes (Certain information)	Release all except Annex D
29	Email 8 March 2005 at 16:13hrs Immediate M74	s.29 & s.30	Reg 10(4)(e) – upheld	No	Withhold
30	Email 8 March 2005 at 15:28hrs Meeting to	s.29 & s.30	Reg 10(4)(e) – upheld	Yes	Release

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Doc No	Description of document	Exemptions cited by the Ministers under FOISA – summary	Equivalent exception in EIRs	P.I in making available outweighs exception? Yes/No	Release/Withhold
	discuss the M74.				
31	Email 8 March 2005 at 15:10hrs M74	s.29 & s.30	Reg 10(4)(e) – upheld	Yes	Release
32	Email 8 March 2005 at 16:42hrs M74 discussion: 9 March	s.29 & s.30	Reg 10(4)(e) – upheld	Yes	Release
33	Email 8 March 2005 at 16:37hrs Decision letter on the M74	s.29 & s.30	Reg 10(4)(e) – upheld	No	Withhold
34	Email 8 March 17:23hrs M74	s.29 & s.30	Reg 10(4)(e) – upheld	No	Withhold
35	Email 8 March 2005 at 17:32hrs Meeting to discuss the M74	s.29 & s.30	Reg 10(4)(e) – upheld	Yes	Release
36	Email 8 March 2005 at 17:33hrs Immediate M74	s.29 & s.30	Reg 10(4)(e) – upheld	No	Withhold
37	Email 8 March 2005 at 17:48hrs M74 discussion 9 March	s.29 & s.30	Reg 10(4)(e) – upheld	No	Withhold
38	Email 9 March 2005 at 07:01hrs M74 word document M74 COMPLETION – PLI REPORT RECOMMENDATIONS	s.29 & s.30	Reg 10(4)(e) - upheld	No	Withhold
39	Email 9 March 2005 at 09:59hrs M74	s.29 & s.30	Reg 10(4)(e) – upheld	No	Withhold
40	Email 9 March 2005 at 12:07hrs M74	s.29 & s.30	Reg 10(4)(e) – upheld	Yes	Release
41	Email 10 March 2005 at 11:52hrs M74 PLI	s.29 & s.30	Reg 10(4)(e) – upheld	No	Withhold
42	Submission to Minister for Transport 9 March 2005. M74 reporter's	s.29 & s.30	Reg 10(4)(e) – upheld	Yes	Release

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Doc No	Description of document	Exemptions cited by the Ministers under FOISA – summary	Equivalent exception in EIRs	P.I in making available outweighs exception? Yes/No	Release/Withhold
	suggested measures.				
43	Email 10 March 2005 at 12:51hrs M74 handling – lines to take.	s.29 & s.30	Reg 10(4)(e) - upheld	No	Withhold
44	Email 10 March 2005 at 18:29hrs M74 SCANCE	s.29 & s.30	Reg 10(4)(e) - upheld	No	Withhold
45	Email 11 March 2005 at 11:50 M74	s.29 & s.30	Reg 10(4)(e) – upheld	Yes	Release
46	Minute 11 March 2005 M74 Special Road Draft Decision Letter.	s.29 & s.30	Reg 10(4)(e) – upheld	No	Withhold
47	Email of 15 March 2005 at 10:52hrs “Meeting on M74 9 March – draft minute”.	s.29 & s.30	Reg 10(4)(e) – upheld	No	Withhold
47a	M74 SCANCE	s.29 & s.30	Reg 10(4)(e) – upheld	No	Withhold
48	Email “M74 discussion 8 March” 15 March 2005 at 14:00hrs	s.29 & s.30	Reg 10(4)(e) – upheld	Yes	Release
49	M74 Extension: Scottish Executive’s response to inquiry report minutes of meetings held at Holyrood 16 March 2005.	s.29 & s.30	Reg 10(4)(e) – upheld	No	Withhold
50	Email 16 March 2005 at 10:11hrs containing note of meeting at Queensberry house on 8 March 2005.	s.29 & s.30	Reg 10(4)(e) – upheld	No	Withhold
51	Email 16 March 2005 at 10:28hrs “Clyde Gateway/M74”	s.29 & s.30	Reg 10(4)(e) – upheld	Yes	Release
52	Email 16 March 2005 at	s.29 & s.30	Reg 10(4)(e)	Yes	Release

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Doc No	Description of document	Exemptions cited by the Ministers under FOISA – summary	Equivalent exception in EIRs	P.I in making available outweighs exception? Yes/No	Release/Withhold
	18:08hrs “M74 Q&A”		– upheld		
53	Word document 17 March 2005 “M74 completion scheme – made orders – table of modifications to draft orders”	s.29 & s.30	Reg 10(4)(e) – upheld	Yes	Release
54	Email dated 17 March 2005 at 14:55hrs	s.29 & s.30	Reg 10(4)(e) – upheld	Yes	Release
55	Word document. M74 COMPLETION PROJECT (DRAFT) HANDLING STRATEGY FOR THE ANNOUNCEMENT OF A MINISTERIAL DECISION FOLLOWING THE PUBLIC LOCAL INQUIRY REPORT 17 March 2005.	s.29 & s.30	Reg 10(4)(e) – upheld	No	Withhold
56	Minute on M74 special road draft decision letter 18 March 2005.	s.29 & s.30 s.36(1)	Reg 10(4)(e) – upheld	No	Withhold
57	Word document “Van de Walle” by email from Frances Beck to Angus MacInnes 18 March 2005 at 13:15hrs	s.29 & s.30	Reg 10(4)(e) – upheld	Yes	Release
58	Word document “Traffic Implications” by email on 18 March at 13:15hrs.	s.29 & s.30	Reg 10(4)(e) – upheld	Yes	Release
59	Email “RE:M74 special road – draft decision letter” on 18 March 2005 at 14:03hrs.	s.29 & s.30	Reg 10(4)(e) – upheld	Yes	Release

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Doc No	Description of document	Exemptions cited by the Ministers under FOISA – summary	Equivalent exception in EIRs	P.I in making available outweighs exception? Yes/No	Release/Withhold
60	Email from Cabinet Secretariat to Minister for Transport containing a minute, minutes of meetings on 8 and 9 March 2005 “M74 Extension: Scottish Executive’s Response to Inquiry Report”	s.29 & s.30	Reg 10(4)(e) – upheld	No	Withhold
61	Word document “Economic Impact and Regeneration”	s.29 & s.30	Reg 10(4)(e) – upheld	Yes	Release
62	M74 SCANCE paper sent by email on 18 March 2005	s.29 & s.30	Reg 10(4)(e) – upheld	No	Withhold
63	Email about “M74” on 18 March 2005 at 16:22hrs	s.29 & s.30	Reg 10(4)(e) – upheld	Yes	Release
64	Email “RE:M74” 18 March 2005 at 17:09hrs	s.29 & s.30	Reg 10(4)(e) – upheld	Yes	Release
65	Submission about “M74 PUBLIC ENQUIRY:CLIMATE CHANGE AND AIR QUALITY ISSUES” BY EMAIL on 18 March 2005 at 17:23hrs	s.29 & s.30	Reg 10(4)(e) – upheld	Yes (Certain information)	Release all except para 8
66	Minute on 18 March 2005. Subject: M74 Draft decision letter.	s.29 & s.30 s.36(1)	Reg 10(4)(e) – upheld	No	Withhold
67	Email dated 18 March 2005. Subject “RE:M74”	s.29 & s.30	Reg 10(4)(e) – upheld	Yes	Release
68	Word documents titled :M74 COMPLETION SCHEME- MADE ORDERS-TABLE OF	s.29 & s.30	Reg 10(4)(e) – upheld	Yes	Release

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Doc No	Description of document	Exemptions cited by the Ministers under FOISA – summary	Equivalent exception in EIRs	P.I in making available outweighs exception? Yes/No	Release/Withhold
	MODIFICATIONS TO DRAFT ORDERS” sent on 21 March 2005 at 08:52hrs.				



Appendix 3

Schedule of Documents as considered under FOISA exemptions

The abbreviation “n/c” means “not considered”.)

Doc No	Description of document	Exemption cited by the Ministers under FOISA	Exemption upheld? Yes/No	P.I in making available outweighs exception? Yes/No	Release/Withhold
1	Emails dated 15 and 20 December 2004 M74 Completion Project, Glasgow	s.29(1)(a) s.30(b)(i) & (ii)	Yes Yes (email of 20 December only)	Yes No	Release- email of 20 December Withhold- email of 15 December
2	Response to M74 PLI Report	s.29(1)(a) s.30(b)(i) & (ii)	Yes No	Yes	Release
3	Minute dated 23 December 2004. M74 SPECIAL ROAD ORDERS	s.29(1)(a) s.30(b)(i) & (ii)	n/c Yes	No	Withhold
4	Email dated 23 December 2004 at 10:12hrs M74 Decision letter draft.	s.29(1)(a) s.29(1)(c) s.30(b)(i) & (ii)	Yes No No	No	Release
5	Email dated 23 December 2004 at 11:06hrs IMMEDIATE M74	s.29(1)(a) s.30(b)(i)& (ii)	n/c No		Release
6	Submission to Minister for Transport. M74 COMPLETION PROJECT, GLASGOW (Annex A – except for one sentence – B and C have already been released)	s.29(1)(a) s.30(b)(i) & (ii) s.36(1)	Yes No except Annex D No	Yes except Annex D No (Partial information)	Release all except Annex D Release the information in the sentence which was redacted at



Doc No	Description of document	Exemption cited by the Ministers under FOISA	Exemption upheld? Yes/No	P.I in making available outweighs exception? Yes/No	Release/Withhold
					paragraph 11 of Annex A
7	Email 29 December 2004 at 10:23hrs M74 completion – Road Orders and CPO	s.29(1)(a) s.29(1) (c) s.30(b)(i) & (ii) s.36(1)	n/c n/c n/c Yes	No	Withhold
8	Email 30 December 2004 at 17:10hrs. M74 completion-Road Orders and CPO	s.29(1)(a) s.29(1) (c) s.30(b)(i) & (ii) s.36(1)	n/c n/c n/c Yes	No	Withhold
9	Email 10 January 2005 at 11:37hrs M74 COMPLETION PROJECT, GLASGOW	s.29(1)(a) s.29(1)(b) s.30(b)(i) & (ii)	n/c Yes n/c	Yes	Release
10	Minute M74 SPECIAL ORDERS: REPORT OF THE PLI: ASSESSMENT OF REPORT: ENVIRONMENTAL MATTERS INCLUDING REMEDIATION	s.29(1)(a) s.30(b)(i) & (ii)	Yes No	Yes	Release
11	Email 18 January 2005 at 11:30hrs M74 TRAFFIC	s.29(1)(a) s.30(b)(i) & (ii)	n/c Yes	No	Withhold
12	Briefing for M74 25	s.29(1)(a)	Yes	Yes	Release

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Doc No	Description of document	Exemption cited by the Ministers under FOISA	Exemption upheld? Yes/No	P.I in making available outweighs exception? Yes/No	Release/Withhold
	January 2005	s.30(b)(i) & (ii)	No		
13	Email 2 February 2005 at 10:40hrs Procedures Committee Minute	s.29(1)(a) s.30(b)(i) & (ii)	Yes No	Yes	Release
14	Email 4 February 2005 at 12:38hrs M74 Decision	s.29(1)(a) s.30(b)(i) & (ii)	n/c Yes		Withhold
15	Email 7 February 2005 at 10:04hrs PQ-S2W-13774-Rosie Kane	s.29(1)(a) s.30(b)(i) & (ii)	No No		Release
16	Email 9 February 2005 at 12:09hrs M74 Completion – Freedom of Information Request submission				Outwith scope of request
17	Email 11 February 2005 at 09:36hrs M74 Completion – Freedom of Information Request				Outwith scope of request
18	Email 16 February 2005 at 14:25hrs M74 Completion – Freedom of Information Request				Outwith scope of request
19	Email 16 February 2005 at 18:19hrs A(96)T Fochabers/Musstodloch bypass	s.29(1)(a) s.29(1)(b) s.30(b)(i) & (ii)	n/c Yes n/c		Withhold



Doc No	Description of document	Exemption cited by the Ministers under FOISA	Exemption upheld? Yes/No	P.I in making available outweighs exception? Yes/No	Release/Withhold
20	Email 24 February 2005 at 11:09hrs Tolling of Trunk Roads and Motorways	s.29(1)(a) s.30(b)(i) & (ii) s.36(1)	n/c n/c Yes	No	Withhold
21	Minute to First Minister. STATUTORY DECISION MAKING – M74 DECISION	s.29(1)(a) s.29(1)(b) s.29(1)(c) s.30(b)(i) & (ii) s.36(1)	n/c Yes (second document only) n/c n/c Yes (first document only)	No No	Withhold
22	Minute. Are there any additional environmental mitigation measures that could be considered?	s.29(1)(a) s.30(b)(i) & (ii)	Yes No	Yes	Release
23	Email 28 February 2006 at 09:57hrs M74 Tolling.	s.29(1)(a) s.30(b)(i) & (ii)	n/c Yes	n/c	Withhold
24	Email 28 February 2005 at 15:01hrs M74 completion - CPO (Mr Edwards already has the information contained in the final paragraph of this document)	s.29(1)(a) s.30(b)(i) & (ii) s.33(1)(b)	n/c Yes n/c	No	Withhold

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Doc No	Description of document	Exemption cited by the Ministers under FOISA	Exemption upheld? Yes/No	P.I in making available outweighs exception? Yes/No	Release/Withhold
		s.36(1)	Yes (paragraph 3 on first page only)	No	
		s.38	n/c		
25	Note by Counsel for the Scottish ministers re Decision Letter for M74 Special Road (Fullerton Road to West of Kingston Bridge) Orders	s.29(1)(a)	n/c		
		s.29(1)(c)	n/c		
		s.30(b)(i) & (ii)	n/c		
		s.36(1)	Yes	No	Withhold
26	Email 7 March 2005 at 13:58hrs M74 -urgent	s.29(1)(a)	n/c		Withhold
		s.29(1)(b)	Yes	No	
		s.30(b)(i) & (ii)	n/c		
27	Email 7 March 2005 at 18:09hrs Ministerial discussion on the M74	s.29(1)(a)	n/c		Withhold
		s.29(1)(b)	Yes	No	
		s.30(a)	n/c		
		s.30(b)(i) & (ii)	n/c		
28	Email 8 March 2005 at 16:09hrs Ministerial discussion on the M74 (Annex A – one sentence)	s.29(1)(a)	Yes	Yes	Release all except Annex D
		s.29(1)(b)	Yes	Yes (Certain information)	
		s.30(a)	No		
		s.30(b)(i) & (ii)	No (except Annex D)		
		s.30 (c)	No		
29	Email 8 March 2005 at	s.29(1)(a)	n/c		Withhold

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Doc No	Description of document	Exemption cited by the Ministers under FOISA	Exemption upheld? Yes/No	P.I in making available outweighs exception? Yes/No	Release/Withhold
	16:13hrs Immediate M74	s.30(b)(i) & (ii)	Yes	No	
30	Email 8 March 2005 at 15:28hrs Meeting to discuss the M74.	s.29(1)(a) s.30(b)(i) & (ii)	No No		Release
31	Email 8 March 2005 at 15:10hrs M74	s.29(1)(a) s.30(b)(i) & (ii)	No No		Release
32	Email 8 March 2005 at 16:42hrs M74 discussion: 9 March	s.29(1)(a) s.29(1)(b) s.30(b)(i) & (ii)	Yes Yes No	Yes Yes	Release
33	Email 8 March 2005 at 16:37hrs Decision letter on the M74	s.29(1)(a) s.29(1)(b) s.29(1)(c) s.30(b)(i) & (ii)	n/c Yes N/c n/c	No	Withhold
34	Email 8 March 17:23hrs M74	s.29(1)(a) s.30(b)(i) & (ii)	n/c Yes	No	Withhold
35	Email 8 March 2005 at 17:32hrs Meeting to discuss the M74	s.29(1)(a) s.30(b)(i) & (ii)	No No		Release
36	Email 8 March 2005 at 17:33hrs Immediate M74	s.29(1)(a) s.30(b)(i) & (ii)	n/c Yes	No	Withhold
37	Email 8 March 2005 at 17:48hrs M74 discussion 9 March	s.29(1)(a) s.29(1)(b) s.30(b)(i) & (ii)	n/c Yes (third email only) Yes (but not third email)	No No	Withhold

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Doc No	Description of document	Exemption cited by the Ministers under FOISA	Exemption upheld? Yes/No	P.I in making available outweighs exception? Yes/No	Release/Withhold
38	Email 9 March 2005 at 07:01hrs M74 word document M74 COMPLETION – PLI REPORT RECOMMENDATIONS	s.29(1)(a) s.30(b)(i) & (ii)	No Yes	No	Withhold
39	Email 9 March 2005 at 09:59hrs M74	s.29(1)(a) s.29(1)(b) s.30(b)(i) & (ii)	n/c Yes n/c	No	Withhold
40	Email 9 March 2005 at 12:07hrs M74	s.29(1)(a) s.30(b)(i) & (ii)	No No		Release
41	Email 10 March 2005 at 11:52hrs M74 PLI	s.29(1)(a) s.30(b)(i) & (ii)	n/c Yes	No	Withhold
42	Submission to Minister for Transport 9 March 2005. M74 reporter's suggested measures.	s.29(1)(a) s.30(b)(i) & (ii)	Yes No	Yes	Release
43	Email 10 March 2005 at 12:51hrs M74 handling – lines to take.	s.29(1)(a) s.30(b)(i) & (ii)	n/c Yes	No	Withhold
44	Email 10 March 2005 at 18:29hrs M74 SCANCE	s.29(1)(a) s.29(1)(b) s.30(b)(i) & (ii)	n/c Yes n/c	No	Withhold
45	Email 11 March 2005 at 11:50 M74	s.29(1)(a) s.30(b)(i) & (ii)	No No		Release
46	Minute 11 March 2005 M74 Special Road Draft	s.29(1)(a)	n/c		Withhold

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Doc No	Description of document	Exemption cited by the Ministers under FOISA	Exemption upheld? Yes/No	P.I in making available outweighs exception? Yes/No	Release/Withhold
	Decision Letter.	s.29(1)(c) s.30(b)(i) & (ii)	n/c Yes	No	
47	Email of 15 March 2005 at 10:52hrs "Meeting on M74 9 March – draft minute".	s.29(1)(a) s.30(b)(i) & (ii)	n/c Yes	No	Withhold
47a	M74 SCANCE	s.29(1)(a) s.30(b)(i) & (ii)	n/c Yes	No	Withhold
48	Email "M74 discussion 8 March" 15 March 2005 at 14:00hrs	s.29(1)(a) s.29(1)(b) s.30(b)(i) & (ii)	Yes Yes No	Yes Yes	Release
49	M74 Extension: Scottish Executive's response to inquiry report minutes of meetings held at Holyrood 16 March 2005.	s.29(1)(a) s.29(1)(b) s.29(1)(c) s.30(a) s.30(b)(i) & (ii)	n/c Yes n/c n/c n/c	No	Withhold
50	Email 16 March 2005 at 10:11hrs containing note of meeting at Queensberry house on 8 March 2005.	s.29(1)(a) s.29(1)(b) s.29(1)(c) s.30(a) s.30(b)(i) & (ii)	n/c Yes n/c n/c n/c	No	Withhold
51	Email 16 March 2005 at 10:28hrs "Clyde Gateway/M74"	s.29(1)(a) s.30(b)(i) & (ii)	No No		Release
52	Email 16 March 2005 at	s.29(1)(a)	No		Release

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Doc No	Description of document	Exemption cited by the Ministers under FOISA	Exemption upheld? Yes/No	P.I in making available outweighs exception? Yes/No	Release/Withhold
	18:08hrs "M74 Q&A"	s.30(b)(i) & (ii)	No		
53	Word document 17 March 2005 "M74 completion scheme – made orders – table of modifications to draft orders"	s.29(1)(a) s.30(b)(i) & (ii)	Yes No	Yes	Release
54	Email dated 17 March 2005 at 14:55hrs	s.29(1)(a) s.30(b)(i) & (ii)	No No		Release
55	Word document. M74 COMPLETION PROJECT (DRAFT) HANDLING STRATEGY FOR THE ANNOUNCEMENT OF A MINISTERIAL DECISION FOLLOWING THE PUBLIC LOCAL INQUIRY REPORT 17 March 2005.	s.29(1)(a) s.30(b)(i) & (ii)	n/c Yes	No	Withhold
56	Minute on M74 special road draft decision letter 18 March 2005.	s.29(1)(a) s.29(1)(c) s.30(b)(i)& (ii) s.36(1)	n/c n/c n/c Yes		Withhold No
57	Word document "Van de Walle" by email from Frances Beck to Angus MacInnes 18 March 2005 at 13:15hrs	s.29(1)(a) s.30(b)(i)& (ii)	Yes No	Yes	Release
58	Word document "Traffic Implications" by email on 18 March at 13:15hrs.	s.29(1)(a) s.30(b)(i) & (ii)	Yes No	Yes	Release
59	Email "RE:M74 special road – draft decision letter" on 18 March 2005 at 14:03hrs.	s.29(1)(a) s.30(b)(i) & (ii)	No No		Release

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Doc No	Description of document	Exemption cited by the Ministers under FOISA	Exemption upheld? Yes/No	P.I in making available outweighs exception? Yes/No	Release/Withhold
60	Email from Cabinet Secretariat to Minister for Transport containing a minute, minutes of meetings on 8 and 9 March 2005 "M74 Extension: Scottish Executive's Response to Inquiry Report"	s.29(1)(a) s.29(1)(b) s.29(1)(c) s.30(a) s.30(b)(i) & (ii)	n/c Yes n/c n/c n/c	No	Withhold
61	Word document "Economic Impact and Regeneration"	s.29(1)(a) s.30(b)(i) & (ii)	Yes No	Yes	Release
62	M74 SCANCE paper sent by email on 18 March 2005	s.29(1)(a) s.30(b)(i) & (ii)	n/c Yes	No	Withhold
63	Email about "M74" on 18 March 2005 at 16:22hrs	s.29(1)(a) s.30(b)(i) & (ii)	Yes No	Yes	Release
64	Email "RE:M74" 18 March 2005 at 17:09hrs	s.29(1)(a) s.30(b)(i) & (ii)	Yes No	Yes	Release
65	Submission about "M74 PUBLIC ENQUIRY:CLIMATE CHANGE AND AIR QUALITY ISSUES" BY EMAIL on 18 March 2005 at 17:23hrs	s.29(1)(a) s.30(b)(i) & (ii)	Yes Yes (Partial)	Yes No (Certain information)	Release all except paragraph 8
66	Minute on 18 March 2005. Subject: M74 Draft decision letter.	s.29(1)(a) s.29(1)(c) s.30(b)(i) & (ii) s.36(1)	n/c n/c n/c Yes	No	Withhold

Decision 056/2008
Mr Rob Edwards
and the Scottish Ministers



Doc No	Description of document	Exemption cited by the Ministers under FOISA	Exemption upheld? Yes/No	P.I in making available outweighs exception? Yes/No	Release/Withhold
67	Email dated 18 March 2005. Subject "RE:M74"	s.29(1)(a) s.29(1)(c) s.30(b)(i) & (ii)	Yes No No	Yes	Release
68	Word documents titled "M74 COMPLETION SCHEME- MADE ORDERS-TABLE OF MODIFICATIONS TO DRAFT ORDERS" sent on 21 March 2005 at 08:52hrs.	s.29(1)(a) s.30(b)(i) & (ii)	Yes No	Yes	Release