

Decision Notice



Decision 094/2008 Mr Rob Edwards and the Scottish Ministers

Information relating to the finalisation and publication of the 2006 bathing water pollution results

Reference No: 200601847

Decision Date: 11 August 2008

www.itspublicknowledge.info

Kevin Dunion

Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews KY16 9DS
Tel: 01334 464610



Summary

Mr Edwards requested all information relating to the finalisation and publication of the 2006 bathing water pollution results from the Scottish Ministers (the Ministers). The Ministers released some information to Mr Edwards, but withheld other documents in terms of several exemptions set out in Part 2 of FOISA. Mr Edwards remained dissatisfied following an internal review and applied to the Commissioner for a decision.

During the investigation, the Commissioner reached the initial view that the withheld information was environmental information and so Mr Edwards' request should have been dealt with under the Environmental Information (Scotland) Regulations 2004 (the EIRs). When invited to comment on this matter, the Ministers argued that the information was not environmental information. However, they indicated that, for any information that the Commissioner determined to be environmental information, they would apply the exception in regulation 10(4)(e) of the EIRs, which relates to "internal communications".

Following an investigation, the Commissioner found that the Ministers failed to deal with Mr Edwards' request for information in accordance with the EIRs. He required the Ministers to disclose all but one of the documents they had withheld.

Relevant statutory provisions and other sources

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

Environmental Information (Scotland) Regulations 2004 (EIRs) regulations: 2 (Interpretation) (definition of "environmental information"); 5(1) and (2) (Duty to make available environmental information on request) and 10(1), (2) and (4)(e) (Exceptions from the duty to make environmental information available)

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

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

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



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

Access to Environmental Information: Guidance for Scottish Public Authorities and Interested Parties on the Environmental Information (Scotland) Regulations 2004:
<http://www.scotland.gov.uk/Resource/Doc/26800/0014460.pdf>.

Background

1. On 18 September 2006, Mr Edwards wrote to the Ministers requesting the following information under both FOISA and the EIRs:

“Copies of all unpublished reports, minutes, memos, correspondence or other documents, whether draft or final, relating to the finalisation and publication of the bathing water pollution results for 2006 on 15 September.”
2. The Ministers wrote to Mr Edwards on 16 October 2006, in response to his request for information. They released some information to Mr Edwards but withheld other documents in terms of sections 25, 29(1), 30(b) and 38(1)(b) of FOISA.
3. On 18 October 2006, Mr Edwards wrote to the Ministers requesting a review of their decision. Mr Edwards stated that he was not concerned with the documents they had withheld from him in terms of sections 25 and 38(1)(b) of FOISA, but he queried the Ministers’ decision to withhold information in terms of sections 29(1) and 30(b).
4. The Ministers notified Mr Edwards of the outcome of their review on 14 November 2006. The Ministers maintained that they were correct to withhold the information from Mr Edwards, but advised him that they were additionally applying the exemptions contained in section 30(b) to all of the material they had previously withheld in terms of section 29(1) of FOISA.
5. On 21 November 2006, Mr Edwards wrote to the Commissioner, stating that he was dissatisfied with the outcome of the Ministers’ review and applying for a decision in terms of section 47(1) of FOISA (which, in terms of regulation 17 of the EIRs, applies for the purposes of the EIRs as it applies for the purposes of FOISA, subject to minor modification).
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. On 10 January 2007, a letter was sent to the Ministers giving notice that an application had been received and inviting comments from the Ministers on the matters raised by Mr Edwards and on the application as a whole. The Ministers were also asked to provide the Commissioner with copies of the information withheld from Mr Edwards.
8. The Ministers responded in full on 2 February 2007, providing copies of the withheld information and comments on the matters raised by Mr Edwards and on the application as a whole. The case was then allocated to an investigating officer.
9. During the investigation, the Ministers reconsidered the information previously withheld and decided to release further information to Mr Edwards. Two additional documents were supplied to him on 21 March 2007.
10. In later correspondence, the Ministers were informed that, having considered the documents withheld in this case, the Commissioner was of the view that they contained environmental information. The Ministers were asked to comment on this matter and provide submissions on whether they would consider some or all of the information withheld in this case to fall under the scope of any of the exceptions contained in the EIRs. In subsequent correspondence, the Ministers were also asked if they wished to apply the exemption in section 39(2) of FOISA to any information that the Commissioner considered to be environmental.
11. The Ministers' response informed the Commissioner that they did not consider the withheld documents to constitute environmental information (as defined in regulation 2(1) of the EIRs). However, they indicated that, where the Commissioner determined that the withheld information was environmental information, they would withdraw their reliance on the exemptions in 30(b) of FOISA, and instead rely on the exemption contained in section 39(2) of FOISA.
12. The Ministers also confirmed that they would wish to apply the exception contained in regulation 10(4)(e) of the EIRs to any information the Commissioner deemed to be environmental information.

Scope of the decision

13. In his application, Mr Edwards asked the Commissioner to only consider whether the Ministers were correct in withholding information in terms of the exemptions contained in section 30(b) or (as initially claimed) section 29(1) of FOISA.
14. Mr Edwards confirmed that he was not interested in information which had been withheld because it was already publicly available (and so exempt under section 25 of FOISA), or because it was personal data, disclosure of which would breach any of the data protection principles (and so exempt under section 38(1)(b)). The Commissioner has therefore not considered in this decision information withheld by the Ministers on these grounds, or under the equivalent provisions under the EIRs.



Commissioner's analysis and findings

15. 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.

Documents under consideration

16. The Ministers identified 15 documents as falling within the scope of Mr Edwards' information request. Of these:
- Documents 4, 7, 10 and 12 were disclosed to Mr Edwards in full in response to his initial request.
 - Document 15 was supplied subject to the redaction of mobile phone numbers (which Mr Edwards indicated he did not wish to be considered) and a section judged to fall outside the scope of the request.
 - Documents 13 and 14 were withheld on the basis that they were already publicly available (and these documents therefore fall outside the scope of the decision).
 - Documents 9 and 11 were released during the Commissioner's investigation, subject to the redaction of emails within them which are duplicated in documents 6 and 8, and which have been withheld.
17. The Commissioner has considered the section of document 15 which was judged to fall outside the scope of Mr Edwards' information request and he is of the view that it was incorrectly excluded. Document 15 is part of a memo prepared by an official in the water division of the Scottish Government as part of a briefing on the announcement of the bathing water results. The section considered (by the Ministers) to be outwith the scope of the request discusses the requirements of the revised Bathing Water Directive in Scotland. As this information was provided in the context of the Scottish Government's announcement of the bathing water results, and related to this announcement the Commissioner has concluded that this section of document 15 clearly falls within the scope of Mr Edwards' request. He has therefore considered it in this decision.
18. The remaining documents that require to be considered in this decision consist of six emails and one draft press release, along with the content excluded from the disclosed version of item 15. The items under consideration are numbered and listed below:
- 1 Email from the Scottish Environment Protection Agency (SEPA) to the Ministers dated 9 August 2006
 - 2 Internal email from Water Division to Communications dated 7/9/06
 - 3 Email from Water Division to SEPA dated 12/9/06



- 5 Email from the Ministers to SEPA dated 13 September 2006 (sent 15:31)
- 6 Internal email from Water Division to Ministers dated 13/9/06 sent 13:27
- 8 Internal email to and from the Ministers dated 14 September 2006
- 11a Draft press released attached to internal email dated 14 September 2006
- 15 Section of memo discussing the revised Bathing Water Directive dated 14 September 2006

FOISA or EIRs?

19. In *Decision 218/2007 Professor A D Hawkins and Transport Scotland*, the Commissioner considered the relationship between FOISA and the EIRs at some length. Broadly, the Commissioner's position on the interaction between the two regimes is as follows:
- The definition of what constitutes environmental information should not be viewed narrowly, but in line with the definition in the EIRs.
 - There are two separate statutory frameworks for access to environmental information and an authority is required to consider any request for environmental information under both FOISA and EIRs.
 - Any request for environmental information therefore must be dealt with under the EIRs.
 - In responding to a request for environmental information under FOISA, an authority may claim the exemption in section 39(2).
 - If the authority does not choose to claim the section 39(2) exemption it must deal with the request fully under FOISA, by providing the information, withholding it under another exemption in Part 2, or claiming that it is not obliged to comply with the request by virtue of another provision in Part 1 (or a combination of these).
 - The Commissioner is entitled (and indeed obliged) where he considers a request for environmental information has not been dealt with under the EIRs to consider how it should have been dealt with under that regime.
20. Firstly, therefore, the Commissioner must determine whether the information withheld is environmental information. If it is, the Commissioner must go on to consider the Ministers' handling of the request in terms of the EIRs.
21. "Environmental information" is defined in regulation 2 of the EIRs (the definition is reproduced in full in the Appendix). Where information falls within the scope of this definition, a Scottish public authority holding that information has a duty to make it available, subject to various restrictions and exceptions contained in the EIRs, to the applicant.



22. In this case, Mr Edwards made his information request under the terms of both FOISA and the EIRs. The Ministers provided their responses in terms of FOISA, having reached the view that the information requested was not environmental information.
23. During the investigation, the Commissioner reached an initial view that the information under consideration in this case contained environmental information. The Ministers were invited to comment on:
- whether the information withheld should be considered to be environmental information as defined in regulation 2 of the EIRs;
 - whether the Ministers would wish to apply the exemption in section 39(2) of FOISA to any information that the Commissioner judged to be environmental information; and
 - whether they considered any exceptions within the EIRs to apply to the information withheld, should it be judged to be environmental information.
24. In response to this request, the Ministers submitted that, although the bathing water results themselves were clearly environmental information, the information withheld contained internal discussions regarding the announcement of these results. The Ministers maintained that the information withheld did not fall within the definition of environmental information set out in regulation 2 of the EIRs and so their approach of considering the request solely under FOISA was correct. The Ministers submitted that in terms of sub-paragraph (c) of the definition of environmental information, these documents do not relate to measures “affecting or likely to affect” the elements and factors referred to in paragraphs (a) and (b).
25. The Ministers did, however, confirm that if the Commissioner reached the view that the information under consideration in this case was environmental information, they would wish to apply the exemption in section 39(2) of FOISA. The Ministers confirmed that they would consider all of the documents listed in paragraph 18 of this decision to be exempt from disclosure under the terms of regulation 10(4)(e) of the EIRs, which applies to internal communications.

Is the information withheld environmental information?

26. While taking due account of the Ministers' submissions as to whether the information withheld is environmental, the Commissioner has considered fully the categories of environmental information as defined in regulation 2(1) of the EIRs. The Commissioner has concluded that all of the information under consideration in this decision (i.e. items 1, 2, 3, 5, 6, 8, 11a and 15) consist of environmental information.
27. In reaching this decision, the Commissioner has noted that, although the documents contain information planning the announcement of the bathing water testing results, they also contain information about water quality at various sites, progress on sampling and analysis, discussion and interpretation of the results and background information on factors that may have influenced these.



28. The information under consideration provides considerable insight into the measurement of and matters influencing bathing water quality around Scotland, as well as the publication of the results of the bathing water testing. Bathing water is clearly one of the elements of the environment referred to in part (a) of the definition of environmental information contained in regulation 2 of the EIRs. Insofar as the information under consideration relates to the state of this element the Commissioner finds the information to be environmental information under the terms of part (a) of the definition.
29. The documents withheld also make numerous references to factors such as environmental conditions that may have influenced the state of the bathing water tested. Insofar as the documents contain references to such factors, the Commissioner finds these to be environmental information under the terms of part (b) of the definition.
30. The Commissioner has also found the information withheld, in its entirety, to be environmental information as defined in part (c) and (d) of the definition. This refers to any information on measures affecting or likely to affect the state of the elements of the environment, and any information on reports on the implementation of environmental legislation. The Commissioner takes the view that the Ministers' publication of bathing water testing results forms part of a programme of measures designed to monitor and improve Scotland's bathing water standards in line with European law and the monitoring and reporting of bathing water quality implements Bathing Water Directive 76/160 EEC. While some of the information might be narrowly viewed as simply containing information relating to the publication of data, the Commissioner has concluded that the clearly environmental nature of that data means that the information relating to its publication should also be considered to be environmental information.

The exemption in section 39(2) of FOISA

31. As noted above, the Ministers did not agree that the information withheld from Mr Edwards was environmental information. However, they indicated that if the Commissioner concluded that it was, they would apply the exemption in section 39(2) of FOISA.
32. This technical exemption provides that environmental information for the purposes of regulation 2 of the EIRs is exempt information under FOISA (thereby allowing any information held to be considered solely in terms of the EIRs).
33. Having concluded that all of the documents under consideration are environmental information as defined in regulation 2 of the EIRs, the Commissioner has also concluded that they were properly exempt from disclosure under section 39(2) of FOISA.
34. The exemption in section 39(2) is subject to the public interest test in section 2(1)(b) of FOISA. The Commissioner considers that, as there is a separate statutory right of access to environmental information provided by the EIRs, the public interest in maintaining this exemption and allowing access in line with the requirements of the EIRs outweighs that public interest in the disclosure of information under FOISA. Given this conclusion, the Commissioner has made his decision on the information in this case solely under the terms of the EIRs.



Application of 10(4)(e) of the EIRs

35. The Ministers have submitted that they consider all of the withheld documents to be excepted from disclosure in terms of regulation 10(4)(e) of the EIRs. Under regulation 10(4)(e), a Scottish public authority may refuse to make environmental information available to the extent that the request involves making available internal communications.
36. Regulation 10(4)(e) does not expand upon what is meant by "internal communications". The wording of the regulation directly reflects Article 4.1(e) of the relevant European directive (Directive 2003/4/EC on public access to environmental information), as well as Article 4.3(c) of the Aarhus Convention.
37. As with all of the exceptions contained within regulation 10, a Scottish public authority applying this exception must interpret the exception in a restrictive way (regulation 10(2)(a)) and apply a presumption in favour of disclosure (regulation 10(2)(b)). Even where the exception applies, the information must be released unless, in all the circumstances, the public interest in making the information available is outweighed by that in maintaining the exception (regulation 10(1)(b)).
38. For information to fall within the scope of the exceptions, it need only be established that the information is an internal communication. Only if the Commissioner decides that a document is an internal communication will he be required to go on and consider the public interest test.
39. The Commissioner is satisfied that documents 2, 6, 8, 11a and 15 are clearly internal communications for the purposes of regulation 10(4)(e) of the EIRs. These items are comprised of a draft document that was attached to an internal email which has already been released to Mr Edwards, emails and part of a memo exchanged within the Scottish Government.
40. Documents 1, 3 and 5, however, consist of emails between officials at SEPA and the Scottish Government. The Ministers submitted that these should also be considered to be internal communications for the purposes of regulation 10(4)(e). In support of this claim, the Ministers provided background information about SEPA's status. SEPA is an executive non-departmental public body, established in 1996 under the terms of the Environment Act 1995. The Ministers noted that SEPA's board members are appointed by the Scottish Ministers, and that Ministers are ultimately accountable to the Scottish Parliament for the activities and performance of SEPA, including, inter alia, approving the policy and performance framework within which it operates, objective setting and approving budgets.
41. The Ministers referred to the definition of "internal communications" provided for in the Aarhus Convention Implementation Guide. This states that:



“The public authority may refuse to disclose materials “concerning internal communications” but only when national law and customary practice exempts such materials. The Convention does not clarify what is meant by “customary practice” and this may differ according to the administrative law of an implementing Party. For example, for some Parties “customary practice” may apply only to those materials covered by evidence of established norms of administrative practice”.

42. The Ministers argued that as it is not “customary practice” or “a norm of administrative practice” for them to disclose documents such as 1, 3 and 5, that their decision to withhold the documents in this case is in line with the approach advocated by the Aarhus Convention Implementation Guide.
43. In addition, the Ministers noted that the Aarhus Convention Implementation Guide suggests that countries may wish to clearly define “internal communications” for implementing the convention. The Ministers submitted that this seems to suggest that countries have some scope to have their own definitions of internal communications.
44. In this regard, the Ministers referred the Commissioner to paragraph 82 of their own guidance entitled “*Access to environmental information – guidance for Scottish Public Authorities and interested parties on the implementation of the EIRs 2004*”. This non-statutory guidance states that “information contained in any internal communications or between Scottish public authorities... may be excepted from the duty to release if it is of a confidential nature”. The Ministers argued that this definition would encompass correspondence between the Scottish Ministers and SEPA.
45. The Commissioner has considered documents 1, 3 and 5 and all of the Ministers’ submissions as well as the guidance referred to therein. The Commissioner has also borne in mind the requirement to interpret the exception in regulation 10(4)(e) in a restrictive way and to apply a presumption in favour of disclosure.
46. Having considered the relevant provisions of the Environment Act 1995 (Chapter 2), the Commissioner is satisfied that SEPA is a body corporate in its own right, with its own legal personality. It is not part of the Scottish Administration as defined in the Scotland Act 1998. The Commissioner is therefore satisfied that documents 1, 3 and 5 cannot be considered to be internal communications in the sense of being transferred or circulated within a discrete authority.
47. As has been noted in previous decisions, the Commissioner does not dismiss the possibility of cases where communications between two or more separate public authorities may be capable of being considered as internal communications for the purposes of regulation 10(4)(e), but expects an authority to be able to highlight particular aspects of the administrative and legal relationship between the two bodies, or about the nature of the communications under consideration, to show why communications should be considered to be internal. This will include consideration, on a case-by-case basis, of matters such as the nature and context of the particular relationship and the nature of the communication itself.



48. In this case, documents 1, 3 and 5 reveal discussions between SEPA and the Scottish Government on the finalisation and announcement of bathing water testing results. SEPA is responsible for the testing and analysis, while the Ministers announce the results.
49. When interpreting the exception narrowly, and adopting a presumption in favour of disclosure (both of which he is required to do), the Commissioner is unable to accept the assertion that these documents are internal communications. In particular, the Commissioner has found the Ministers' arguments to be circular. These state that it is not customary practice to disclose such communications and, accordingly, these items should be considered to be internal communications and so exempt.
50. The Commissioner has noted that, according to this reasoning, almost any communication between the Ministers and other organisations in the course of their work (perhaps not even restricted to the public sector) could be considered to be internal communications for the purposes of regulation 10(4)(e), unless the Ministers were already in the habit of disclosing these.
51. The arguments put forward by the Ministers in this case, if accepted, would entail that communications between the Scottish Government and a large proportion of the separate public authorities making up the public sector in Scotland (many of which engage in joint working on matters of mutual interest) should be considered to be internal communications. The Commissioner takes the view that such an approach would be incompatible with the obligations to interpret the exception in regulation 10(4) (e) restrictively and to apply a presumption in favour of disclosure.
52. Having considered the submissions put forward in this instance, the Commissioner is not persuaded that documents 1, 3 and 5 are internal communications for the purposes of the EIRs. For that reason, the Commissioner does not accept that the exception in regulation 10(4)(e) has been correctly applied to these, and he finds that the Ministers acted in breach of regulation 5(1) of the EIRs by withholding these documents.

Consideration of the public interest test and regulation 10(4)(e)

53. Having found documents 2, 6, 8, 11(a) and 15 to be exempt in terms of regulation 10(4)(e), the Commissioner is required to consider the public interest test required by regulation 10(1) of the EIRs. This specifies that a public authority may only withhold information to which an exception applies where, in all the circumstances, the public interest in making the information available is outweighed by the public interest in maintaining the exception.
54. In this case, the Commissioner has also considered the public interest in relation to documents 1, 3 and 5 as if, contrary to his views set out above, the exception in regulation 10(4)(e) of the EIRs had also been found to apply to these.



55. In favour of disclosure, the Commissioner has noted that there is a general public interest in the disclosure of information held by public authorities, particularly where it relates to matters concerning the state of the environment. As the Ministers have noted, the publication of bathing water results are clearly in the public interest and these are published on an annual basis. However, the Commissioner also considers there to be a public interest in understanding the finalisation and publication of this information. He has taken this into consideration when balancing the public interest for and against disclosure.
56. The Ministers' submissions on the public interest regarding the information withheld in this case were made in relation to the exemptions cited under FOISA. When asked to comment on the application of the EIRs to the information, they did not make any new submissions on the public interest in relation to regulation 10(4)(e) of the EIRs, but instead they referred the Commissioner to the previous submissions in terms of FOISA. The Ministers asked the Commissioner to consider these arguments in relation to the application of regulation 10(4)(e).
57. The Ministers submitted that there is undoubtedly a public interest in viewing the bathing water results for 2006, and that this is recognised in the publication of this information on a yearly basis. However, they went on to state that the public interest in viewing documents relating to the announcement of the results was outweighed by the public interest in withholding the information.
58. The Ministers' submissions on the public interest (made in the context of their submissions that disclosure would be likely to inhibit the free and frank provision of advice and exchange of views for the purposes of section 30(b) of FOISA) argued that that the withheld documents related to the free and frank provision of advice and exchange of views for the purposes of deliberation on the finalisation and publication of the Bathing Water Results 2006, and that their release could inhibit substantially the candour of such exchanges in the future.
59. The Ministers maintained that there is a strong public interest in maintaining the integrity of the process of giving free and frank advice in this sort of case. They suggested that knowledge of possible disclosure might inhibit the provision of advice in the future and impair the candour and freedom within which papers are prepared, deliberated and revised in future. This in turn, it was submitted, would be likely to have a detrimental effect on the efficiency and quality of the deliberative process since officials would take into consideration issues of release when providing advice and tailor that advice in the light of potential release. The Ministers submitted that, if such considerations existed, advice cannot be free and frank.
60. The Ministers also argued that there is a strong public interest in ensuring that, where necessary, advice to Ministers on decision making can take place in a non-public arena which will enable rigorous and frank debate about the merits and demerits of alternative courses of action, without fear that such considerations will be picked over out of context. The Ministers maintained that it is in the public interest for decision making to be based on the best advice available, with a full consideration of all of the options, including those that may not be immediately considered to be broadly politically acceptable.



61. The Ministers also submitted more generally, that where the information requested relates to an important and ongoing process; there can be a public interest in the protection of a process in itself. The Ministers submitted that they would argue that the public interest in protecting internal communications should be applied in cases where the likely effect of releasing information would be the suppression of effective communication in the future, e.g. because the advice or discussion would be oral instead of being written down. The Ministers submitted that the consequences of releasing the withheld documents in this case would substantially prejudice the provision of advice by government officials and their candour in exchanges of view, and on balance they judged that the public interest lay in withholding the information.

Conclusions on the public interest

62. Having reviewed the content of the documents under consideration in this case, the Commissioner is not persuaded by the Ministers' arguments that there is a significant public interest in maintaining the exception in relation to items 2, 6, 8 or 15. He has found little evidence of the free and frank provision of advice in any of the withheld documents. Generally, these documents provide some information on the opinions of officials, but in the main they merely outline the course of action that an official or an official's department is planning to take or they provide factual information about the interim results of the bathing water pollution results or they discuss the requirements of the revised Bathing Water Directive in Scotland.
63. The Commissioner is unable to accept the Ministers' arguments that officials would be inhibited from putting forward opinions or providing advice in the future should they be aware that information of this type might be disclosed in response to information requests. It is clear to him that the comments contained in these documents (including those highlighted in the Ministers' submissions) relate to the routine, everyday business of disseminating news stories and discussion of the facts and practicalities between those involved in the data collection and those preparing to publicise the results. He does not accept that officials responsible for undertaking work of the type illustrated in these documents would be less likely to perform their duties diligently or less willing to provide advice and views as part of this role.
64. It is the Commissioner's view that disclosure of documents 2, 6, 8 or 15 would not be likely to dissuade officials from providing any future opinions on the content and structure of a news story. Delivering opinions and advice in their field of expertise is an expectation of many officials, and the Commissioner does not accept the Ministers' arguments that an official will fail to carry out their duties for fear of these specific opinions being made public. Neither does he accept the Ministers' argument that if these documents are released, officials will be less willing to write down their views or advice and will conduct discussions orally.
65. The Commissioner accepts that officials may take more care in recording their advice or views, and pay more attention to the manner of expression, as a result of their awareness that information might be disclosed in response to an information request. However, he has not been presented with evidence that persuades him that the effect of disclosing information of this type under either FOISA or the EIRs would be or has been that of reducing the effectiveness of government, or limiting the type or quality of information that is recorded.



66. The Commissioner has finally noted the timing of Mr Edwards' information request. This was made four days after the public announcement of the 2006 bathing water results. It is the Commissioner's opinion that the process of finalising and publishing the results of bathing water testing was no longer ongoing at that time. He considers that any sensitivity which lay in these documents prior to this publication was significantly diminished after the final results were published.
67. Consequently, the Commissioner has not been persuaded that disclosure of documents 2, 6, 8 or 15 would have the effects submitted by the Ministers, and so that the public interest would be harmed in the way that is suggested as a consequence of these. As a consequence, having considered the public interest in favour of disclosure and the public interest in favour of maintaining the exception, and having balanced the two, the Commissioner has concluded that the public interest in maintaining the exception in regulation 10(4)(e) of the EIRs is outweighed by the public interest in the disclosure of the information.
68. For the same reasons set out above, the Commissioner has also concluded that had he determined (contrary to his findings set out above) that documents 1, 3 and 5 were also excepted from disclosure under regulation 10(4)(e), the public interest in maintaining the exception in relation to these documents would also be outweighed by the public interest in the disclosure of the information.
69. The Commissioner therefore concludes that the Ministers have acted in breach of regulation 5 of the EIRs by withholding documents 1, 2, 3, 5, 6, 8 and 15 from Mr Edwards.
70. Document 11a is a draft press release which contains drafting suggestions. Having considered the content of this document, the Commissioner is of the opinion that it provides no further substantive information above that which has already been placed in the public domain. He has not identified any substantial public interest in favour of disclosure of this document. For this document, the Commissioner finds the public interest in favour of disclosure is outweighed by that in favour of withholding and enabling the process of drafting and agreeing the form of a public announcement to proceed with a degree of privacy.
71. In the case of document 11a only, therefore, the Commissioner finds that the Ministers were entitled to withhold this item on the basis that it was exempt under the terms of regulation 10(4)(e) of the EIRs.

DECISION

Having found that the information under consideration in this case was environmental information and so exempt from disclosure under section 39(2) of the Freedom of Information (Scotland) Act 2002, the Commissioner has gone on to consider whether Mr Edwards was entitled to access this information under the terms of the Environmental Information (Scotland) Regulations 2004 (the EIRs).



The Commissioner has found that the Ministers complied with the EIRs by withholding document 11a from Mr Edwards. He found this to be excepted from disclosure under regulation 10(4)(e) and concluded that the public interest in maintaining this exception outweighed the public interest in the disclosure of the information.

The Commissioner has found that the Ministers did not comply with regulation 5(1) of the EIRs, in withholding the remaining information under consideration in this decision. He found that the exception in regulation 10(4)(e) did not apply to documents 1, 3, and 5 on the basis that these items are not internal communications.

He found that this exception did apply to documents 2, 6, 8 and 15, but that the public interest in maintaining this exception is outweighed by the public interest in disclosing this information.

The Commissioner noted also that, had documents 1, 3 and 5 been found to be excepted from disclosure under regulation 10(4)(e), he would have concluded that the public interest favoured the disclosure of these items also.

The Commissioner requires the Ministers to release documents 1, 2, 3, 5, 6, 8 and a version of document 15 with the content previously omitted restored to Mr Edwards by 25 September 2008.

Appeal

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

Kevin Dunion
Scottish Information Commissioner
11 August 2008



Appendix

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002

1 General entitlement

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

2 Effect of exemptions

- (1) To information which is exempt information by virtue of any provision of Part 2, section 1 applies only to the extent that –
 - (a) the provision does not confer absolute exemption; and
 - (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

39 Health, safety and the environment

...

- (2) Information is exempt information if a Scottish public authority-
 - (a) is obliged by regulations under section 62 to make it available to the public in accordance with the regulations; or
 - (b) would be so obliged but for any exemption contained in the regulations.

The Environmental Information (Scotland) Regulations 2004

2 Interpretation

- (1) In these Regulations –

"environmental information" has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on-

- (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine



areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;

- (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in paragraph (a);
- (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in paragraphs (a) and (b) as well as measures or activities designed to protect those elements;
- (d) reports on the implementation of environmental legislation;
- (e) costs benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in paragraph (c); and
- (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in paragraph (a) or, through those elements, by any of the matters referred to in paragraphs (b) and (c);

5 Duty to make available environmental information on request

- (1) Subject to paragraph (2), a Scottish public authority that holds environmental information shall make it available when requested to do so by any applicant.
- (2) The duty under paragraph (1)-
 - (a) shall be complied with as soon as possible and in any event no later than 20 working days after the date of receipt of the request; and
 - (b) is subject to regulations 6 to 12.

10 Exceptions from duty to make environmental information available—

- (1) A Scottish public authority may refuse a request to make environmental information available if-
 - (a) there is an exception to disclosure under paragraphs (4) or (5); and
 - (b) in all the circumstances, the public interest in making the information available is outweighed by that in maintaining the exception.



- (2) In considering the application of the exceptions referred to in paragraphs (4) and (5), a Scottish public authority shall-
 - (a) interpret those paragraphs in a restrictive way; and
 - (b) apply a presumption in favour of disclosure.
- (4) A Scottish public authority may refuse to make environmental information available to the extent that –
 - ...
 - (e) the request involves making available internal communications.