

Decision Notice



Decision 098/2008 Mr Rob Edwards, of the Sunday Herald and the Scottish Ministers

Scottish Ministers' decision to reject the 'Application in Principle' for road user charging on the Forth Road Bridge.

**Reference No: 200700042
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Summary

Mr Rob Edwards (Mr Edwards) requested all unpublished reports, memos and correspondence relating to the Scottish Ministers' (the Ministers) decision to reject the 'Application in Principle' for road user charging (RUC) on the Forth Road Bridge. The Ministers responded by disclosing some of the information, he sought but withholding other information in terms of section 29(1)(a) and (b), 30(b)(i) and (ii), 36(1) and (2) and 38(1)(b) of the Freedom of Information (Scotland) Act 2002 (FOISA).

Following an investigation, the Commissioner found that the Ministers had partially failed to deal with Mr Edward's request for information in accordance with Part 1 of FOISA. While he found that the majority of the information under consideration in this decision was properly withheld, he found that some should have been disclosed. The Commissioner required the Ministers to release this information to Mr Edwards. The Commissioner also found that the Ministers had significantly breached the timescale for providing a response to Mr Edwards' information request set out in section 10(1) of FOISA.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1) (Effect of exemptions); 10(1) (Time for compliance); 29(1)(a) and (b), (3), (4) (definition of "Ministerial communications") and (5) (Formulation of Scottish Administration policy etc.) and 30(b) and (c) (Prejudice to effective conduct of public affairs)

The full text of each of the statutory provisions cited above is reproduced in Appendix 1 to this decision. Appendix 1 forms part of this decision.

Background

1. On 17 May 2006, Mr Edwards wrote to the Ministers requesting the following information:

"Copies of all unpublished reports, memos and correspondence, whether draft or final, relating to the decision by Scottish Ministers on 1 March 2006 to reject the 'Application in Principle' for a road user charge on the Forth road bridge by the Forth Estuary Transport Authority".



2. After a considerable delay, the Ministers wrote to Mr Edwards on 24 November 2006 in response to his request for information. The Ministers disclosed some information to Mr Edwards but withheld a range of information in terms of sections 29(1)(a) and (b), 30(b)(i) and (ii), 36(1) and (2) and 38(1)(b) of FOISA.
3. On 29 November 2006, Mr Edwards wrote to the Ministers, requesting a review of their decision. In particular, Mr Edwards queried the Ministers' application of the exemptions contained in section 29(1)(a) and (b), 30(b)(i) and (ii) and 36(1) of FOISA to the withheld documents.
4. The Ministers wrote to notify Mr Edwards of the outcome of their review on 29 December 2006. The Ministers upheld their original decision to withhold the documents in terms of section 29(1)(a) and (b), 30(b)(i) and (ii) and 36(1) of FOISA.
5. On 9 January 2007, Mr Edwards wrote to the Commissioner, stating that he was dissatisfied with the outcome of the Ministers' review and applying to him for a decision in terms of section 47(1) of FOISA. In this letter, Mr Edwards stated that he was only interested in the information withheld in terms of section 29(1)(a) and (b), 30(b)(i) and (ii) and 36(1) of FOISA.
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 29 January 2007, a letter was sent to the Ministers giving notice that an application had been received and an investigation into the matter had begun, and inviting comments from the Ministers as required under section 49(3)(a) of FOISA. 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 March 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. The Ministers advised the Commissioner that, on reviewing the documents withheld, they had decided to release further information to Mr Edwards. Documents numbered 3 - 10 and 15 were disclosed in their entirety at this stage. Documents 58 and 59 were disclosed with the redaction of content judged to fall outside the scope of the request. Document 19 was disclosed with the redaction of content judged to be exempt in terms of section 30(b)(ii) of FOISA. The Ministers also indicated that for a number of documents (numbered 75 – 122) previously disclosed with the removal of the names of persons acting in their professional capacity, they had decided to provide additional copies, now with these persons' names restored.



10. The Ministers provided copies of the documents both provided to, and withheld from, Mr Edwards. The withheld documents are listed in the schedule at Appendix 2 of this decision, along with the exemptions that were applied to each item. This schedule is organised in line with that provided to the Commissioner by the Ministers, which was ordered chronologically and did not follow a regular numerical order throughout. Appendix 2 excludes section 4 of the Ministers' schedule, which listed the documents disclosed to Mr Edwards and which are not under consideration in this decision.
11. The Ministers informed the Commissioner that they no longer wished to rely upon the exemption contained in section 36(1) of FOISA in relation to any of the information withheld. However, they indicated that, after further consideration, they believed that the exemptions in section 30(a) and (c) should have been applied to some of the information withheld from Mr Edwards. The Ministers provided their reasons for considering why each exemption applied and (where appropriate) why the public interest lay in withholding the information.
12. In later correspondence, the Ministers confirmed that item 46(v) was considered exempt in terms of section 25(1) of FOISA (Information otherwise accessible), on the basis that it was published on the Scottish Government's website at the time of Mr Edwards' request.
13. In May 2007, the Ministers also provided further general submissions to the Commissioner on the application of the exemptions contained in section 30(b) of FOISA. They indicated that these should be taken into consideration in relation to ongoing cases where these exemptions had been raised, and so the Commissioner also took these submissions into consideration in this case.
14. During the investigation, Mr Edwards was also given the opportunity to comment on why he considered the public interest would favour the disclosure of the information withheld in this case. He was also notified of the Ministers' reliance on additional exemptions and given the chance to comment on these.

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.

Scope of this decision

16. As indicated above, the Ministers withheld item 46(v) in terms of section 25(1) of FOISA, arguing that it was in the public domain at the time of Mr Edwards' request. The Commissioner has established that this document was published on the Scottish Government's website at the time of Mr Edwards' request, and since Mr Edwards asked only for *unpublished* documents, this document clearly falls outside the scope of his request. Accordingly, the Commissioner will not consider document 46(v) in this Decision.



17. In his application to the Commissioner, Mr Edwards stated that he was not concerned with information withheld under sections 36(2) and 38(1)(b) of FOISA, but that he was concerned with information withheld in terms of section 29(1)(a) and (b), 30(b)(i) and (ii) and 36(1). During the investigation, Mr Edwards also confirmed that he wanted the Commissioner to consider information the Ministers later withheld in terms of sections 30(a) and 30(c) of FOISA.
18. As Mr Edwards has accepted the Ministers' application of the exemption in section 36(2), the items to which this exemption has been applied (numbers 26, 28, 29 and 31) have not been considered further in this decision.
19. The Ministers confirmed that they had applied the exemption in section 38(1)(b) to parts of items 28 to 33 which would identify individuals. This is in line with the approach taken to personal data within documents already released to Mr Edwards, and Mr Edwards has clearly indicated that he does not require the Commissioner to consider the application of this exemption. For documents 30, 32 and 33, however, the Commissioner has considered whether the remaining parts of these documents were exempt from disclosure under the terms of section 30(c) of FOISA.
20. As the Ministers no longer sought to rely on section 36(1) in relation to any information withheld, this decision notice will only consider information that was withheld under sections 29(1)(a) and (b), 30(a), 30(b)(i) and (ii) and 30(c).

Relevance of the information withheld to Mr Edwards' request

21. As noted above, the Ministers provided the Commissioner with copies of the documents withheld from Mr Edwards. They indicated that, within these documents, there was a lot of material which they considered to fall outwith the scope of Mr Edwards' request. The Ministers argued that it would have been extremely complicated and time consuming to extract from the documents only the information which fell within the scope of Mr Edward's request. The Ministers also argued that as they considered all of these documents exempt from disclosure in their entirety anyway, it would be needless for them to undertake such an exercise.
22. Having considered the documents provided by the Ministers, the Commissioner accepts that in many cases material falling within the scope of Mr Edwards' request appears alongside material which is outwith the scope of his request, making identification and separation of the requested material a complex task.
23. In the light of this, the Commissioner has first considered each of the withheld documents as if it were entirely within the scope of Mr Edwards' information request. After drawing his conclusions on the application of the relevant exemptions to each document, he then considered the relevance to Mr Edward's request of any items found to be disclosable. This approach ensured that any information found to be releasable but outside the scope of Mr Edwards' request was excluded from disclosure.



Background to the case

24. It may be helpful at this point to provide some background information about the “Application in Principle” proposed by the Forth Estuary Transport Authority (FETA) and related issues concerning transport across the Forth that were ongoing at the time of Mr Edwards’ request.
25. The decision to which Mr Edwards’ request relates concerns FETA’s proposal to modify the existing tolling regime on the Forth Road Bridge by introducing a road user charge (RUC) scheme. FETA proposed to implement variable charges according to time of day (with peak times having a higher charge) and by vehicle occupancy (with single occupancy vehicles being charged more). The details of this proposal caused controversy and attracted extensive local and national press coverage.
26. FETA submitted an application for Approval in Principle of its RUC scheme to the Ministers on 25 November 2005. The Minister for Transport announced the Ministers’ decision to reject the application in a statement to Parliament on 1 March 2006.
27. FETA’s application was submitted under the terms set out by the Ministers for authorities looking to introduce RUC schemes. Under the Transport (Scotland) Act 2001 (the 2001 Act), local traffic authorities may make user charging schemes, subject to the confirmation of the Ministers. All charging schemes must comply with the 2001 Act and associated secondary legislation. At the time of Mr Edward’s, request the development of these regulations was ongoing and was not expected to be finalised by the Ministers until the end of 2007 or the beginning of 2008.
28. At the time of FETA’s RUC proposal, there were a number of ongoing issues associated with transport across the Forth, including the condition of the existing crossing, pressure for a replacement crossing and the Tolled Bridges Review Stage 2. These were all the focus of considerable media and political attention. The Ministers made it clear that they would not decide upon any of these issues in isolation, but that they would be considered together. Subsequently, discussion of road user charging on the Forth Road Bridge took place within a much broader discussion of the main issues facing Scotland’s bridges and, in particular, the findings of Stage 2 of the Tolled Bridges Review.
29. The Commissioner considers that an understanding of the background to FETA’s RUC scheme, the context in which it was rejected and the public debate it generated are relevant in considering the application of exemptions and the public interest test (where relevant) to the information requested by Mr Edwards.
30. Before continuing, the Commissioner would note that he has considered (as he is required to do) the application of exemptions to the information under consideration and (where this test is relevant) the balance of public interest in the circumstances that existed at the time when the Ministers notified Mr Edwards’ of the outcome of their review, and disregarding any developments in government policy or the public debate with respect to tolls on the Forth Bridge since that time.



FOISA or EIRs?

31. When Mr Edwards made his original information request, he asked for the information under FOISA and the Environmental Information (Scotland) Regulations 2004 (the EIRs). As will be clear from the Ministers' responses to Mr Edwards and their submissions to the Commissioner, the Ministers dealt with the request under FOISA. The question of whether Mr Edwards' request should be dealt with under FOISA or under the EIRs was not raised while the Ministers were dealing with this request. However, the Commissioner believes it may be useful to include his consideration of this issue in this Decision Notice.
32. As outlined above, the information sought by Mr Edwards relates to FETA's application to initiate RUC on the Forth Road Bridge. The underlying reasons behind the application to introduce RUC are many, but significant factors were the desire to encourage car sharing as a method of limiting emissions and congestion, and also as a method of reducing the load on the Bridge following the discovery of corrosion and broken wires in the Bridge's main cables. This corrosion is responsible for the declining state of the Bridge and has also led to calls for a replacement crossing to handle the growing levels of traffic. It is the Commissioner's view that emissions data or information concerning the effect of corrosion on a main traffic crossing, would be environmental information and would fall under the remit of the EIRs. However, the information sought in this case is limited in scope to documents relating to the Ministers' decision to reject FETA's Application in Principle for road user charging, the content of which does not include the wider environmental issues.
33. Having carefully considered the sought material, the Commissioner is of the opinion that the documents that fall under the scope of Mr Edwards request do not contain environmental information. As a result he is satisfied that this information request was properly considered under FOISA rather than under the EIRs.

Application of section 29(1)(a) of FOISA

34. Section 29(1)(a) of FOISA states that information held by the Scottish Administration is exempt information if it relates to the formulation or development of government policy. The Ministers applied the exemption in section 29(1)(a) to most of the information withheld from Mr Edwards (as indicated in the schedule in Appendix 2).
35. For information to be exempt under section 29(1)(a), it must relate to the formulation or development of government policy. The Commissioner takes the view that "formulation" means the output from the early stages of the policy process, where options are generated and sorted, risks are identified, consultation occurs and recommendations or submissions are put to a Minister. "Development" is sometimes used interchangeably with "formulation", but "development" may go beyond this stage. It may refer to the processes involved in improving on, altering or recording the effects of existing policy.
36. Section 29(1)(a) is a 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.



37. Having examined the documents to which this exemption has been applied, the Commissioner accepts that in all cases they can be seen to relate to the formulation or development of government policy regarding FETA's RUC scheme, and so fall under the exemption in section 29(1)(a) of FOISA.

The public interest test

38. As noted above, the section 29(1)(a) exemption of FOISA is a qualified exemption which is subject to the public interest test required by section 2(1)(b) of FOISA.
39. This means that even if the exemption applies, the information can only be withheld if, in all the circumstances of the case, the public interest maintaining the exemption outweighs the public interest in disclosing the information.
40. Section 29(3) of FOISA requires the Scottish Administration, when applying the public interest test in relation to the exemption in section 29(1)(a), to 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.

Consideration of the public interest issues

41. The Ministers' submissions on the public interest as it relates to section 29(1)(a) asserted that there is a strong public interest in high quality policy and decision-making and that in order to uphold that public interest, Ministers and officials need to be able to consider all available options, however unpalatable, to debate those rigorously, to expose their merits and demerits and to understand their implications. The Ministers asserted that the public interest applies in ensuring that officials can conduct rigorous and candid risk assessments of their policies and programmes including consideration of the pros and cons without there being premature disclosure which might close off discussion and the development of better options and without fear that the exploration of potential solutions would be subdued or inhibited.
42. The Ministers submitted that RUC, along with other related issues, was still very much an ongoing area of policy formation. They maintained that the Cabinet must be given the space to develop and formulate policies without fear that deliberations will be released which could close off discussions on some options. They submitted that Ministers need to be free to discuss all options among themselves and their candour in doing so will be affected by their assessment of whether the content of their discussions will be disclosed in the near future, especially when, as in this case, it may undermine or constrain the Government's view on policy development that is ongoing. They argued that it is in the public interest to protect the impartiality of ministers. They contended that release of this information might create the risk that ministers and officials could come under political or public pressure not to challenge ideas in the formulation of policy, thus leading to poorer decision making.



43. The Ministers further argued that there is a strong public interest in ensuring that, where necessary, advice in areas of ongoing policy development can take place in a non-public arena, and that it is in the public interest for decision making to be based on the best advice available, with a full consideration of all the options, including those that may not be immediately considered to be broadly politically acceptable.
44. The Ministers noted that the public interest must be considered on a case-by-case basis, but stated that in this case, where the information requested relates to an important and ongoing process, i.e. the ongoing formulation of government policy with regard to road user charging, there is a public interest in the protection of a specific policy formulation process.
45. Mr Edwards submitted that it is difficult for him to judge the public interest in releasing documents which he has not seen. However, Mr Edwards argued that the debate over RUC, like all debates on transport policy, is of great interest to many members of the public. He maintained that there is a strong case for releasing as much information as possible to help the public understand how and why a decision was taken to reject RUC on the Forth Road Bridge. Mr Edwards contended that while the Government's suggestion that they need space to formulate policy in secret may have some justification at the time that policy is being formulated, the rationale becomes weaker after the decision is made, and as time passes.
46. In general, the Commissioner accepts that there will often be a significant considerable public interest in allowing the process of policy formulation and development to proceed without disclosure of documents revealing details of the matters under active consideration before any decision or settled policy been reached. The Commissioner accepts that it is in the public interest that (for instance) officials or Ministers are not inhibited from considering the merits of a wide range of policy options, expressing their views upon them, and rigorously challenging the arguments for and against any proposed approach. The fear of (near) contemporaneous disclosure may well inhibit the putting forward of politically controversial policy options, or limit the recording of these, and the Commissioner accepts (as he has previously, for example in *Decision 077/2006 Mr Paul Hutcheon and the Scottish Executive*) that the benefits of open government need to be balanced against this risk in the interests of sound policy development.
47. On the other hand, the Commissioner has also made it clear (see again *Decision 077/2006*) that it is inappropriate to "ring-fence" all internal deliberations on public interest grounds. Although the exemption in section 29(1)(a) applies widely to a class of information, this should not be taken to suggest that the public interest will automatically favour the maintenance of that exemption once it has been found to apply. The Commissioner will not be able to accept arguments that information requires protection simply because it is of a general type or subject matter. Consideration must be given to the content of the information in deciding whether the public interest demands its protection, and the balance of public interest may well change over time.
48. Mr Edwards considers that the arguments put forward by the Ministers for withholding the deliberations preceding the decision to reject FETA's application for RUC have been weakened due to the passage of time, and are no longer convincing.



49. Mr Edwards submitted his original information request in May 2006, two months after the Transport Minister announced the decision to reject FETA's Application in Principle. However, the Ministers did not respond to this request until late November 2006, more than six months later. Mr Edwards requested a review of this request five days later, and he was notified of the outcome of this review on 29 December 2007.
50. The delays in the Ministers' handling of Mr Edwards' request are commented on further below. They are relevant here because, when considering whether a public authority has acted in accordance with Part 1 of FOISA, the Commissioner must assess the decision taken on review. In this case, therefore, the delays in the Ministers' handling of the request meant that almost 10 months had passed from the announcement of the relevant decision. Therefore, the process of policy formulation leading to this decision could well be argued to have ended at the time that is relevant for this decision.
51. However, while the decision to reject FETA's Application in Principle had been made some months prior to this point, the Commissioner accepts that policy development relating to the future of the Forth Road Bridge and its tolls was ongoing, and RUC was only one of the options available following the rejection of FETA's application. It is the Commissioner's view that for most of the documents to which the exemption in section 29(1)(a) have been applied, public disclosure at the time of the Ministers' review would have been likely to have a detrimental effect on the formulation of policy development in this area, and inhibit discussion on future options for tolling on the Forth Road Bridge.
52. The Commissioner accepts that disclosure of these documents would shed further light on the process leading to the Ministers' decision to reject FETA's application, and the options and arguments considered when taking this decision, but he has concluded in this case that the public interest in disclosure at the relevant time was outweighed by the public interest in maintaining the exemption, and in allowing the wider policy making process with respect to the future of tolling for the Forth Road Bridge to continue in private at that stage.
53. However, the Commissioner has not accepted that the public interest in maintaining the exemption in all cases outweighed the public interest in disclosure of the exempt information. For (parts of) items 1, 20, 21, 22, 23 and 46(iv), he has concluded that the Ministers' arguments with respect to the public interest do not carry significant weight, and that the public interest lies in disclosure of information that will provide additional insights into the decision taken and the process by which it was reached.
54. The information contained in the items which the Commissioner has judged should be released includes summaries of the options available to Ministers with respect to FETA's application, the process of reaching a decision, consideration of factual or technical issues, and a Q&A document prepared to assist in answering questions from the media about the Ministers' decision to reject FETA's Application in Principle. In some cases, information contained within these documents has already been disclosed to Mr Edwards within the documents already released to him.



55. The information for which the Commissioner has judged the public interest favours disclosure does not reveal the advice given to Ministers or opinions or detailed consideration of options by Ministers or officials. For such information, the Commissioner does not accept that disclosure would have a detrimental effect on the effectiveness of government in the way suggested by the Ministers, and he has concluded that the public interest in disclosure (and, in so doing, increasing public understanding of a significant decision by Ministers) outweighs the public interest in maintaining the exemption in section 29(1)(a).
56. The Commissioner's findings on the public interest for each document are set out in the schedule in Appendix 2. Where he has found that the public interest in maintaining the exemption in section 29(1)(a) outweighs the public interest in disclosure of that information, the Commissioner has not gone on to consider any other exemption in this decision.

Application of section 29(1)(b) of FOISA

57. Section 29(1)(b) of FOISA provides that information held by the Scottish Administration is exempt information if it relates to Ministerial communications. Section 29(4) explains that the phrase "Ministerial communications" means any communications between Ministers and includes, in particular, communications relating to proceedings of the Scottish Cabinet (or a sub-committee thereof). Section 29(5) makes it clear that in section 29(4), "Minister" means a member of the Scottish Executive or a junior Scottish Minister.
58. For 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 communications between Ministers, such as a letter or email from one Minister to another, but could also cover records of discussions between Ministers.
59. Section 29(1)(b) is also a qualified exemption, and so is subject to the public interest test required by section 2(1)(b) of FOISA.
60. The documents to which the Ministers have applied this exemption are listed in the schedule in Appendix 2. Most have been found to have been correctly withheld under the exemption in section 29(1)(a) of FOISA and so the Commissioner has only considered the application of 29(1)(b) to item 46(iv).
61. Item 46(iv) was created for media handling and is a Question and Answer document for the Tolled Bridges Review report. This document was an email attachment sent by an official to the Minister for Transport. This item therefore forms part of a communication between an official and a Minister. The Commissioner has concluded that it does not relate to or constitute any direct Ministerial communication as defined in section 29(4) of FOISA.
62. The Commissioner has therefore concluded that the exemption in section 29(1)(b) was misapplied to this item.



Sections 30(b)(i) and (ii)

63. Generally speaking, the exemptions in section 30(b) of FOISA allow for information to be withheld if its disclosure would, or would be likely to, inhibit substantially the imparting or commissioning of advice, or the offering or requesting of opinions or considerations. Section 30(b)(i) of FOISA states that information is exempt information if its disclosure under FOISA would, or would be likely to, inhibit substantially the free and frank provision of advice. Section 30(b)(ii) of FOISA states that information is exempt information if its disclosure under FOISA would, or would be likely to, inhibit substantially the free and frank exchange of views for the purposes of deliberation. These exemptions are both subject to the public interest test required by section 2(1)(b) of FOISA.
64. In *Decision 166/2006 Mr Martin Williams of The Herald and the Scottish Executive*, the Commissioner discussed, in detail, his views on the issues that should be considered in deciding whether the exemptions in section 30(b)(i) and (ii) can apply. The Commissioner will not repeat his comments in full in this decision notice, but they can be summarised as follows. Information must be treated on a case-by-case basis: release of information in one case need not imply release in another case. The nature of the information in question must be considered, rather than considering "advice" or "exchange of views" as categories of information. If the information withheld does not in itself constitute advice or an exchange of views, the argument for exemption under section 30(b) may be weaker. The standard to be met in applying the tests in 30(b) is high.
65. The Commissioner's consideration of the Minister's application of the exemptions under section 30(b) has also been informed by the judgment of the Court of Session *Scottish Ministers v Scottish Information Commissioner (re Alexander's Application) 2007 S.L.T. 274*. The Court's conclusions made clear that the actual content of the information must be considered in determining whether disclosure would be likely to have a substantially inhibitive effect, rather than proceeding on an assumption that disclosure of certain types of information, such as advice to Ministers, would always lead to future substantial inhibition for the purposes of these exemptions.
66. The Commissioner has also taken into consideration the comments on these exemptions made in the Minister's letter of 2 May 2007. The Commissioner has summarised these in detail in decision *089/2007 Mr James Cannell and Historic Scotland*. In that decision, the Commissioner also responded in some detail to the Ministers' general comments on the application of these exemptions. The Commissioner will not repeat his arguments or those of the Ministers in this decision, but he has had regard to these when considering the application of these exemptions to the documents under consideration in this case. In particular, it should be clear that the Commissioner cannot, as a rule, accept an automatic presumption that harm will be caused by the release of information simply because it falls into a particular category.



Application of section 30(b)(i) of FOISA

67. Having found that most of the items to which this exemption was applied were correctly withheld under section 29(1)(a), the Commissioner has only considered the application of 30(b)(i) to items 2, 21, 22, 23 and 46(iv).
68. The Ministers argued that these documents contain advice which was given freely and frankly and that it is important that decision makers have the best advice available to them and can be confident that that advice is given freely, frankly and without reserve. They argued that officials could feel constrained from offering full and frank advice on future occasions if they were concerned that their comments would be made public in such circumstances
69. In assessing whether the test for the application of section 30(b)(i) is met in this case, the Commissioner has carefully reviewed the specific information contained in documents 2, 21, 22, 23 and 46(iv), taking into consideration the context of their creation and the timing of the Ministers' review of Mr Edwards' request. He has noted that the information in these documents is generally factual in nature, including background information on FETA's proposals, and the process of considering this and reaching a decision. This information does not include detailed analysis or advice on the options available to the Ministers. In several instances, the information to which this exemption has been applied includes documents prepared to assist those explaining the Ministers' decision and the process by which it was reached to the media or the public.
70. It is clear to the Commissioner that information contained in these documents relate to the everyday business of officials. Delivering briefings and advice in their field of expertise is an expectation of many officials, and the Commissioner does not accept the Ministers' arguments that a civil servant will be inhibited in their offering of advice in future should information of this type be disclosed some time after the relevant decision has been made and announced.
71. Accordingly, the Commissioner does not accept that disclosure of information contained in items 2, 21, 22, 23 and 46(iv) would have the effect of substantially inhibiting the provision of free and frank advice in future and so he is not persuaded that the exemption in 30(b)(i) applies to any of these documents.

Application of section 30(b)(ii) of FOISA

72. Having found that most of the documents to which this exemption has been applied was correctly withheld in terms of section 29(1)(a), the Commissioner has only considered the application of 30(b)(ii) to items 1 (only those parts not found to have been correctly withheld under section 29(1)(a)), 19, 20, 22, 23 and 46(iv).



73. The Ministers submitted that these documents contain information relating to the free and frank exchange of views during the process of reaching a decision on FETA's application. They indicated that the issues discussed were, and remained, sensitive and release would prejudice substantially the effective conduct of public affairs, because it would be likely to inhibit substantially such exchanges in future. The Ministers argued that if officials were concerned that details of their discussions would be disclosed to the public, they would be less inclined in the future to be so candid, particularly, as in this case, if issues are of a politically sensitive nature. They went on to suggest that if the papers were released, it was likely that the range and quality of similar debates in future would be significantly reduced.
74. The Commissioner has considered the content of the documents listed above in the light of all the Ministers' submissions on the application of section 30(b)(ii) and the comments made in paragraphs 58-61 above.
75. Once again, he has noted that the information withheld within items 1, 19, 20, 22, 23 and 46(iv) is generally routine and includes background briefings and information of a factual nature. The Commissioner accepts that, in some instances, these documents contain the expression of views by individual officials and, further, that these might (in some cases) be considered to be freely or frankly expressed. However, having considered this information fully, the Commissioner is unable to accept that disclosure of any of these items would, or would be likely to, inhibit substantially the free and frank exchange of views for the purposes of deliberation in the future.
76. The Commissioner accepts that officials may take more care in recording their 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 FOISA would be or has been that of limiting the range or quality of discussion in which officials are willing to participate in their professional lives.
77. Therefore, the Commissioner has concluded that the exemption in section 30(b)(ii) has been incorrectly applied to the relevant parts of items 1, 19, 20, 22, 23 and 46(iv).

The application of section 30(c) of FOISA

78. In order for the Ministers to be able to rely on the exemption under section 30(c) the disclosure of the information which has been withheld would have to "otherwise" prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs. The use of the word "otherwise" makes it clear that the exemption is different from the exemptions in sections 30(a) and (b). This is a broad exemption, and the Commissioner expects any public authority citing it to show what specific harm would be caused to the conduct of public affairs by release of the information.



79. Having concluded already that document 11 was correctly withheld by the Ministers under section 29(1)(a) of FOISA, the Commissioner has only considered the application of this exemption to documents 27, 30, 32 and 33. As Mr Edwards has accepted the Ministers' application of the exemption in section 38(1)(b) in this case, the Commissioner has not considered the application of 30(c) to the parts of items 30, 32 and 33 to which the Ministers have judged section 38(1)(b) to apply.
80. Items 27, 30, 32 and 33 are letters to MSPs from a Minister, concerning matters that were raised by the MSPs on behalf of their constituents.
81. The Ministers have argued that it is vital that space exists in which Ministers and MSPs can communicate in order to ensure that the voice of constituents is properly taken into account. The Ministers submitted that disclosure of this information could result in MSPs being less inclined to write candidly to Ministers and that this would substantially prejudice the effective conduct of public affairs, in particular, the communications between MSPs and Ministers regarding the views of the general public.
82. The Commissioner has considered carefully the information the Ministers consider falls within the scope of section 30(c). He has noted that the documents that he is considering here include only the Ministers' responses to the MSPs concerned. These do not, therefore, reveal the comments put forward by the MSPs on behalf of their constituents. The Ministers' application of section 38(1)(b) (which has been accepted by Mr Edwards) means that no constituent can be identified from the content of the correspondence.
83. In the Commissioner's view it is important for public authorities to treat each request for information on a case by case basis. Release of information in one case should not be taken to imply that such communications will be "routinely" released in future. The circumstances of each case must be taken into consideration and the public interest in each case assessed on its own merits.
84. The Commissioner has considered carefully the Ministers' arguments in respect of section 30(c) and he accepts that, in some instances, the content of correspondence exchanged between an MSP and a Minister (particularly where this would identify a constituent, or reveal detail of their personal circumstances or views), may be of such a sensitive nature that public disclosure could prevent similar exchanges taking place in the future.
85. The Commissioner also accepts that if this did happen, and MSPs were reluctant to raise constituents' concerns with Ministers, that it would be to the detriment of effective government. However, the Commissioner does not accept that the release of any correspondence between MSPs and Ministers would always have such a negative impact.



86. The Ministers have not attempted to explain why the effective conduct of public affairs would be substantially prejudiced by the disclosure of the information in each document to which it seeks to apply this exemption, but rather has taken a broad brush, quasi-class based approach, applying this exemption without regard, it seems, to the content of the correspondence. Whether innocuous or contentious, the Ministers' views seem to be that the simple act of exposing this correspondence to public scrutiny would, or would be likely to, prejudice substantially the effective conduct of public affairs.
87. The Commissioner has carefully considered the content of items 27, 30, 32 and 33, which have been withheld under section 30(c) of FOISA, and he does not accept that (once redacted in line with the Ministers application of section 38(1)(b)) the content of any of these documents is of such sensitivity that disclosure would have the effect described by the Ministers. He does not accept that disclosure of information of this type would be harmful to the effective conduct of public affairs, simply because it is a communication between Ministers and MSPs in response to representations made on behalf of constituents. Having reviewed the content, and noting that disclosure would reveal not reveal the substance of the representations made, or the identity of the individual constituents concerned, he is unable to accept that disclosure would have the prejudicial effect suggested by the Ministers.
88. Consequently, he does not accept that disclosure of items 27, 30, 32 and 33 would, or would be likely to, prejudice substantially the effective conduct of public affairs, and so has found that they are not exempt in terms of section 30(c) of FOISA.

Section 30(a)

89. As noted above, the Ministers cited the exemption in section 30(a) in relation to a number of the documents withheld from Mr Edwards. However, in each case, the Commissioner has found that the exemption in section 29(1)(a) applies to these documents and has found that the public interest lies in maintaining that exemption. As a result, he has not gone on to consider whether the exemption in section 30(a) also applies to these documents.

Conclusions on exemptions, and disclosure required

90. The Commissioner has found that certain items were wrongly withheld in response to Mr Edwards' information request. The Commissioner's conclusions on each exemption considered and on the public interest are set out in the schedule in Appendix 2 of this decision.
91. The documents which the Commissioner has found, partly or wholly to have been wrongly withheld (subject to removal of personal information, where relevant) are: items 1 (partly), 2, 19, 20 (partly), 21 - 23, 27, 30, 32, 33 and 46(iv). As indicated at paragraph 23 of this decision, the Commissioner has finally gone onto consider for these items only, the extent to which they fall within the scope of Mr Edwards' request.



92. Having considered these fully, the Commissioner has concluded that the items identified for release generally fall within the scope of Mr Edwards' request. However, he has found that the section within item 21 headed "Bridges review" falls outside the scope of the request and so does not require to be supplied in response to this decision. Within item 46(iv), only the content page and section 9 fall within the scope of the request. The remaining parts do not require to be supplied.
93. The Commissioner's findings on each item and any steps required to be taken in response to this decision are set out in the schedule.

Discussion of Technical Breaches

94. The Commissioner has finally noted a technical breach of the requirements of Part 1 of FOISA in the handling of Mr Edwards' information request.
95. Section 10(1) of FOISA gives public authorities a maximum of 20 working days from receipt of the request to comply with a request for information. In this case, not only did the Ministers fail to respond to Mr Edwards' request within that period, they took longer than six months to do so. This is an unacceptably long response time and is a clear breach of the requirements of section 10(1).

DECISION

The Commissioner finds that the Scottish Ministers (the Ministers) have failed to comply fully with the requirements of Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in their handling of Mr Edward's request for information.

He found that the Ministers correctly applied the exemption in section 29(1)(a) of FOISA to a number of documents withheld from Mr Edwards, and so the Ministers acted in accordance with Part 1 of FOISA by withholding this information.

However, the Commissioner also found that the exemptions in sections 29(1)(a), 29(1)(b), 30(b)(i), 30(b)(ii) and 30(c) had been misapplied to other information that had been withheld.

The Commissioner finds that by refusing to release the information which was found not to be exempt from disclosure under any provision in Part 2 of FOISA, the Ministers failed to comply with the requirements of section 1(1) of FOISA, and in doing so, failed to comply with Part 1 of FOISA. The Commissioner also found that the Ministers breached the requirements of Part 1 of FOISA by failing to comply with the timescales set out in section 10(1).

Decision 098/2008
Mr Rob Edwards
and the Scottish Ministers



The Commissioner now requires the Ministers to release information to Mr Edwards as set out in Appendix 2 to the decision. This appendix forms part of the decision, but should be read in conjunction with the text of the analysis and findings section of this decision. The information specified therein should be provided to Mr Edwards by 5 October 2008.

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
21 August 2008



Appendix 1

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002

1 General entitlement

- (1) A person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority.
- (...)
- (6) This section is subject to sections 2, 9, 12 and 14.

2 Effect of exemptions

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

10 Time for compliance

- (1) Subject to subsections (2) and (3), a Scottish public authority receiving a request which requires it to comply with section 1(1) must comply promptly; and in any event by not later than the twentieth working day after-
 - (a) in a case other than that mentioned in paragraph (b), the receipt by the authority of the request; or
 - (b) in a case where section 1(3) applies, the receipt by it of the further information.



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;
 - (...)
- (3) In determining any question under section 2(1)(b) as respects information which is exempt information by virtue of subsection (1)(a), 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.
- (4) In this section –

...

“Ministerial communications” means any communications between Ministers and include, in particular, communications relating to proceedings of the Scottish Cabinet (or of any committee of that Cabinet) ...
- (5) In the definition of “Ministerial communications” ... 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-

- (...)
- (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.



Appendix 2 - schedule of documents withheld

Section 1 – documents relating to initial consideration of FETA’s application and AiP working group

Doc.	Exemptions cited	Exemptions considered	Public interest lies in disclosure	Release/Withhold
1	29(1)(a) 30(b)(ii)	29(1)(a) – Yes 30(b)(ii) - No	Yes (in part) No (for remaining parts)	Release part of front page (to the end of point 5) and entire final page Withhold remaining parts
2	30(b)(i)	30(b)(i) - No	n/a	Release
11	29(1)(a) 30(b)(ii) 30(c)	29(1)(a) - Yes	No No	Withhold
12	29(1)(a) 30(b)(ii)	29(1)(a) - Yes	No	Withhold
13	29(1)(a) 30(b)(ii)	29(1)(a) - Yes	No	Withhold
14	29(1)(a) 30(b)(ii)	29(1)(a) - Yes	No	Withhold
16	29(1)(a) 30(b)(ii)	29(1)(a) - Yes	No	Withhold
17	29(1)(a) 30(b)(ii)	29(1)(a) - Yes	No	Withhold
18	29(1)(a) 30(b)(ii)	29(1)(a) - Yes	No	Withhold
19	30(b)(ii) applied to redacted content	30(b)(ii) – No	n/a	Release complete version.
20	29(1)(a) 30(b)(ii)	29(1)(a) – Yes 30(b)(ii) - No	Yes (in part) No (for remaining parts)	Release emails of 29 November and 11 January (11:01). Withhold remaining parts
21	29(1)(a) 30(b)(i)	29(1)(a) – Yes 30(b)(i) - No	Yes	Release - but redact first paragraph (outwith scope)
22	29(1)(a) 30(b)(i), (ii)	29(1)(a) - Yes 30(b)(i) - No 30(b)(ii) – No	Yes	Release
23	29(1)(a) 30(b)(i), (ii)	29(1)(a) - Yes 30(b)(i) - No 30(b)(ii) - No	Yes	Release
24	29(1)(a) 30(b)(ii)	29(1)(a) - Yes	No	Withhold



Section 2 – External correspondence

Doc.	Exemptions cited	Exemptions considered	Public interest lies in disclosure	Release/Withhold
26	36(2) 30(c)	None - section 36(2) and 38(1)(b) accepted by Mr Edwards	n/a	Withhold
27	30(c)	30(c) – No	n/a	Release
28	38(1)(b) 36(2) 30(c)	None - section 36(2) and 38(1)(b) accepted by Mr Edwards	n/a	Withhold
29	38(1)(b) 36(2) 30(c)	None - section 36(2) and 38(1)(b) accepted by Mr Edwards	n/a	Withhold
30	38(1)(b) 30(c)	38(1)(b) – accepted by Mr Edwards 30(c) – No	n/a	Release with 38(1)(b) redactions
31	38(1)(b) 36(2) 30(c)	None - section 36(2) and 38(1)(b) accepted by Mr Edwards	n/a	Withhold
32	38(1)(b) 30(c)	38(1)(b) – accepted by Mr Edwards 30(c) - No	n/a	Release with 38(1)(b) redactions
33	38(1)(b) 30(c)	38(1)(b) – accepted by Mr Edwards 30(c) - No	n/a	Release with 38(1)(b) redactions

Section 3 – Tolloed bridges cabinet paper

Doc.	Exemptions cited	Exemptions considered	Public interest lies in disclosure	Release/Withhold
34	29(1)(a) 30(b)(ii)	29(1)(a) - Yes	No	Withhold
37	29(1)(a) 30(b)(ii)	29(1)(a) -Yes	No	Withhold
38	29(1)(a), (b) 30(b)(i), (ii)	29(1)(a) - Yes	No	Withhold
39	29(1)(a), (b) 30(b)(i), (ii)	29(1)(a) - Yes	No	Withhold
45	29(1)(a), (b) 30(b)(i), (ii)	29(1)(a) - Yes	No	Withhold
61	29(1)(a) 30(b)(i)	29(1)(a) - Yes	No	Withhold



65	29(1)(a), (b) 30(b)(i), (ii)	29(1)(a) - Yes	No	Withhold
73	29(1)(a) 30(b)(i)	29(1)(a) - Yes	No	Withhold
74	29(1)(a), (b) 30(b)(ii)	29(1)(a) - Yes	No	Withhold
72	29(1)(a), (b) 30(b)(i)	29(1)(a) - Yes	No	Withhold
36	29(1)(a), (b) 30(b)(i), (ii)	29(1)(a) - Yes	No	Withhold
43	29(1)(a) 30(b)(i), (ii)	29(1)(a) - Yes	No	Withhold
40	29(1)(a), (b) 30(b)(i), (ii)	29(1)(a) - Yes	No	Withhold
41	29(1)(a) 30(b)(ii)	29(1)(a) - Yes	No	Withhold
62	29(1)(a) 30(b)(ii)	29(1)(a) - Yes	No	Withhold
63	29(1)(a) 30(b)(ii)	29(1)(a) - Yes	No	Withhold
42	29(1)(a) 30(b)(i), (ii)	29(1)(a) - Yes	No	Withhold
54	29(1)(a), (b) 30(a) 30(b)(i), (ii)	29(1)(a) - Yes	No	Withhold
66	29(1)(a), (b) 30(a) 30(b)(ii)	29(1)(a) - Yes	No	Withhold
53	29(1)(a), (b) 30(a) 30(b)(i), (ii)	29(1)(a) - Yes	No	Withhold
55	29(1)(a), (b) 30(a) 30(b)(i), (ii)	29(1)(a) - Yes	No	Withhold
56	29(1)(a), (b) 30(a) 30(b)(i), (ii)	29(1)(a) - Yes	No	Withhold
52	29(1)(a), (b) 30(a) 30(b)(i), (ii)	29(1)(a) - Yes	No	Withhold
67	29(1)(a), (b) 30(a) 30(b)(ii)	29(1)(a) - Yes	No	Withhold
57	29(1)(a) 30(b)(ii)	29(1)(a) - yes	No	Withhold
51	29(1)(a), (b) 30(a) 30(b)(i), (ii)	29(1)(a) - Yes	No	Withhold
49	29(1)(a), (b)	29(1)(a) - Yes	No	Withhold



	30(a) 30(b)(i), (ii)			
48	29(1)(a), (b) 30(a) 30(b)(i), (ii)	29(1)(a) – Yes	No	Withhold
69	29(1)(a), (b) 30(a) 30(b)(i), (ii)	29(1)(a) - Yes	No	Withhold
47	29(1)(a), (b) 30(a) 30(b)(i), (ii)	29(1)(a) - Yes	No	Withhold
50	29(1)(a), (b) 30(a) 30(b)(i), (ii)	29(1)(a) - Yes	No	Withhold
68	29(1)(a) 30(b)(i)	29(1)(a) - Yes	No	Withhold
70	29(1)(a), (b) 30(a) 30(b)(i), (ii)	29(1)(a) - Yes	No	Withhold
71	29(1)(a), (b) 30(a) 30(b)(i), (ii)	29(1)(a) - Yes	No	Withhold
44	29(1)(a), (b) 30(b)(i), (ii)	29(1)(a) - Yes	No	Withhold
35	29(1)(a), (b) 30(b)(i), (ii)	29(1)(a) - Yes	No	Withhold
46(i) – (iii)	29(1)(a), (b) 30(b)(i), (ii)	29(1)(a) - Yes	No	Withhold
46(iv)	29(1)(a), (b) 30(b)(i), (ii)	29(1)(a) - Yes 29(1)(b) - No 30(b)(i) - No 30(b)(ii) - No	Yes	Release content page and section 9 of Q and A briefing (remainder outwith scope of request)
46(v)	25(1)	n/a	n/a	Withhold - outside scope of request
46(vi) & (vii)	29(1)(a), (b) 30(b)(i), (ii)	29(1)(a) - Yes	No	Withhold
64	29(1)(a), (b) 30(b)(ii)	29(1)(a) - Yes	No	Withhold