

Decision Notice



Decision 103/2008 Mr Rob Edwards of the Sunday Herald and the Scottish Ministers

Projections of greenhouse gas emissions in Scotland

Reference No: 200701773

Decision Date: 28 August 2008

www.itspublicknowledge.info

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Summary

Mr Edwards asked the Scottish Ministers (the Ministers) to provide unpublished information relating to projections of Scottish greenhouse gas emissions under different scenarios and the estimation of the 'Scottish share'. The Ministers withheld information which was expected to be published in the near future, under regulation 10(4)(d) of the Environmental Information (Scotland) Regulations 2004 (the EIRs). Information was also withheld under regulation 10(4)(e). Publication of the information was delayed and Mr Edwards applied to the Commissioner for a decision on whether the Ministers had complied with the EIRs in dealing with his request.

The Commissioner found that, in the circumstances of the case, the Ministers had complied with the EIRs in applying the exception in regulation 10(4)(d). However, he found that the Ministers had wrongly withheld information under regulation 10(4)(e).

Relevant statutory provisions and other sources

Environmental Information (Scotland) Regulations 2004 (EIRs): regulations 5(1) and (2) (Duty to make available environmental information on request); 7(1)(a) (Extension of time); 10(1)(b), 10(2), 10(4)(d), 10(4)(e) (Exceptions from duty to make environmental information available) and 13(d) (Refusal to make 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.



Background

1. On 6 June 2007 Mr Edwards submitted a request to the Ministers for “any unpublished reports, correspondence, memos or other information, whether draft or final, relating to projections of Scottish greenhouse gas emissions under different scenarios and the estimation of the ‘Scottish share’.”
2. On 22 June 2007 the Ministers advised Mr Edwards that because of the potential volume and complexity of the information requested, they were unable to respond within the 20 working day period provided for in regulation 5(2)(a) of the EIRs, and would have to extend the period for reply by a further period of up to 20 working days, as provided for in regulation 7(1)(a) of the EIRs. On 1 August 2007 Mr Edwards received another email apologising for the delay in assembling all the information he was seeking, and advising that a reply would be sent within the next few days.
3. On 6 August 2007 Mr Edwards received the response to his request. The Ministers advised him that they had considered his request under three separate categories: greenhouse gas projections relating respectively to projections of carbon dioxide and projections of the non-CO₂ greenhouse gases; and information relating to the ‘Scottish Share’.
4. The Ministers provided some information in relation to each part of Mr Edwards’ request, and directed him to sources of published information. The Ministers advised that other information covered by his request was excepted from release under the EIRs. For the most part, the relevant regulations were 10(4)(d) and (e). Regulations 10(5)(e) and 10(5)(f) were also cited in relation to some information about greenhouse gas emissions but are not relevant to this decision notice: the Ministers later decided not to rely upon regulation 10(5)(e), while regulation 10(5)(f) was applied only to documents falling outside the scope of Mr Edwards’ application to the Commissioner.
5. The Ministers advised that some information relating to the Scottish Share had been supplied by a Minister of the Crown or department of the Government of the United Kingdom and as such, under the provisions of regulation 2(2), was not considered to be “held” by the Scottish Government.
6. The Ministers provided a short account of the public interest issues they had considered and which had led them to conclude that the public interest in maintaining the exceptions outweighed the public interest in disclosure, in relation to the information requested.
7. On 10 August 2007 Mr Edwards asked the Ministers to review their response to his request, pointing out that judgements on what is and is not in the public interest can vary considerably.



8. The Ministers provided their review response on 7 September 2007. They advised that all documents withheld from release had been carefully reviewed. The vast majority of these were internal communications from the preparation of work now long-since published. The Ministers were satisfied that there was no environmental information in these documents that was not freely available in the public domain, and upheld the decision that the documents should not be released.
9. The Ministers found that a limited set of documents contained environmental information which had not yet been made public but was intended for publication in Volume 5 of the Scottish Energy Study. The Ministers indicated that Volume 5 was likely to be published within the next 12 weeks; they acknowledged that the 12 week publication period is specified in a similar exemption contained in section 27 of the Freedom of Information (Scotland) Act 2002 (FOISA), rather than the EIRs, which impose no such limit, but considered that the timescale of 12 weeks specified in FOISA was an indication of the policy intention of the EIRs since otherwise documents might be kept unfinished to escape disclosure requirements.
10. The Ministers could identify no overriding public interest in making the information available in advance of its publication.
11. On 12 December 2007 Mr Edwards applied for a decision from the Commissioner. He explained that he had recently asked the Scottish Government if the reports in question had been published as the 12 week period referred to in the Ministers' letter of 7 September 2007 had passed. He had been informed about a further delay in publication and advised that Volume 5 of the Scottish Energy Study were not now expected to be published until Spring 2008. Mr Edwards was dissatisfied that the Ministers were refusing to release information on the grounds that it was due to be published, but kept postponing the publication date.
12. The application was validated by establishing that Mr Edwards had made a request for information to a Scottish public authority and had applied for a decision from the Commissioner only after asking the authority to review its response to that request.

Investigation

13. On 14 December 2007 the Ministers were notified in writing that an application had been received from Mr Edwards, and were asked to provide copies of the information withheld. In a telephone call of 9 January 2008 it was confirmed that Mr Edwards' application related only to the documents relating to the Scottish Energy Study. The Ministers provided this information on 14 January 2008. The case was then allocated to an investigating officer.
14. On 30 January 2008 the investigating officer contacted the Ministers to invite their comments in terms of section 49(3)(a) of FOISA (which, by virtue of regulation 17 of the EIRs applies for the purposes of the EIRs, subject to minor modifications), and to seek further information about the background to the case and the exceptions which had been applied.



15. The Ministers responded on 3 March 2008, providing a submission about the exceptions applied to the withheld information. They advised that a number of documents previously withheld could now be released. On 7 March 2008 the Ministers sent Mr Edwards five covering emails of a routine nature and 13 other documents which had previously been withheld.
16. Since Mr Edwards made his information request in June 2007, the publication of Volume 5 of the Scottish Energy Study has been delayed several times. In September 2007 Mr Edwards was told that publication was likely to take place within 12 weeks; in December 2007 he was advised that further work was required on the remaining volumes and publication was now expected in Spring 2008. In June 2008 the Commissioner's office was advised that Volume 5 was being finalised with the aim of publishing it before Parliament went into recess at the end of the month. In July 2008 the investigating officer was informed that the report was being revised to take into account new data: it was hoped that publication would take place in August 2008.

Commissioner's analysis and findings

17. 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 and is satisfied that no matter of relevance has been overlooked.

Information withheld under regulation 10(4)(e) – internal communications

18. Under regulation 10(4)(e) of the EIRs, a Scottish public authority may refuse to disclose environmental information if the request involves making available internal communications. The Scottish Ministers withheld documents 3, 13, and 18 - 35 under this exception. (The covering emails from documents 3, 19 and 30 were released by the Ministers on 7 March 2008.)
19. This regulation directly reflects Article 4.1(e) of the European Directive 2003/4/EC on public access to environmental information, and also Article 4.3(c) of the Convention on access to information, public participation in decision-making and access to justice in environmental matters, established at the Aarhus Convention. The regulation, however, does not expand upon what is meant by internal communications.
20. As with all of the exceptions under regulation 10, a Scottish public authority applying this exception must do so in a restrictive manner and apply a presumption in favour of disclosure (regulation 10(2)(a) and (b)). Even where the exception applies, the information must be made available unless, in all the circumstances of the case, the public interest in making the information available is outweighed by that in maintaining the exception (regulation 10(1)(b)).

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21. For information to fall within the scope of the exception in regulation 10(4)(e), 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 consider the public interest in disclosing or withholding the information.
22. The Commissioner found that, with the exception of one email in document 20, the information withheld under this exception in documents 3, 18 – 21, 29, 32, 33 and 35 comprised correspondence between Scottish Government officials or Ministers and the company contracted to provide data modelling on emissions projections.
23. The Commissioner does not accept that the relationship between those parties would permit their correspondence to be described as "internal communications", and notes that Ministers have offered no argument in support of such a view. The Commissioner finds that the exception in regulation 10(4)(e) was wrongly applied to these documents.
24. The information in documents 3, 18 – 21, 29, 32, 33 and 35 was also withheld under the exception in regulation 10(4)(d), considered later in this decision notice.
25. The Commissioner found that documents 13, 22 – 28, 30, 31 and 34 consisted of documents or correspondence exchanged between Scottish Government officials and/or Ministers, and were therefore correctly described as "internal communications". In such cases the Commissioner accepts that the information is covered by the exception in regulation 10(4)(e). The Commissioner also accepted that the exception applied to one email in document 20; that is, the email sent 6 June 2006 at 17:33.
26. Before the exception can be upheld, the Commissioner must consider whether the public interest in making the information available is outweighed by that in maintaining the exception.
27. The Ministers explained that the documents in question were communications about the ongoing work to develop Volume 5 of the Scottish Energy Study, and include drafts of the report, material intended to be published in it, and discussion about the report's content or publication arrangements. The Ministers recognised that there is a clear public interest in the information which will be contained in Volume 5 of the Study, but believed this public interest would be met by the final publication of the report.
28. The Ministers saw no public interest in releasing drafts of the report or internal discussions about it before the work was complete. On the contrary, the Ministers believed there was a strong public interest in allowing Ministers and officials a private space within which to debate the issues and develop their thinking before publishing their conclusions, being free to consider all available options, however unpalatable. They argued that Ministers and officials need to be able to debate those options rigorously, to expose all their merits and demerits and to understand their possible implications, without the fear of premature disclosure which might close off discussion and development of better options.



29. The Ministers argued that the candour of such discussions would be affected by the participants' assessment of whether the content of their discussions would be disclosed in the near future, especially when it might undermine or constrain the Government's view on settled policy or policy that is under development. In the Ministers' view, inappropriate disclosure had the potential to limit the full and frank discussion of issues and also to distort public perceptions of advice provided by officials: the prospect of early disclosure therefore had the potential to affect the impartiality of the advice provided. The Ministers cited the public interest in protecting the impartiality of the civil service, warning that this applied where a particular release of official advice might create the risk that officials could come under political or public pressure not to challenge ideas in the formulation of policy, thus leading to poorer decision making.
30. The Ministers stated that although the public interest test must be considered on a case by case basis, the information requested may relate to an important and ongoing process: in this case, the carrying out of a detailed study leading to an important Government report. The Ministers argued that there was a public interest in the protection of such a process where the likely effect of releasing information would be the suppression of effective communication in the future; for example, because the advice or deliberations would be oral instead of written down. The Ministers did not suggest that the public interest in withholding internal communications would apply simply because officials had used strong or trenchant language, but considered that the focus should be on the real impact of releasing the information.
31. Mr Edwards was invited to provide his view of the public interest in disclosure, and did so, although he commented that without sight of the documents it was impossible to judge whether it was really in the public interest to withhold them. He submitted that combating climate change is one of the overriding imperatives of our time, and the kind of commentary and analysis which seemed likely to be contained in the documents withheld could be crucial in helping the public and politicians judge whether Scotland is on the right path or not. He argued that if there were problems with any of the scenarios that might form part of the Scottish Energy Study, there was a strong argument that the public should learn about them as soon as possible, and in as much detail as possible.
32. Mr Edwards asked whether it might be possible to separate the public interest considerations relating to the drafts of Volume 5 from those relating to discussions, particularly where those discussions focused on "presentational issues around its publication". He believed that there was a strong public interest in understanding how Ministers wished to present issues as important as tackling climate change, particularly if there was any suggestion that they were trying to avoid bad news.
33. The Commissioner has considered all submissions relating to the public interest in reaching his decision.



34. Regulation 10(4)(e) excepts a “class” of information – internal communications – without requiring the public authority to show that harm would be caused by disclosure of the information within those communications. The Ministers have focused on the potential harmful consequences of disclosure in framing their public interest arguments. The Commissioner accepts that the degree of harm likely to be caused by disclosure is one of the issues which must be considered in establishing whether the public interest in disclosure is outweighed by the public interest in upholding the exception. The harm must, in the Commissioner’s opinion, relate to the specific information withheld.
35. In *Decision 089/2007: Mr James Cannell and Historic Scotland*, the Commissioner commented:
- “In my judgement and experience, professional civil servants are well able to understand that some information of a particular type will be released and other information of the same general type will be withheld, depending on the circumstances.” (paragraph 28)
- The Commissioner therefore does not accept that disclosure of internal communications relating to one particular policy area would necessarily cause officials or other participants to hold back from full discussion of other issues on another occasion, but is something to assess against the particular circumstances of the case.
36. The Commissioner has previously considered the Ministers’ arguments about the public interest in protecting a process (summarised in paragraph 30 above) and has set out his views in *Decision 075/2006: Mr Paul Hutcheon and the Scottish Executive*. Similar arguments were advanced in that case in relation to section 29(1)(a) of FOISA, and the related public interest issues. In *Decision 075/2006* the Commissioner commented:
- “...the process argument will only stand where the actual content of the information is sufficiently sensitive.” (paragraph 73)
37. The Commissioner considers that the sensitivity of the information withheld is also the key issue when examining whether disclosure would be likely to inhibit and circumscribe policy discussions, or to prejudice the impartiality of the civil service. The Commissioner accepts that there are a range of factors which may have a bearing on the sensitivity of information: for instance, the subject matter or content; the author of the views expressed; the timing of disclosure in relation to the policy development process; or the known existence of contradictory opinions or views. The Commissioner considers that the consequences of disclosure of internal communications will vary, depending upon the current sensitivity of the information and its surrounding context.
38. Therefore, in assessing the likely impact of disclosure, the Commissioner found the key consideration to be the sensitivity of the information at the time of Mr Edwards’ request.
39. The withheld communications contain discussion about the data and scenarios to be included in Volume 5 of the Scottish Energy Study, and the assumptions upon which the projections should be based. It is clear that options were being actively examined and assessed, both in terms of the usefulness of the data and the presentational issues associated with the data.



40. The Commissioner finds the fact that Volume 5 has not yet been published imparts a sensitivity to the record of discussions on the data about emissions. The Commissioner agrees with Mr Edwards that future emissions levels are a matter of great importance to the Scottish public and that there is significant public interest in disclosure of information which will allow an informed examination of the Scottish Government's policy on reducing those emissions. However, the Commissioner accepts that it was important that there should be frank and wide-ranging discussion on the data modelling, to test the validity of the data and the assumptions upon which the projections were made, and that disclosure of the communications withheld would have been likely to constrain participants engaged in those discussions.
41. The Commissioner accepts that disclosure of the discussions surrounding the development of the projections would, at the time Mr Edwards made his request, have pre-empted the final decisions about the contents of Volume 5 and would have been likely to trigger a public discussion of matters which had not yet been fully resolved. The Commissioner accepts that such a development would have been likely to affect the ongoing discussions between officials and Ministers, and may have constrained discussion of some options or led participants to modify their conclusions in the light of public opinion.
42. The Commissioner finds that, in all the circumstances of this case, the over-riding public interest lies in safeguarding the provision of projections based on solid data, which have taken into account the most relevant scenarios, and which will allow public understanding of the extent to which Scottish Government policy will be affected by the need to reduce emissions. Therefore, in this case, the Commissioner finds that the balance of public interest lies in safeguarding full and frank discussions of these matters without any potential for discussion to be constrained by disclosure of their substance, and therefore the exception in regulation 10(4)(e) should be maintained in respect of all but part of one of the documents to which it has been applied.
43. The document about which the Commissioner has reached a different conclusion is an internal communication forming part of document 20 (i.e. the email sent on 6 June 2006 at 17:33). The Commissioner took the view that this communication was of a routine nature and did not relate closely to the discussions taking place. The Commissioner found that the public interest in making the information available outweighed that in maintaining the exception in regulation 10(4)(e). The email in question was also withheld under regulation 10(4)(d), which is considered below.
44. As noted previously, Mr Edwards asked whether it was possible to separate the public interest issues associated with information about the discussions, and information about the presentation of the projections. The Commissioner found that it was not possible to do so, as discussion about presentation took place within the context of discussion about the contents of Volume 5, and related closely to the particular options under consideration.



Information withheld under regulation 10(4)(d) – incomplete data

45. Regulation 10(4)(d) of the EIRs provides that a Scottish public authority may refuse to make environmental information available to the extent that it relates to material which is still in the course of completion, to unfinished documents or to incomplete data. In considering the application of this exception, regulation 10(2) states that Scottish public authorities shall interpret the exception in a restrictive way and apply a presumption in favour of disclosure.
46. The Ministers applied this exception to 15 documents. In this decision notice the Commissioner will only consider regulation 10(4)(d) in relation to information not already found to have been correctly withheld under regulation 10(4)(e). Therefore, this part of the Commissioner's decision relates only to information withheld in documents 3, 5, 7, 18, 19, 21, 29, 32, 33 and 35, and that part of document 20 identified in paragraph 43 above.
47. The Commissioner accepts that Volume 5 of the Scottish Energy Study is an unfinished document which is still in the course of completion and, consequently, information which "relates to" Volume 5 is information which falls within the exception in regulation 10(4)(d) of the EIRs. The Commissioner is satisfied that all the withheld information relates to Volume 5.

Regulation 10(4)(d) – the public interest test

48. The Commissioner must go on to decide whether the public interest in making the information available is outweighed by that in maintaining the exception (regulation 10(1)(b)).
49. The Commissioner must consider the public interest factors as they existed at the time the Ministers responded to Mr Edwards' request for review. In other words, the Commissioner cannot consider whether the repeated delays in publishing Volume 5 of the Scottish Energy Study may have increased the public interest in disclosure of the information requested by Mr Edwards since his request for review was dealt with.
50. The Ministers have submitted that the balance of public interest lies in withholding the information requested. As noted previously, the Ministers recognise that there is a clear public interest in the information which will be contained in Volume 5 of the Study, but believe this will be satisfied by the final publication of the document. The Ministers see no public interest in releasing drafts of the report or material intended for inclusion in it, before the work is complete. The Ministers believe there is a strong public interest in allowing themselves and their officials to have a private space within which issues can be debated and thinking developed before their conclusions are published.



51. The Commissioner fully appreciates Mr Edwards' frustration that Volume 5 of the Scottish Energy Study has still not been published, almost a year after he was advised that publication was likely to take place within the next 12 weeks. However, after investigation, the Commissioner is satisfied that this advice was given in good faith. Volumes 1 and 2 of the study had been published and the general scope of subsequent volumes and the intention to publish these had been widely made known. For the reasons similar to those outlined above in paragraphs 40 to 42 above, the Commissioner finds that the balance of public interest lay in withholding the information at the time the Ministers dealt with Mr Edwards' request for review, in order to allow the process of discussion and consideration of options to continue without the inhibition or distraction potentially caused by disclosure. The Commissioner finds that although there is undoubtedly a genuine and increasing public interest in the information due to be published in Volume 5, at the time the Ministers responded to Mr Edwards' request for review, the public interest in immediate disclosure was outweighed by the public interest in allowing the information to be fully considered and finalised. Where publication does not take place or is indefinitely or inordinately delayed there may be other public interest considerations to take into account. However, at the time of responding to Mr Edwards' request for review, the length of delay was not inordinate, even though it had exceeded the period indicated by the Government. (It should be noted that the exception at 10(4)(d) of the EIRs does not have the clarity of the 12 week timescale which applies to the equivalent section 27 exemption in FOISA.)
52. For these reasons, the Commissioner finds that, for the most part, Ministers were justified, at that time, in withholding the information in question under regulation 10(4)(d).
53. However, the Commissioner finds that this reasoning does not apply to one email within document 20 (email sent 6 June 2006 at 17:33). The information in this document "relates" to the unpublished Volume 5 only in the loosest sense and, if disclosed at the time of responding to Mr Edwards' request for review, would not have been capable of prejudicing the ongoing discussions or work on Volume 5. In relation to this information, the Commissioner has not identified any reason why the public interest in maintaining the exception would outweigh the public interest in disclosure.

Compliance with regulation 13(d)

54. A Scottish public authority relying upon the exception in regulation 10(4)(d) must (under regulation 13(d)) state the time by which the authority considers that the information will be finished or completed, when issuing its refusal.
55. The Ministers' initial response (6 August 2008) relied upon regulation 10(4)(d) to withhold certain information, but did not advise Mr Edwards when the information was expected to be finished or completed. The Commissioner notes that this was rectified in the review response issued by Ministers on 7 September 2008.

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DECISION

The Commissioner finds that the Scottish Ministers (the Ministers) generally complied with the requirements of the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by Mr Rob Edwards.

The Commissioner finds that Ministers were not justified in withholding the following information under the exceptions in regulations 10(4)(d) and 10(4)(e) of the EIRs: document 20 (email sent 6 June 2006 at 17:33).

The Commissioner therefore requires Ministers to provide Mr Edwards with this information, which must be provided no later than 13 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
28 August 2008



Appendix

Relevant statutory provisions

The Environmental Information (Scotland) Regulations 2004

5 Duty to make available environmental information on request

(1) Subject to paragraph (2), a Scottish public authority that holds environmental information shall make it available when requested to do so by any applicant.

(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.

7 Extension of time

(1) The period of 20 working days referred to in –

(a) regulation 5(2)(a);

...

may be extended by a Scottish public authority by a further period of up to 20 working days if the volume and complexity of the information requested makes it impracticable for the authority either to comply with the request within the earlier period or to make a decision to refuse to do so.

10 Exceptions from duty to make environmental information available–

(1) A Scottish public authority may refuse a request to make environmental information available if-

(a) there is an exception to disclosure under paragraphs (4) or (5); and

(b) in all the circumstances, the public interest in making the information available is outweighed by that in maintaining the exception.



- (2) In considering the application of the exceptions referred to in paragraphs (4) and (5), a Scottish public authority shall-
 - (a) interpret those paragraphs in a restrictive way; and
 - (b) apply a presumption in favour of disclosure.
 - (...)
- (4) A Scottish public authority may refuse to make environmental information available to the extent that
 - (...)
 - (d) the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data; or
 - (e) the request involves making available internal communications.

13 Refusal to make information available

Subject to regulations 10(8) and 11(6), if a request to make environmental information available is refused by a Scottish public authority in accordance with regulation 10, the refusal shall-

- (...)
- (d) if the exception in regulation 10(4)(d) is relied on, state the time by which the authority considers that the information will be finished or completed;
- (...)