



Scottish Information
Commissioner

**Decision 151/2007 Mr Rob Edwards of the Sunday
Herald and the Scottish Executive**

*Request for copies of all documents contained within a file entitled
'Release of Radionuclides in Drinking Water Systems'*

Applicant: Mr Rob Edwards of the Sunday Herald

Authority: Scottish Executive

Case No: 200600914

Decision Date: 23 August 2007

**Kevin Dunion
Scottish Information Commissioner**

Kinburn Castle
Doubledykes Road
St Andrews
Fife
KY16 9DS



Decision 151/2007 Mr Rob Edwards of the Sunday Herald and the Scottish Executive

Request for copies of all documents contained within a file entitled 'Release of Radionuclides in Drinking Water Systems' held by the Scottish Executive - majority of information withheld on the basis that exemptions in sections 26(a) 28(1), 29(1) and 31(1) of FOISA applied - Commissioner required disclosure of all information.

Relevant Statutory Provisions and Other Sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) (General Entitlement); 2 (Effect of exemptions); 10(1) (Time for compliance); 26 (Prohibitions on disclosure); 28 (Relations within the United Kingdom); 29 (Formulation of Scottish Administration policy etc); 31(1) (National security and defence).

Anti-Terrorism, Crime and Security Act 2001 sections 76 (Atomic Energy Authority special constables); 79 (Prohibition of disclosures relating to nuclear security)

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

Facts

Mr Rob Edwards, Environment Editor of the Sunday Herald Newspaper requested copies of all documents contained within a file entitled 'Release of Radionuclides in Drinking Water Systems' from the Scottish Executive (the Executive). The Executive responded by supplying Mr Edwards with two documents contained within the file but withholding the remainder of the file on the basis that sections 28(1) (Relations within the United Kingdom); 29(1) (Formulation of Scottish Administration policy etc) and 31(1) (National Security and defence) of FOISA applied. Mr Edwards was not satisfied with this response and asked the Executive to review its decision. The Executive carried out a review and, as a result, notified Mr Edwards that it upheld its original decision to withhold the information on the basis of the exemptions cited above. Mr Edwards remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the Executive had failed to deal with Mr Edwards' request for information in accordance with Part 1 of FOISA.



He required the Executive to provide the copies of the withheld information withheld that was contained within the file entitled 'Release of Radionuclides in Drinking Water Systems' to Mr Edwards.

Background

1. On 6 December 2005, Mr Edwards wrote to the Executive requesting the following information: copies of all documents contained within the Executive's file entitled 'Release of Radionuclides in Drinking Water Systems'.
2. On 5 April 2006, the Executive wrote to Mr Edwards in response to his request for information. The Executive firstly apologised for the delay in responding to his request and supplied copies of two documents which were contained within this file and thus within the scope of Mr Edwards' request. However, the Executive withheld the remaining content of the file on the basis that sections 28(1), 29(1) and 31(1) of FOISA applied.
3. On 6 April 2006, Mr Edwards wrote to the Executive requesting a review of its decision. In particular, Mr Edwards expressed concern over the application of the public interest test in withholding the information.
4. On 28 April 2006, the Executive wrote to notify Mr Edwards of the outcome of its review. The Executive upheld its original decision.
5. On 13 May 2006, Mr Edwards wrote to my office, stating that he was dissatisfied with the outcome of Executive's review and applying to me for a decision in terms of section 47(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 me for a decision only after asking the authority to review its response to that request. The case was then allocated to an investigating officer.



The Investigation

7. On 20 June 2006, the Executive was notified in writing that an application had been received from Mr Edwards and was asked to provide my office with specified items of information required for the purposes of the investigation. In particular, the Executive was asked to comment on whether Mr Edwards' request should have been handled under the terms of FOISA or the Environmental Information (Scotland) Regulations 2004 (EIRs); and to explain the reasons for its application of the exemptions claimed and its consideration of the public interest.
8. The Executive responded to my office on 19 July 2006 supplying the information withheld and supporting documentation.
9. In its submissions to my office, the Executive indicated that in addition to those exemptions applied in correspondence with Mr Edwards, the exemption in section 26(a) (Prohibitions on disclosure) of FOISA applied to all of the information requested by Mr Edwards. The Executive suggested that disclosure of this information would constitute an offence under section 79 of the Anti-terrorism, Crime and Security Act 2001.

The Commissioner's Analysis and Findings

10. The Executive withheld 9 documents which fell within the scope of Mr Edwards' request. These documents are contained within a file marked 'Restricted'. I have numbered these documents 1-9 as they appear in the file, excluding the two documents which have previously been released to Mr Edwards.
11. Having reviewed the documents withheld, I notice that the content of documents 8 and 9 are duplicated entirely in document 7. I have also noted that the email exchanges in document 4 are duplicated in document 3. I therefore shall not consider documents 4, 8 and 9 in my investigation. My consideration below relates only to documents 1, 2, 3, 5, 6, and 7.
12. In coming to a decision on this matter, I have considered all of the information and the submissions that have been presented to me by both Mr Edwards and the Executive and I am satisfied that no matter of relevance has been overlooked.



FOISA or the EIRs?

13. The first question I will briefly consider is whether the Executive acted correctly when responding to Mr Edwards' request under the terms of FOISA rather than the EIRs. In its submissions to my office the Executive outlined its views as to whether Mr Edwards' request should have been considered under the EIRs. The Executive concluded that the information requested was not 'environmental information' but was information relating to the process of setting up a research project and therefore should be dealt with under FOISA rather than the EIRs.
14. Having reviewed the information in question, I am satisfied that the Executive acted correctly in dealing with Mr Edwards' request under the terms of FOISA.

Consideration of the Exemptions

15. The Executive withheld all 6 documents under consideration here (excluding duplicates) on the basis that the exemptions contained within sections 26(a), 28(1), 29(1) and 31(1) of FOISA applied. I will consider the application of each of these exemptions in turn.
16. A notable feature of this case is that the Executive has suggested that release of this information may have dire consequences. It has said that release could constitute an offence under anti terrorism laws, that it might harm national security and it could even be misused in a way which could be lethal to the public. Yet, as I explain below, after considering the nature and content of the information being withheld I found that not only are these highly worrying claims overstated, in fact it is not possible to find any justification for them at all.

Section 26(a) Prohibitions on disclosure

17. In submissions to my office the Executive cited section 26(a) in withholding all the information from Mr Edwards, (although it had not cited this exemption when responding to Mr Edwards' initial request or following his request for review.)
18. Section 26(a) of FOISA provides that information is exempt information if its disclosure by a Scottish public authority (otherwise than under FOISA) is prohibited by or under an enactment. The exemption contained in section 26(a) applies to Acts of the Scottish Parliament and Acts of the UK Parliament and also applies to secondary legislation.
19. The Executive submitted that disclosure of this information could constitute an offence under section 79 of the Anti-terrorism, Crime and Security Act 2001 (the Act), punishable by imprisonment of the persons releasing the information.



20. Section 79 of the Act provides:
- (1) a person is guilty of an offence if he discloses any information or thing the disclosure of which might prejudice the security of any nuclear site or of any nuclear material.*
21. The definitions of “nuclear material” and “nuclear site” are provided within section 76 of the Act. The relevant parts of this section are reproduced within the appendix to this decision.
22. Having fully considered the material withheld by the Executive I can see nothing in the nature or the content of the information which could remotely be thought to cause such prejudice. Beyond asserting that release of the information *could* (my emphasis) constitute an offence the Executive has not indicated to me how the release of the information in question would prejudice the security of any nuclear site or of any nuclear material. I therefore find that the Executive’s claim that the exemption at section 26(a) applies to the information withheld, is incorrect.

Section 31(1) National Security and Defence

23. Section 31(1) of FOISA provides that information is exempt information if exemption from section 1(1)(General Entitlement) is required for the purpose of safeguarding national security.
24. The Executive argued that the information withheld was exempt from release as disclosure would make information available which could harm and compromise the safety of the State as it relates to measures to protect essential services.
25. In my briefing on section 31(1), I highlight that information can be withheld for the purpose of safeguarding national security, not simply that the information relates to national security.
26. The Executive have not indicated to me why this particular information gives rise to the grave harm to the safety to the State which it claims. However the fact that the file is entitled ‘ Release of Radioactive Nuclides in Drinking Water Systems’ relates it to concerns about how such radioactive contamination might enter the water system, what effect this might have and how it might be prevented or mitigated. It may simply be that the Executive does not think any information on this type of subject matter should be released.
27. However, I note that the Government already makes (and did so at the time of the request) a large amount on information on this subject publicly available.



28. For instance, the UK Recovery Handbook for Radiation Incidents 2005 published by the Health Protection Agency, and partly funded by the Scottish Executive(http://www.hpa.org.uk/radiation/publications/hpa_rpd_reports/2005/hpa_rpd_002_5.pdf) addresses what should be done in the event of a release of radioactive material to establish whether this has affected drinking water supplies as distributed to the public. It sets out in detail the recovery options which should be considered in the event that activity concentrations exceed Action Levels. A contingency planning checklist recommends that authorities gather information on, e.g., alternative source of supply; existing and potential sources of water treatment and that they should collect data on the effectiveness of water treatment in reducing radionuclide concentrations in water.
29. In particular, the Handbook advises authorities on how to estimate the committed effective doses which individuals are likely to consume in the event of radioactive contamination, setting out dose variables for 23 separate radionuclides.
30. Finally, the Handbook details the feasibility, effectiveness and constraints of a range of countermeasures which could be taken in the event of contamination.
31. If this kind of information is readily available, it is inconceivable that disclosure of the information withheld by the Executive in this case could have the effect upon national security and public safety which it alleges. As noted above, the contents of this file relate only to the financing and administrative arrangements involved in setting up a joint research project. The information contained within this file does not reflect proposed methodologies, analysis or results of this particular project, nor does it identify any particular threats to the UK's security. I cannot see how disclosure of this information would result in a threat to national security.
32. Consequently, I am not satisfied that the Executive acted correctly in withholding this information under the exemption contained within section 31(1).

Section 28-Relations within the United Kingdom

33. The Executive also relied upon the exemption in section 28(1) of FOISA in withholding the remaining documents within the file.



34. Section 28(1) exempts information if its disclosure under FOISA would, or would be likely to, prejudice substantially relations between any administration in the United Kingdom and any other such administration. Section 28(2) defines “administration in the United Kingdom” as the Government of the United Kingdom (the UK Government), the Scottish Administration, the Executive Committee of the Northern Ireland Assembly or the National Assembly for Wales. The exemption in section 28(1) is a qualified exemption in that it is subject to the public interest test contained in section 2(1)(b) of FOISA.
35. The main question to consider in relation to this exemption is not the nature or the content of the information in question, but whether the effect of releasing the information would, or would be likely to, substantially prejudice relations with another UK administration - although, of course, this may turn upon the nature of the information itself.
36. As I have noted in my briefing on the use of this exemption, I require public authorities to justify the use of section 28 on a case-by-case basis, and to consider disclosing the information unless it would cause them real, actual, and significant harm.
37. The Executive submitted that it is vital that a clear and uninhibited line of communication remains open between itself and the UK Government on the issue of radioactive waste. The Executive argues that release of such communications would undoubtedly cause real harm to this line of communication and, therefore, considers all the documents received from the UK Government exempt from release under section 28(1) of FOISA due to the substantial prejudice to its relations with the UK Government that the release would cause.
38. The Executive further argue that any limitations on what it describes as these important communications would also have repercussions for the effectiveness of Scottish government, as they are vital to keep Ministers briefed on matters relating to radioactive waste. The Executive states that the documents concerned form a body of information that must be exempt in its entirety.
39. Additionally, the Executive argues that the Concordats between itself and the Department of Trade and Industry (DTI) and the Department for Environment, Food and Rural Affairs (Defra), which established an agreed framework for cooperation, joint working and exchange of information between the two administrations, are particularly relevant to matters relating to radioactive waste.



40. In light of the Executive's submissions, it is apparent to me that the Executive has not sufficiently considered the exemption in relation to the specific information in each document. The rather general concerns, which might well apply in certain other circumstances, do not adequately address whether the effect of releasing this particular information would or would be likely to cause substantial prejudice to relations between the Scottish Administration and the Government of the United Kingdom.
41. I accept the need for officials in the different UK Administrations to be able to have free and frank discussions about the development of policy, particularly in relation to sensitive issues such as radioactive waste. However, in this instance, the exchanges contained within these documents largely relate to the financing and administrative arrangements relating to the formation of a joint research project. Furthermore, I do not accept that the information in question directly relates to matters concerning radioactive waste as argued by the Executive.
42. It seems unlikely to me that such innocuous exchanges relating to the establishment of a joint research project would or would be likely to prejudice substantially relations between administrations. The officials involved in this exchange come from administrations to which broadly similar freedom of information laws apply. Officials will be aware of the circumstances in which information may be released. I do not believe that that these officials or indeed officials involved in these types of exchanges would be affected by knowing that this type of administrative information had been requested and was released after proper consideration. As such, I cannot see any justification for concluding that real, actual and significant harm would be a likely outcome from the release of this information such that the disclosure of this information would or would be likely to prejudice substantially relations within the United Kingdom. As such, I am not satisfied that this information is exempt under section 28(1) of FOISA.
43. As I am satisfied that this information is not exempt under section 28(1) of FOISA, I am not required to consider the public interest test in relation to the use of this exemption.

Section 29 Formulation of Scottish Administration policy etc.

44. All documents relevant to this investigation have also been withheld by the Executive under section 29(1)(a) of FOISA. In terms of section 29(1)(a), information held by the Scottish Administration is exempt information if it relates to the formulation or development of government policy.



45. The reasoning behind the section 29(1)(a) exemption in FOISA is to ensure that, where appropriate, Scottish Administration policy can be formulated and developed effectively by allowing the Administration to discuss matters in a candid and frank manner. The section 29(1)(a) exemption is a qualified exemption, which means that even if the exemption applies, the application of this exemption is subject to the public interest test contained in section 2(1)(b) of FOISA.
46. In citing section 29(1)(a) of FOISA, the Executive effectively linked its application of the exemptions in sections 28 and 29(1)(a) of FOISA, submitting that the inability to communicate and exchange information with the UK government and the other devolved administrations would inhibit its ability to advise Ministers on the formulation and development of policy.
47. The Executive noted that as these documents relate to an issue which covers matters both reserved to Westminster and devolved to the Scottish Executive, where there has to be frequent communication between the Executive and UK Departments, its reasons for applying sections 28 and 29 of FOISA are interlinked.
48. For information to fall under the section 29(1)(a) exemption in FOISA, it must relate to government policy, i.e. to the development of options and priorities for Scottish Ministers, who will subsequently determine which options should be translated into political action and when. The formulation of government policy suggests the early stages of the policy process where options are considered, risks are identified, consultation takes place and recommendations and submissions are presented to Scottish Ministers. The development of government policy suggests the processes involved in improving upon or amending already existing policy and could involve the piloting, monitoring, reviewing, analysing or recording the effects of existing policy.
49. Section 29(1)(a) includes no harm test; it is not necessary for the authority to show that disclosure of the information would or would be likely to prejudice substantially the formulation of policy or to consider the effect or harm that would result if the information were to be disclosed. Information, whether sensitive or innocuous, will be covered by this exemption if it “relates” (i.e. directly or indirectly) to policy formulation or its development.
50. As I have stated in earlier decisions, in order to fall under section 29(1)(a), the information need only “relate” to the formulation or development of government policy. However, in my opinion “relate to” must mean more than simply having some association with an area of activity which is devolved to the Executive.



51. During correspondence with my office, the Executive was asked to provide further clarification as to the relationship between the documents withheld and the development or formulation of policy. In the Executive's response it submitted that the documents related to its policy on radionuclides in drinking water systems.
52. The file under consideration contains information relating to the formulation of a strategic joint research project, the results of which may provide a contextual background for future policy formation relating to devolved civil contingency measures. Given the nature and timing of the research, I am satisfied that it would be conducted for the purposes of informing future policy development by the Scottish Administration. As such, I am satisfied that the information withheld from Mr Edwards relates to the formulation of policy by the Scottish Administration. In these circumstances, I am satisfied that the wide reaching exemption in section 29(1)(a) applies to all of the information withheld in this case.

Consideration of the public interest

53. 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.
54. This means that even if the exemption applies, the information should still be released unless, in all the circumstances of the case, the public interest in disclosing the information is outweighed by the public interest in maintaining the exemption. If the public interest lies in disclosure, the information must be released.
55. The Executive's submissions on the public interest insofar as it relates to the application of the exemption in section 29(1)(a) were also linked with those in relation to section 28(1). The Executive stated that it is extremely important that it is able to maintain good relations with a range of other parties (including the UK government), and that it is able to exchange information with these on a confidential basis, knowing that it will not be disclosed without agreement. It went on to state that this is essential for the Executive to maintain the ability to advise ministers confidentially on matters relating to the ongoing formulation and development of policy in an extremely sensitive area. While recognising the public interest in having access to information on this subject, the Executive maintained that the public interest in relation to this is outweighed by the public by those reasons for maintaining the exemptions applied.
56. Essentially, the Executive is saying that if release jeopardises its relationship with the UK administration, then its policy making on this matter would be harmed and that would not be in the public interest. However, I have already concluded that there is no justification in concluding that harm to the exchange with officials in the UK administration would be harmed.



57. Furthermore, I do not see how the formulation or development of policy in this area by the Scottish Administration would otherwise be adversely affected. Having examined the documents concerned, although it can be said that information withheld from Mr Edwards falls within the scope of the exemption in section 29(1)(a) of FOISA, this file does not contain information that directly reveals the Scottish Administration's policy – or the formulation of such policy – on the prevention of or response to the contamination of the water supply with radionuclides.
58. FOISA has created, or at least acknowledges, a public interest in disclosing information. The particular public interest in disclosure in this case is not of great significance. However, the information does provide an insight into activity on a matter which bears upon public safety, and there is a public interest in knowing of this unless there are greater public interest reasons for withholding this information. I cannot see what harm to the formulation or development of policy would occur, and I am not persuaded by the Executive's arguments as to why it is in the public interest to maintain the exemption. It is therefore my view that, on balance, the information in this case should be disclosed.

Personal Information

59. I note that document 7 (along with documents 8 and 9 which are entirely duplicated within document 7) contains the mobile phone number of an official (within the email timed 22:27). In the course of my investigation, Mr Edwards confirmed that he would be content for such information to be excluded from his request. When disclosing this information, the Executive should therefore remove this information prior to release of these documents.

Technical Breaches of FOISA

60. Section 10(1) of FOISA gives Scottish public authorities a maximum of 20 working days from the receipt of the request to comply with the request for information. The Executive did not respond to Mr Edwards' request for information within this timescale and so I find that the Executive failed to act in accordance with the requirements of section 10(1) of FOISA.
61. However, the Executive apologised for this delay, explaining it was due to the number and scale of requests received by this particular department and the Executive's wish to seek other parties' views as part of its consideration of the material withheld. Mr Edwards was informed of this possible delay and the reasons underlying it during the intervening period.



Decision

I find that the Scottish Executive (the Executive) failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request from Mr Edwards.

I find that the Executive incorrectly applied sections 26(a), 28(1) and 31(1) of FOISA in withholding the information requested by Mr Edwards and that while it was correct to apply the exemption in section 29(1)(a) to the information, the public interest in the disclosure of the information outweighs the public interest in the maintenance of the section 29(1)(a) exemption.

In withholding information falling under the scope of Mr Edwards' request, the Executive failed to comply with section 1(1) of FOISA.

I therefore require the Executive to provide Mr Edwards with a copy of the remaining documents held in the file entitled 'Radionuclides in Drinking Water Systems' (excluding documents 4, 8, and 9, which are entirely duplicated in other documents to be released), subject to the redaction of a telephone number as detailed in paragraph 59 within 45 days of receipt of this notice.

I also find that the Executive failed to respond to Mr Edwards' initial request within the required timescales as set down in section 10(1) of FOISA. I do not require the Executive to take any action in respect of this breach.

Appeal

Should either Mr Edwards or the Scottish Executive 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 of receipt of this decision notice.

Kevin Dunion
Scottish Information Commissioner
23 August 2007



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.

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

....

26 Prohibitions on disclosure

Information is exempt information if its disclosure by a Scottish public authority (otherwise than under this Act)-

- (a) is prohibited by or under an enactment;

....



28 Relations within the United Kingdom

- (1) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice substantially relations between any administration in the United Kingdom and any other such administration.
- (2) In subsection (1), "administration in the United Kingdom" means-
 - (a) the Government of the United Kingdom;
 - (b) the Scottish Administration;
 - (c) the Executive Committee of the Northern Ireland Assembly; or
 - (d) the National Assembly for Wales.

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;
 -

31 National security and defence

- (1) Information is exempt information if exemption from section 1(1) is required for the purpose of safeguarding national security.

Anti-Terrorism, Crime and Security Act 2001

76 Atomic Energy Authority special constables

[...]

"nuclear material" means-

- (a) any fissile material in the form of uranium metal, alloy or chemical compound, or of plutonium metal, alloy or chemical compound; or



(b) any other fissile material which may be prescribed by regulations made by the Secretary of State;

"nuclear site" means premises in respect of which a nuclear site licence (within the meaning of the Nuclear Installations Act 1965 (c. 57)) is for the time being in force

[...]

79 Prohibition of disclosures relating to nuclear security

(1) A person is guilty of an offence if he discloses any information or thing the disclosure of which might prejudice the security of any nuclear site or of any nuclear material-

(a) with the intention of prejudicing that security; or

(b) being reckless as to whether the disclosure might prejudice that security.

(2) The reference in subsection (1) to nuclear material is a reference to-

(a) nuclear material which is being held on any nuclear site, or

(b) nuclear material anywhere in the world which is being transported to or from a nuclear site or carried on board a British ship,

(including nuclear material which is expected to be so held, transported or carried).

(3) A person guilty of an offence under subsection (1) is liable-

(a) on conviction on indictment, to imprisonment for a term not exceeding seven years or a fine (or both); and

(b) on summary conviction, to imprisonment for a term not exceeding six months or a fine not exceeding the statutory maximum (or both).

(4) In this section-

"British ship" means a ship (including a ship belonging to Her Majesty) which is registered in the United Kingdom;

"disclose" and "disclosure", in relation to a thing, include parting with possession of it;



"nuclear material" has the same meaning as in section 76; and

"nuclear site" means a site in the United Kingdom (including a site occupied by or on behalf of the Crown) which is (or is expected to be) used for any purpose mentioned in section 1(1) of the Nuclear Installations Act 1965 (c. 57).

[...]