

# Decision Notice



Decision 151/2010 Mr Tom Gordon of the Sunday Herald and the Scottish Ministers

Minutes of Transport Scotland Directors' Board meetings

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## Summary

Mr Gordon asked Transport Scotland, an agency of the Scottish Ministers (the Ministers), for minutes of meetings of the Transport Scotland Directors' Board from January 2006 onwards. On behalf of the Ministers, Transport Scotland responded by providing information in the form of 31 sets of minutes, but withheld some content under a number of exemptions in the Freedom of Information (Scotland) Act 2002 (FOISA). Mr Gordon was not satisfied with this response. Following a review, some of the redacted content was restored and the number of exemptions applied to the remaining redacted content was reduced. Mr Gordon remained dissatisfied and applied to the Commissioner for a decision.

During the investigation, more of the redacted information was released. After investigation, the Commissioner found that the Ministers had wrongly applied the exemptions in section 30(b) and (c) of FOISA, relating to the effective conduct of public affairs, to certain information. Other information, however, he found to have been correctly withheld under the section 30(b) exemptions. The Commissioner also found that the exemption in section 29(1)(a) of FOISA applied to certain information (as it related to the formulation or development of government policy), but that the balance of the public interest favoured disclosure.

The Commissioner also found that certain of the withheld information was environmental information and therefore subject to the Environmental Information (Scotland) Regulations 2004 (the EIRs). He found that the Ministers had failed to deal with this information under the EIRs. While finding that the exception could not be upheld in relation to all of the environmental information, the Commissioner found that the Ministers were entitled to withhold some of the environmental information under regulation 10(4)(e) of the EIRs.

The Ministers were also found to have failed to respond to Mr Gordon's request for review within the statutory timescale.

## Relevant statutory provisions and other sources

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 8(1)(c) (Requesting information); 21(1) (Review by Scottish public authority); 29(1)(a) (Formulation of Scottish Administration policy etc.); 30(b) and (c) (Prejudice to effective conduct of public affairs).



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

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

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1. On 20 November 2008 Mr Gordon sent an email to Transport Scotland, asking for a full and unedited copy of all minutes of meetings of the Transport Scotland Directors' Board. In a second email sent that day he clarified that his request was for all Board meeting minutes since Transport Scotland came into existence in January 2006.
2. Transport Scotland is an agency of the Scottish Ministers (the Ministers) and, in relation to this request, is considered to have been acting on behalf of the Ministers, who are the relevant Scottish public authority in terms of FOISA. In this particular case, the Commissioner considers it appropriate to refer to "the Ministers" even where responses originated with Transport Scotland.
3. On 18 December 2008, the Ministers apologised for failing to provide a full response within the statutory timescale of 20 working days.
4. On 8 January 2009, the Ministers provided Mr Gordon with 31 sets of minutes of the Transport Scotland Board meetings held since 2006, with some content redacted. The redacted content was withheld under exemptions in sections 27, 28, 29, 30, 31, 33, 39 and 40 of FOISA.
5. On 27 January 2009, Mr Gordon asked the Ministers for a review of their decision. He queried whether all minutes covered by his request had been supplied, noting that the last minute supplied dated from August 2008 whereas clearly there had been a Board meeting in October 2008. He also complained that the number of exemptions cited was disproportionate, and that Ministers had not started from the premise that information should be made public in the absence of a strong and over-riding reason for withholding it. In particular, he pointed out that financial information had been withheld even where it was more than two years old, and that not a single cash figure appeared in more than 150 sides of A4 paper.
6. The Ministers provided their review response on 9 March 2009. They confirmed that they had considered as falling within the scope of his request all minutes agreed as true and fair records of the Board meetings: this did not include the minute of the October 2008 meeting, which had not been agreed at the time of his request. They restored some of the content which had previously been redacted from the minutes, and reduced the number of exemptions cited in respect of the remaining withheld information (no longer claiming reliance on sections 27, 28, 31, 33, 39 and 40).

Decision 151/2010  
Mr Tom Gordon of the Sunday Herald  
and the Scottish Ministers



7. On 11 March 2009 Mr Gordon wrote to the Commissioner, stating that he was dissatisfied with the outcome of the review and applying for a decision in terms of section 47(1) of FOISA. At this point he had not yet received the Ministers' review response, dated 9 March 2009.
8. After receiving the Ministers' review response, and after further correspondence between the Commissioner's office and the Ministers, Mr Gordon withdrew his initial application to the Commissioner and submitted a fresh application for a decision on 30 March 2009. In his application Mr Gordon complained that the Ministers had been excessive in their use of exemptions, redacting far more material than could be justified under FOISA. He also noted that the Ministers had failed to respond to a review request within the statutory 20 working days.
9. The application was validated by establishing that Mr Gordon 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

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10. On 31 March 2009, the Ministers were notified in writing that an application had been received from Mr Gordon and were asked to provide the Commissioner with any information withheld from him. The Ministers responded with the information requested on 15 April 2009 and the case was then allocated to an investigating officer.
11. The investigating officer subsequently contacted the Ministers on 30 April 2009, providing them with an opportunity to comment on the application (as required by section 49(3)(a) of FOISA) and asking them to respond to specific questions. In particular, the Ministers were asked to comment on the extent to which the passage of time had affected the sensitivity or the currency of the information withheld. The Ministers were also asked whether they considered any of the withheld information to be environmental information, as defined by Regulation 2(1) of the EIRs. They were asked to justify any exemptions/exceptions claimed in respect of the withheld information, with arguments in respect of the public interest where applicable.
12. On 17 June 2009, a revised schedule of documents and submission was provided to the Commissioner's office by the Ministers, with a further revised schedule following on 7 July.
13. On 8 July 2009, Mr Gordon confirmed that he had received new versions of the Board minutes, which he described as a huge improvement with very few redactions. However, he asked the Commissioner to consider whether the remaining redactions were justified. He adhered to this position following the release of further information.
14. During the investigation, the Ministers indicated that they considered Mr Gordon's information request to be invalid. Their submissions on this and all other points relevant to this decision will be considered fully in the Commissioner's analysis and findings below.



## Commissioner's analysis and findings

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15. In coming to a decision on this matter, the Commissioner has consider all of the submissions made to him by both Mr Gordon and the Ministers and is satisfied that no matter of relevance has been overlooked.

### Validity of request

16. As indicated above, the Ministers indicated in the course of the investigation that they considered Mr Gordon's request to be invalid. This followed the decision of the Court of Session in the case of *Glasgow City Council and Dundee City Council v Scottish Information Commissioner [2009] CSIH 73*, in which the Court emphasised that FOISA gives a right to information rather than documents. The Ministers contended that Mr Gordon had not described the information he was seeking, as required by section 8(1)(c) of FOISA. They considered the request, in seeking categories of documents, to be broadly framed and unfocused. In the Minister's view, they did nothing more than indicate where the information Mr Gordon might be interested in might be found, which could not be equated with describing the information requested. The Ministers highlighted the importance, as noted in the Court of Session decision, of identifying precisely the information sought by the applicant, emphasising that (irrespective of how they might have dealt with these requests prior to that decision) they remained entitled to revisit that position in the light of the decision and consequently treat the requests as invalid.
17. The Commissioner has considered Mr Gordon's request in the light of the Ministers' submissions and the Court of Session decision referred to above. He is satisfied that the description provided by Mr Gordon was unambiguous, seeking information comprising an unredacted version of certain minutes. From this description, the Ministers should have experienced no difficulty in identifying and locating the information, which must be the primary consideration in determining whether such a description is valid. In fact, they provided Mr Gordon with information from the minutes in question in response to his request for information and request for review, and for that matter in the course of the investigation. They identified other information in the minutes sufficiently to be able to redact it under various exemptions in FOISA, while (prior to the issue of validity being raised) they appear to have had no problem identifying and providing the Commissioner's Office with what they considered to be the relevant information for the purposes of this investigation. In all the circumstances, therefore, the Commissioner cannot accept that the difficulty experienced by the Ministers in this case was in fact one of identification: and whatever effect the Court of Session decision may have had on the applicable law, it can not have affected the matter of identification as a question of fact.



18. In addition, the Commissioner notes the Ministers' attempts in their submissions to distinguish documents from information: in particular, they submit that they were wrong in the past (prior to the Court of Session decision) to interpret requests of this kind broadly and thus to search for, and consider disclosing, the documents requested without identifying the information sought. In this case, however, while noting the Ministers' submissions on this point, the Commissioner must also take into consideration paragraph 45 of the Court of Session's Opinion. Here, the Court states that where a request refers to a document which may contain the relevant information, it may nonetheless be reasonably clear in the circumstances that it is the information recorded in the document that is relevant. As indicated above, he considers it to have been clear in this case that the applicant was seeking the information in the specified minutes.
19. The Commissioner is therefore satisfied that the request submitted by Mr Gordon was sufficiently clear and, in particular, that it described the information requested as required by section 8(1)(c) of FOISA. Consequently, he is satisfied that the request (and therefore the subsequent application to the Commissioner) is valid.
20. The Commissioner would also note that the arguments he has received from the Ministers on the question of validity do not appear to relate to environmental information as defined in the EIRs. In any event, he does not consider the Court of Session decision referred to above to have any bearing on environmental information. For the avoidance of doubt, however, he would note that the only provision in the EIRs of potential relevance to the question of adequacy of description is the exception in regulation 10(4)(c), which relates to requests formulated in too general a manner (and which is subject to the duty to provide advice and assistance in regulation 9): even if he had received submissions on the application of this exception (which he has not), given his reasoning in paragraphs 17-19 he finds it difficult to envisage circumstances in which he would be able to accept that Mr Gordon's request, framed as it was, was formulated in too general a manner.

### **Scope of the investigation**

21. The information which the Ministers continue to withhold from Mr Gordon is contained within 10 of the Transport Scotland Board meeting minutes. For the purposes of this Decision Notice, the information is identified by the document reference numbers assigned by the Ministers and the paragraph numbers as they appear in the minutes. The minutes in question are documents 5 (two redactions), 6, 11, 13 (three redactions), 16 (two redactions), 18 (two redactions), 21 (two redactions), 22, 29, and 30.
22. All of the information withheld was considered by the Ministers to be exempt under sections 30(b)(i) and (ii) and 30(c) of FOISA, while in all but 5 instances the information was also withheld under section 29(1)(a).





## EIRs or FOISA?

23. The Ministers advised the Commissioner (17 June 2009) that they did not believe any of the withheld information qualified as environmental information for the purposes of the EIRs and therefore they did not wish to apply the exemption in section 39(2) of FOISA. However, they stated that if the Commissioner decided that the information should have been considered under the EIRs, they would wish to apply the exception in regulation 10(4)(e) of the EIRS.
24. The Commissioner took the view that some of the information withheld from the minutes was environmental information. The investigating officer relayed this view to the Ministers in a letter dated 11 September 2009 and invited their comments on this point. The Ministers reiterated (8 October 2009) that they did not consider the information to be environmental, but that if the Commissioner determined otherwise they would apply the exception in regulation 10(4)(e) of the EIRs.
25. Environmental information is defined in regulation 2(1) of the EIRs (the definition is reproduced in full in the Appendix to this decision). Where information falls within the scope of this definition, a person has a right to access it under the EIRs, subject to various restrictions and exceptions contained in the EIRs.
26. In this decision the Commissioner will not repeat in full his discussion of the relationship between FOISA and EIRs, which has been set out in *Decision 218/2007 Professor A D Hawkins and Transport Scotland* and which applies equally to this case. Broadly, the Commissioner's general position on the interaction between the two regimes is as follows:
  - i. The definition of what constitutes environmental information should not be viewed narrowly.
  - ii. There are two separate statutory frameworks for access to environmental information and an authority is required to consider any request for environmental information under both FOISA and the EIRs.
  - iii. Any request for environmental information therefore must be dealt with under the EIRs.
  - iv. In responding to a request for environmental information under FOISA, an authority may claim the exemption in section 39(2).
  - v. If the authority does not choose to claim the section 39(2) exemption it must then also deal with the request fully under FOISA, by providing the information, withholding it under another exemption in Part 2, or claiming that it is not obliged to comply with the request by virtue of another provision in Part 1 (or a combination of these).
  - vi. The Commissioner is entitled (and indeed obliged) where he considers a request for environmental information has not been dealt with under the EIRs to consider how it should have been dealt with under that regime.



27. The implication of the Hawkins Decision for the Commissioner's consideration of Mr Gordon's request is that he must first determine whether some or all of the information withheld is environmental information. If it is, he must go on to consider the Ministers' handling of the request in terms of both the EIRs and FOISA.
28. The Commissioner considers the following information, all of which deals with major infrastructure projects at some level of detail, to fall within the definition of environmental information in regulation 2(1) of the EIRs:
- information in document 5 paragraph 27(b)
  - information in document 6 paragraph 9
  - information in document 11 paragraph 5.6(a)
  - information in document 13 paragraphs 4.3 and 4.6
  - information in document 16 paragraphs 3.1, 3.2 and 18
  - information in document 21 paragraph 24
  - information in document 22 paragraph 2
  - information in document 29 paragraph 8.
- In failing to identify and deal with this information as environmental information under the EIRs, the Ministers failed to comply with regulation 5(1) of the EIRs.
29. The Commissioner accepts that the remaining withheld information does not fall within the definition in regulation 2(1) of the EIRs, that is:
- information in document 5 paragraphs 9 and 17(b)
  - information in document 6 paragraphs 7 and 8
  - information in document 13 paragraph 4.10 (b)
  - information in document 18 paragraphs 7 and 8
  - information in document 21 paragraph 19
  - information in document 30 paragraph 8.
30. The Commissioner will first consider whether the Ministers dealt with Mr Gordon's request as required by Part 1 of FOISA. He will then consider whether the Ministers dealt with the withheld environmental information in accordance with the EIRs.

#### **Information withheld under section 30(b)(i) and (ii) of FOISA**

31. The Ministers applied the exemptions in section 30(b)(i) and (ii) of FOISA to all of the withheld information. In order to rely on the exemptions laid down in section 30(b)(i) and (ii), the Ministers must show that disclosure of the information under FOISA would, or would be likely to, inhibit substantially the free and frank provision of advice (section 30(b)(i)) or the free and frank exchange of views for the purposes of deliberation (section 30(b)(ii)).





32. As the Commissioner has said in previous decisions, it is his view that the standard to be met in applying the tests contained in section 30(b)(i) and (ii) is high. In applying these exemptions, the chief consideration is not whether the information constitutes advice or opinion (although this may also be relevant) but whether the release of the information would, or would be likely to, inhibit substantially the free and frank provision of advice or the exchange of views.
33. Noting that the function of the Transport Scotland Board was to support and advise the Chief Executive, the Ministers submitted that the minutes were in effect advice to the Chief Executive of Transport Scotland, relating to the Directors' discussions on a variety of matters. They argued that the minutes contained several instances of free and frank advice or expression of views for the purposes of deliberation, partly because of the often controversial subject matter and also because they had been written with no expectation of publication.
34. The Ministers considered that release would substantially inhibit the ability of Transport Scotland officials to operate in an open and candid manner, arguing (with reference to examples) that if such free and frank comments were to be routinely released officials would be substantially inhibited from contributing as effectively to discussion for fear of early disclosure. They also believed that the provision of full and accurate advice required an environment in which officials felt able to discuss issues openly and express their views candidly: this was what they considered the Directors' meetings to provide, as reflected in the minutes.
35. The Ministers also took the view that disclosure would inhibit or compromise relations with certain organisations to which reference was made in the minutes. The Ministers gave some examples of information likely (in their view) to have this effect if disclosed, given what they considered to be the free and frank nature of the comments in question.
36. The Ministers contended that if the minutes were to be released in full, the style and content of future minutes would be significantly different, being light on substance and devoid of the crucial free and frank detail which provided a full record of the Directors' engagement with the issues.
37. The Commissioner accepts that the information withheld from Mr Gordon constitutes a record of free and frank advice and/or the free and frank exchange of views for the purposes of deliberation. He has gone on to consider whether the disclosure of the information would (or would be likely to) inhibit substantially the provision of such advice or views in future.
38. In reaching his conclusions, the Commissioner has considered the Ministers' submissions and taken into account factors including (insofar as relevant) the passage of time; other information already in the public domain; the fact that policy development or implementation was still underway in relation to some of the matters discussed; and the potentially controversial nature of some of the views expressed or the advice given, particularly in relation to other organisations.
39. The Commissioner notes that some of the free and frank comments previously withheld have now been released to Mr Gordon. He accepts that this, in itself, may not mean that the information was wrongly withheld at the time of the request or request for review.



40. The Commissioner has accepted that disclosure of the following information, in response to Mr Gordon's request or his request for review, would have been likely to inhibit substantially the future free and frank provision of advice or free and frank exchange of views for the purposes of deliberation:
- information in document 5 paragraph 9
  - information in document 6 paragraphs 7, 8 and the first sentence of paragraph 9
  - information in document 13 paragraphs 4.3 (points c and d only) and 4.10 (b)
  - information in document 16 paragraphs 3.1 (point (c) and final sentence of point (b) only) and 3.2
  - information in document 18 paragraphs 7 and 8
  - information in document 21 paragraph 19 (second sentence only)
  - information in document 21 paragraph 24 (points a – g only)
  - information in document 22 paragraph 2
  - information in document 30 paragraph 8.
41. It follows that the Commissioner does not accept the Ministers' application of the exemptions in section 30(b) of FOISA to the remainder of the withheld information, that is:
- information in document 5 paragraphs 17(b) and 27(b)
  - information in document 6 paragraph 9 (second and third sentences only)
  - information in document 11 paragraph 5.6 (a)
  - information in document 13 paragraphs 4.3 (points (a) and (b) only) and 4.6
  - information in document 16 paragraphs 3.1 (points (a), (b) (except final sentence), (d) and (e)) and 18
  - information in document 21 paragraphs 19 (except second sentence) and 24 (except points a – g)
  - information in document 29 paragraph 8.
42. The Commissioner has considered the substance of the information listed in paragraph 41 and the manner of its recording, together with the Ministers' submissions and such other factors as he has considered relevant (see paragraph 38). He finds it difficult to imagine circumstances in which matters such as those covered would not be reported to a Board of this kind, nor have any been suggested to him. In all the circumstances, he cannot accept that disclosure of this particular information in response to Mr Gordon's request or his request for review would have had, or would have been likely to have, the effects on future contributions of this kind and their recording which the Ministers have described. In addition, he does not consider any references to other organisations to be of such a nature that their disclosure would have been likely to compromise relationships with those organisations.



43. In relation to the information detailed in paragraph 40, the Commissioner has gone on to consider (as required by section 2(1)(b) of FOISA) whether the public interest in disclosure outweighed the public interest in maintaining the exemption or exemptions.
44. The Ministers, while accepting a public interest in the release of information which would enhance the transparency and accountability of Transport Scotland, submitted that there was a stronger public interest in officials being able to debate issues without concern about disclosure. They considered it imperative that the Board was able to hold effective discussions on the development and monitoring of significant projects, while also highlighting the importance of protecting critical relations with external stakeholders (which might be compromised by the disclosure of certain information).
45. Mr Gordon highlighted the importance of starting from the premise that information should be public unless there was an extremely strong and overriding reason for withholding it.
46. Having considered the arguments advanced by both parties in relation to the information detailed in paragraph 40, the Commissioner is satisfied in all the circumstances that the public interest in maintaining the exemptions in section 30(b) of FOISA outweighed the public interest in disclosure. He therefore finds that this information was correctly withheld under these exemptions and will not go on to consider the application to it of any other exemptions claimed. He will, however, consider below the application of the EIRs, and in particular regulation 10(4)(e), to this information (all of which he considers to be environmental information).
47. In relation to the information listed in paragraph 41, the Commissioner will now go on to consider the arguments advanced by the Ministers in respect of the application of other exemptions/exceptions.

#### **Application of the exemption in section 30(c) of FOISA**

48. Section 30(c) of FOISA applies where the disclosure of information would "otherwise" prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs. The word "otherwise" refers to the exemptions in section 30(a) and (b). Section 30(c) is a broad exemption, and the Commissioner expects any public authority citing this exemption to show what specific harm (which must be at the level of substantial prejudice) would, or would be likely to, be caused to the conduct of public affairs by release of the information.
49. The Ministers applied the exemption in section 30(c) to all information withheld in this case. The Commissioner will exclude from his consideration of this exemption the information which he found to be exempt from disclosure under section 30(b)(i) or (ii) of FOISA (that is, the information listed in paragraph 40).



50. As indicated above, the Ministers considered the withheld information to be detailed advice to the Chief Executive of Transport Scotland on a range of subjects. They argued that general release of such information would have a significant impact on the way in which these minutes were taken in future, and on the freedom used in expressing candid opinions about policy matters and stakeholders alike. The Ministers believed this would result in a weakening of the quality of the minute and also of the advice provided, which would not be in the best interests of the Chief Executive or ultimately the Ministers.
51. The Ministers made specific reference to some parts of the withheld information (containing financial projections and forward planning timescales) and argued that disclosure of this information would substantially inhibit officials from recording such details in future. They also argued that if circumstances were to change following release of the information, officials' views and advice could be subject to misrepresentation or the officials could be left open to accusations of incompetence in terms of inaccurate calculation or planning.
52. As a consequence of the perceived effects of disclosure they described, the Ministers believed that Transport Scotland's ability to carry out its day to day business would be inhibited, particularly in its relations with external stakeholders, its decision making and its ability to achieve value for money. In their view, this would amount to substantial prejudice to the effective conduct of public affairs.
53. The Commissioner has already considered arguments relating to the disclosure of advice and subsequent inhibition in providing similar advice or views, in relation to the exemptions in section 30(b). He finds that the Ministers' arguments in support of section 30(c) are similar to those put forward in relation to section 30(b), in that the prejudice to the effective conduct of public affairs which is envisaged as a consequence of disclosure stems from a predicted reluctance to record advice and views in the same detail in future minutes of the Board meetings (with a consequent weakening in the quality of the minutes).
54. As indicated above, the Commissioner is only considering the application of section 30(c) in relation to the information he has found not to have been properly withheld under section 30(b). The Commissioner has already found that disclosure of this information would not result in substantial inhibition as argued by the Ministers. He therefore does not accept the arguments presented in relation to section 30(c), finding that disclosure of the information in question would not "otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs."
55. As the exemption in section 30(c) has not been found not to apply, the Commissioner has not considered the public interest test in relation to the information withheld under this exemption.

#### **Information withheld under section 29(1)(a) of FOISA**

56. In relation to the information listed below, to which the Ministers have applied the exemption in section 29(1)(a) of FOISA and which has not been found to have been properly withheld under any of the exemptions in section 30(b) or (c) of FOISA, the Commissioner will go on to consider whether the exemption in section 29(1)(a) should be upheld:
  - information in document 5 paragraph 27(b)



- information in document 6 paragraph 9 (second and third sentences only)
  - information in document 13 paragraphs 4.3 (points (a) and (b) only) and 4.6
  - information in document 16 paragraphs 3.1 (points (a), (b) (except final sentence), (d) and (e)) and 18
  - information in document 21 paragraphs 19 (except second sentence) and 24 (except points a – g)
  - information in document 29 paragraph 8.
57. In terms of section 29(1)(a) of FOISA, information held by the Scottish Administration is exempt information if it relates to the formulation or development of government policy. The exemption is subject to the public interest test in section 2(1)(b) of FOISA.
58. For information to fall under the exemption in section 29(1)(a), it must relate to the formulation or development of government policy. The Commissioner considers that this process can be defined as the development of options and priorities for Ministers, who will subsequently determine which options should be translated into political action and when this should be done. 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. “Development” suggests the processes involved in improving upon or amending already existing policy and could involve piloting, monitoring, reviewing, analysing or recording the effects of existing policy.
59. In this case the Ministers applied section 29(1)(a) to most of the information withheld, on the basis that it related to ongoing issues where policy was continuing to be developed and implemented. In their submissions the Ministers made specific reference to some of the information withheld, and explained how it related to ongoing discussions, debates or negotiations.
60. Having considered the information detailed in paragraph 56, the Commissioner is satisfied that the exemption in section 29(1)(a) of FOISA is applicable to all of it, in that it is information which relates to the formulation or development of government policy. He must therefore go on to consider the public interest test in section 2(1) of FOISA in relation to this information.
61. The Ministers acknowledged that there was a public interest in public authorities being accountable and transparent, particularly where they managed large scale transport projects funded by the taxpayer. However, they believed this to be met by the information already released and due to be released (i.e. the information provided to Mr Gordon in response to his request and request for review and during the investigation of his application for a decision from the Commissioner).





62. In respect of the information remaining withheld, the Ministers argued that there was a greater public interest in ensuring that policy relating to such matters was formulated in a protected environment, allowing full consideration of all advice and options. They took the view that the discussions to which reference was made in the withheld information related to ongoing policy issues which were, as yet, incomplete. The Ministers argued that there was clearly a strong public interest in high quality policy-making and implementation, and that for this to be maintained Ministers and officials required to be able to consider all available options and assess these rigorously in order to expose their merits and demerits. In their view, early or premature release of such policy discussions would compromise the position of officials, as well as Ministers, in being able to fully assess all relevant issues and reach considered conclusions.
63. The Commissioner finds that some of the information under consideration for the purposes of this exemption relates to progress in implementing policy decisions rather than discussion of future policy options. While he accepts that implementation of the policies concerned was clearly incomplete at the time these matters were discussed by the Board, he finds it is possible to distinguish between matters where the key decisions had been taken and work was progressing as planned (subject on occasion to operational issues), and matters where the key issues were still under discussion or subject to further negotiation.
64. Where the information refers to policy options on decisions yet to be taken at the time of the minuted discussion, the Commissioner finds that in some cases the key decision had been made by the time Mr Gordon made his request for review. He finds the Ministers' arguments on the public interest in protecting policy discussions to be less compelling when applied to information about policy decisions which had already been taken and had, in some cases, been publicly announced.
65. In such cases, the Commissioner considers that retrospective disclosure of the advice or views presented to the Board and recorded in the minutes would not have been likely to adversely affect current policy discussions, with the implications this would have in terms of the public interest. On the other hand, disclosure would serve to increase accountability for, and understanding of, decisions on matters affecting the travelling public.
66. The Commissioner has therefore concluded that the public interest in disclosure outweighed the public interest in maintaining the exemption in section 29(1)(a) in the following instances:
- information in document 6 paragraph 9 (second and third sentences only)
  - information in document 13 paragraphs 4.3 (points (a) and (b) only) and 4.6
  - information in document 16 paragraphs 3.1 (points (a), (b) (except final sentence), (d) and (e)) and 18
  - information in document 21 paragraph 19 (except second sentence) and 24 (except points a – g)
  - information in document 29 paragraph 8.





67. In relation to the information in document 5 paragraph 27(b), the Commissioner finds little public interest in withholding information which in essence has already been disclosed through the release of other parts of document 5. In this instance, he finds the public interest in transparency regarding decisions about public expenditure outweighs any public interest in withholding information relating to the development or formulation of policy, and therefore concludes that the exemption in section 29(1)(a) of FOISA should not be upheld in relation to this information.
68. Having found that the public interest in disclosure outweighed the public interest in maintaining that exemption, in respect of the information being considered under section 29(1)(a) of FOISA, the Commissioner finds that the exemption was wrongly applied to the information listed in paragraph 56.

### **Environmental information**

69. As noted previously, the Commissioner considers some of the information withheld from Mr Gordon to be environmental information as defined in regulation 2(1) of the EIRs. Having reached his conclusions on the extent to which Ministers complied with Part 1 of FOISA in dealing with Mr Gordon's request, the Commissioner must go on to consider whether the environmental information withheld from the minutes was correctly withheld under the EIRs.
70. The information considered to be environmental information in terms of the EIRs is listed in paragraph 28. The Ministers have advised that awhile they do not consider this information to be environmental information, they would wish to apply the exception in regulation 10(4)(e) of the EIRs if the Commissioner reached a different conclusion.

### *Regulation 10(4)(e)*

71. Regulation 10(4)(e) of the EIRs states that a Scottish public authority may refuse to make environmental information available to the extent that the request involves making available internal communications. The Commissioner accepts that the Transport Scotland Directors' Board minutes are internal communications, distinct from the edited minutes published on the Transport Scotland website, and that the withheld information therefore falls within the scope of regulation 10(4)(e).
72. The exception in regulation 10(4)(e) is subject to the public interest test in regulation 10(1)(b): in other words, the exception can only apply if, in all the circumstances, the public interest in making the information available is outweighed by that in maintaining the exception.



73. The Ministers advised the Commissioner that they were generally content to reply upon the public interest arguments previously set out in relation to the exemptions in FOISA. They reiterated that, in their view, any public interest in the release of the remaining withheld information was outweighed by the public interest in continuing to withhold the information, which related to discussions about ongoing projects and key funding issues and would not have been prepared in any expectation of release into the public domain. The Ministers also reiterated that the release of internal communications discussing sensitive issues and sometimes containing critical comments would be prejudicial to officials in future being able to openly discuss all relevant issues and, moreover, would be prejudicial to relations with external stakeholders.
74. The Ministers could identify no public interest in the release of the remaining information for environmental reasons which would outweigh the public interest in continuing to withhold the information in order that officials could fully discuss key issues in an environment where they were free from concerns about early or premature disclosure.
75. The Ministers reminded the Commissioner that the information had been critically assessed and reassessed on several occasions, and that the vast majority had been released.
76. In reaching his conclusion on whether the environmental information listed in paragraph 28 should be withheld under the exception in regulation 10(4)(e), the Commissioner has considered these particular comments from the Ministers along with the public interest arguments and arguments about the prejudicial effects of disclosure which were discussed earlier in this Decision Notice. The Commissioner will not repeat those earlier arguments at this point.
77. The public interest test requires that a balancing exercise must be carried out on the basis of the specific circumstances of any given case. Consideration of the public interest involves looking at the content and context of the specific information, and the likely effect of disclosure in order to determine whether, on balance, there is a greater public interest in disclosure or withholding of the information.
78. Regulation 10(2)(b) of the EIRs introduces a presumption in favour of disclosure, which means that where arguments are evenly balanced for withholding and disclosing the information, the information must be disclosed. The starting position, therefore, is that there is a public interest in disclosure of environmental information (as expressed in the EIRs and associated European Directive) and that only if there is a stronger competing public interest in withholding the information should the exception be applied.



79. The Commissioner accepts that there is a strong public interest in protecting relations with external stakeholders and in allowing officials the opportunity to debate potentially controversial issues without concern about disclosure, at least at a time when the issue in question remains under active consideration. For these reasons, and having taken account of the public interest in transparency and accountability in relation to the information in question, he has concluded in respect of the information he found to have been properly withheld under section 30(b) of FOISA that the public interest in making the information available outweighed that in maintaining the exception in regulation 10(4)(e) of the EIRs. He therefore finds that the Ministers were entitled to withhold the information listed in paragraph 40 under that exception.
80. The Commissioner also accepts that there is a public interest in protecting high quality policy-making and that premature release of such policy discussions may in some cases hinder or prevent officials or Ministers from reaching fully considered conclusions. However, for the reasons outlined above in relation to section 29(1)(a) of FOISA, and considering matters as they stood at the time of Mr Gordon's request for review, the Commissioner does not believe that disclosure of the remaining environmental information withheld in this case would have been likely to have such detrimental consequences, or that there was any other reason for withholding it in order to protect the policy process.
81. Consequently, the Commissioner finds that the public interest making the following information available outweighs the public interest in maintaining the exception in regulation 10(4)(e) of the EIRs:
- information in document 5 paragraph 27(b)
  - information in document 6 paragraph 9 (second and third sentences only)
  - information in document 11 paragraph 5.6(a)
  - information in document 13 paragraphs 4.3 (points (a) and (b) only) and 4.6
  - information in document 16 paragraphs 3.1 (points (a), (b) (except final sentence), (d) and (e)) and 18
  - information in document 21 paragraph 24 (except points a – g)
  - information in document 29 paragraph 8.

Therefore, he finds that the Ministers were not entitled to withhold this information under the exception cited.

### **Compliance with statutory timescales**

82. In his application for a decision from the Commissioner, Mr Gordon complained that the Ministers had not responded to his request for a review within 20 working days. Section 21(1) of FOISA requires a Scottish public authority to respond to such a request within 20 working days from receipt, subject to exceptions which are not relevant in this case. Mr Gordon made his request for review on 27 January 2009 and it was received on that date, but he was not provided with a response until 9 March 2009. Accordingly, the Commissioner finds that the Ministers failed to comply with section 21(1) of FOISA.



## Summary of conclusions

83. The information which the Commissioner has found to have been wrongly withheld and which he now requires to be provided to Mr Gordon is as follows:
- information in document 5 paragraphs 17(b) and 27(b);
  - information in document 6 paragraph 9 (second and third sentences only);
  - information in document 11 paragraph 5.6 (a);
  - information in document 13 paragraphs 4.3 (points (a) and (b) only) and 4.6;
  - information in document 16 paragraphs 3.1 (points (a), (b) (except final sentence), (d) and (e)) and 18;
  - information in document 21 paragraphs 19 (except second sentence) and 24 (except points a – g);
  - information in document 29 paragraph 8.

## DECISION

The Commissioner finds that the Scottish Ministers failed to comply completely with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr Gordon. While the Ministers were correct to withhold some information under the exemptions in section 30(b)(i) or (ii), other information was wrongly withheld under these exemptions and under those in sections 30(c) and 29(1)(a) of FOISA. In doing so the Ministers failed to comply with Part 1, and in particular section 1(1), of FOISA.

The Ministers also failed to comply with section 21(1) of FOISA, by failing to provide a review response within 20 working days.

In addition, having found that certain of the withheld information was environmental information as defined by regulation 1(1) of the Environmental Information (Scotland) Regulations 2004 (the EIRs), the Commissioner finds that to that extent the Ministers failed to deal with Mr Gordon's request in accordance with the EIRs, and in particular regulation 5(1). He also finds that they were not entitled to withhold certain of the environmental information under regulation 10(4)(e) of the EIRs, while accepting that the exception could have been applied in relation to other elements of that information.

The Commissioner therefore requires the Ministers to provide Mr Gordon with the information wrongly withheld, as listed in paragraph 83 of this Decision Notice, by 28 October 2010.



## Appeal

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

**Kevin Dunion**  
**Scottish Information Commissioner**  
**6 September 2010**



## Appendix

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### 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 –

...

- (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

##### 8 Requesting information

- (1) Any reference in this Act to "requesting" information is a reference to making a request which-

...

- (c) describes the information requested.

...

##### 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;

...





### 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.

## The Environmental Information (Scotland) Regulations 2004

### 2 Interpretation

- (1) In these Regulations –

...

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

-

- (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
- (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in paragraph (a);
- (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in paragraphs (a) and (b) as well as measures or activities designed to protect those elements;
- (d) reports on the implementation of environmental legislation;



- (e) costs benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in paragraph (c); and
- (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in paragraph (a) or, through those elements, by any of the matters referred to in paragraphs (b) and (c);

...

## **5 Duty to make available environmental information on request**

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

...

- (b) is subject to regulations 6 to 12

## **10 Exceptions from duty to make environmental information available—**

- (1) A Scottish public authority may refuse a request to make environmental information available if-
  - (a) there is an exception to disclosure under paragraphs (4) or (5); and
  - (b) in all the circumstances, the public interest in making the information available is outweighed by that in maintaining the exception.
- (2) In considering the application of the exceptions referred to in paragraphs (4) and (5), a Scottish public authority shall-
  - (a) interpret those paragraphs in a restrictive way; and
  - (b) apply a presumption in favour of disclosure.

...

- (4) A Scottish public authority may refuse to make environmental information available to the extent that

...

Decision 151/2010  
Mr Tom Gordon of the Sunday Herald  
and the Scottish Ministers



(c) the request for information is formulated in too general a manner and the authority has complied with its duty under regulation 9;

...

(e) the request involves making available internal communications.