



Scottish Information  
Commissioner

**Decision 052/2008 Mr Stuart Nicolson and the Scottish Ministers**

*Correspondence on the possible siting of new nuclear power stations in Scotland*

**Applicant: Mr Stuart Nicolson**  
**Authority: The Scottish Ministers**  
**Case No: 200700093**  
**Decision Date: 15 April 2008**

**Kevin Dunion**  
**Scottish Information Commissioner**

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## Decision 052/2008 Mr Stuart Nicolson and the Scottish Ministers

***Correspondence with the UK government relating to the possibility of siting new nuclear power stations in Scotland– request handled under the terms of FOISA, but the Commissioner concluded that the information withheld was environmental information – consideration under both FOISA and the EIRs – Commissioner required disclosure.***

### Relevant Statutory Provisions and Other Sources

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Freedom of Information (Scotland) Act 2002 (FOISA): sections 1(1) (General entitlement); 2(1) and (2)(a) (Effect of exemptions); 15(1) (Duty to provide advice and assistance); 25(1) (Information otherwise accessible); 28(1) and (2)(a) and (b) (Relations within the United Kingdom); 30(b)(ii) (Prejudice to effective conduct of public affairs) and 39(2) (Health, safety and the environment)

Environmental Information (Scotland) Regulations 2004 (EIRs): regulations 2 (Interpretation) (definition of “environmental information”); 5(1) and (2) (Duty to make available environmental information on request); 6(1)(b) (Form and format of information); 9(1) (Duty to provide advice and assistance); and 10(1), (2) and (4)(e) (Exceptions from duty to make environmental information available)

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

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

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

*Decision 040/2008 Mr Rob Edwards and the Scottish Ministers*, 17 March 2008.

<http://www.itspublicknowledge.info/applicationsanddecisions/Decisions/2008/200601032.asp>

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

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



## Facts

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Mr Nicolson requested from the Scottish Ministers (the Ministers) correspondence with UK government departments relating to the possible siting of new nuclear power stations in Scotland. The Ministers responded by withholding certain information under a number of exemptions. Following an internal review, Mr Nicolson remained dissatisfied and applied to the Commissioner for a decision.

During the investigation, the information which the Ministers had initially withheld was found to fall outwith the scope of Mr Nicolson's request. However, certain other documents were identified, which were judged to fall within the scope of the request. The Ministers maintained that these were exempt from disclosure under the terms of exemptions contained in sections 25, 28 and 30 of FOISA.

The Commissioner took the view that the information identified was environmental information, and asked for the Ministers' comments. The Ministers did not agree that the information was environmental, and they declined to rely upon the exemption under section 39(2) of FOISA. However, they indicated that should the Commissioner continue to consider the case under the EIRs, they would wish to rely on regulations 6(1)(b) and on the exception in regulation 10(4)(e) of the EIRs in withholding the information.

The Commissioner considered this case under both FOISA and the EIRs. He found that the Ministers had failed to deal with the request in line with the EIRs, and that they had also failed to comply with Part 1 of FOISA. He required the information falling under the scope of the request to be provided to Mr Nicolson except for one attachment to an email which was already reasonably accessible to Mr Nicolson.

## Background

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1. On 18 August 2006, Mr Nicolson wrote to the Ministers requesting copies of all correspondence between the Scottish Executive [now known as the Scottish Government] and UK Government departments relating to the possible siting of new nuclear power stations in Scotland.



2. The Ministers responded on 15 September 2006, confirming that they held information relevant to the request, but that the majority of the information was exempt in terms of sections 28(1), 29(1)(a) and 30(b)(ii) of FOISA. The Ministers also confirmed that they held a copy of a response to an oral Westminster parliamentary question (PQ) (by Mike Weir MP on 7 June 2005) which fell within the terms of the request. However, this information, the Ministers claimed, was exempt by virtue of section 25(1) of FOISA on the basis that it was information which Mr Nicolson could otherwise reasonably obtain other than by requesting it under section 1(1) of FOISA. The Ministers helpfully provided full details of the relevant PQ and supplied a link to allow it to be accessed in the online version of Hansard. The Ministers noted that Mr Nicolson had not specified a timeframe for his request and explained that they did not centrally hold information prior to 2002 and therefore had only considered information created in the last 5 years.
3. Mr Nicolson wrote to the Ministers on 10 October 2006, requesting a review of their decision. In particular, Mr Nicolson drew the Ministers' attention to the significant public interest in information regarding nuclear policy being available.
4. The Ministers notified Mr Nicolson on 7 November 2006 of the outcome of their review. They upheld the original decision to withhold information judged to fall within the scope of the request. However, two documents were disclosed at this stage on the basis that they may be of interest to Mr Nicolson, although they did not fall within the precise terms of his request.
5. On 22 January 2007, Mr Nicolson wrote to my Office, stating that he was dissatisfied with the outcome of the Ministers' review and applying to me for a decision in terms of section 47(1) of FOISA (which, in terms of regulation 17 of the EIRs, applies for the purposes of the EIRs as it applies for the purposes of FOISA, subject to minor modification).
6. The application was validated by establishing that Mr Nicolson 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 Investigation

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7. On 25 January 2007, the Ministers were notified in writing that an application had been received from Mr Nicolson, were invited to comment on the application in terms of section 49(3)(a) of FOISA and asked to provide my Office with specified items of information required for the purposes of the investigation. The Ministers responded on 27 February 2007 with the information and comments requested and the case was then allocated to an investigating officer.
8. The Ministers noted that Mr Nicolson's request was similar to a previous request they had received (that of Mr Rob Edwards considered in my Decision 040/2008) and that they had carried out the same searches in respect of Mr Nicolson's enquiry, and had considered the same documents. As a result, this case was investigated in conjunction with the related case. My decision in this case will therefore mirror that made in Decision 040/2007. The Ministers have indicated that points made in the context of my investigation into Mr Edwards' related case could be considered (insofar as they are relevant to this case) also to apply to this case.
9. In these cases, the information withheld by the Ministers was a document obtained from a secure UK government (Department for Trade and Industry (DTI)) website to which the Ministers had been given privileged access. This document was not correspondence, and so falls outwith the terms of Mr Nicolson's request.
10. However, when comments were sought by my Office, the Ministers supplied copies of the documents below. These had been identified during the investigation of Mr Edwards' related request and the Ministers acknowledged that they may fall within the terms of Mr Nicolson's request:
  - Email from Scotland Office attaching a copy of the official record of a Westminster oral Parliamentary Question (PQ) (document 1).
  - Copy of draft response to Westminster oral PQ and supplementary briefing (document 2);
  - Email exchange between the then Scottish Executive and Scotland Office about the proposed answer to the PQ (document 3).
  - Email exchange between the then Scottish Executive and Scotland Office about the proposed answer to the PQ (document 4).
  - Email exchange between the then Scottish Executive and Scotland Office about the proposed answer to the PQ (document 5).



11. The Ministers stated that they did not believe these documents fell within the scope of the request, but should they be seen to fall within the scope, documents 2 to 5 would be exempt under sections and 30(b) of FOISA. The attachment to document 1 was submitted to be exempt from disclosure under section 25(1) of FOISA on the basis that it was already in the public domain and so reasonably accessible to Mr Nicolson. The Ministers noted that they had supplied a link to this attachment to him, and that they would not seek to apply any exemption to the covering email, should I judge it to fall within the scope of the request.
12. The Ministers also indicated that the exemption in section 28(1) applied to document 2 and that it may also apply to documents 3, 4, and 5. They noted that they had not done so at this stage (because the documents were seen as falling outside the scope of the request), but they would wish to consult the Scotland Office about the sensitivity of the documents if I confirmed that these fell within the scope of the request.
13. Further general arguments on the application of section 30(b) of FOISA (of relevance to this case and others) were provided to my Office by the Ministers with a letter of 2 May 2007.
14. On 4 December 2007, the investigating officer wrote to the Ministers advising them that I was likely to conclude that documents 1, 3, 4 and 5 (but not document 2) fell within the scope of Mr Nicolson's request. The Ministers were alerted to the fact that, having considered these documents, I was of the initial view that they contained environmental information. The Ministers were asked to comment on this matter and to provide submissions on whether they would also consider the information to fall under the scope of any of the exceptions contained in the EIRs, if I were to judge that the information withheld from Mr Nicolson was environmental information. They were also asked whether, should I conclude that any relevant information withheld was environmental information, they would wish to rely upon the exemption in section 39(2) of FOISA in relation to this information.
15. The Ministers responded on 11 December 2007. They submitted that they had acted correctly in considering the request under the terms of FOSIA rather than the EIRs. As they did not consider the information under consideration to be environmental information, they declined to apply the exemption in section 39(2) of FOISA.



16. However, the Ministers said that if I continued to disagree with their view and decided to consider the application from Mr Nicolson under the EIRs, they would wish to apply regulation 6(1)(b) to part of document 1 and the exception in regulation 10(4)(e)(internal communications) of the EIRs to documents 3, 4 and 5. They stated that the reasons for withholding the documents under these exceptions would be the same as those already submitted for withholding under the exemptions in FOISA.
17. The Ministers again questioned whether documents 1, 3, 4 and 5 fell within the scope of Mr Nicolson's request, and my Office responded with further details of my reasoning on this point.
18. I will consider the Ministers' submissions in more detail within my analysis and findings below.

## **The Commissioner's Analysis and Findings**

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19. In coming to a decision in this matter, I have considered all the information and submissions that have been presented to me by both the Ministers and Mr Nicolson and I am satisfied that no matter of relevance has been overlooked.

### **Information falling under the scope of the request**

20. Mr Nicolson's request was for:  
  
"copies of all correspondence between the Scottish Executive and UK Government departments relating to the possible siting of new nuclear power stations in Scotland."
21. The Ministers explained that when they initially responded to Mr Nicolson's request they identified one document relating to the siting of nuclear power stations, obtained from the secure DTI website to which the Ministers had been given privileged access. Although technically outwith the request, the Ministers explained that they had considered, in terms of their duty under section 15 of FOISA, whether this document could be supplied to Mr Nicolson. This document is now within the public domain:

<http://www.gnn.gov.uk/environment/mediaDetail.asp?MediaDetailsID=203181&NewsAreaID=360&ClientID=201&LocaleID=2>



22. I am aware that this document was subsequently published by the UK government and is now publicly available. While this document may be of interest to Mr Nicolson, it does not fall within the terms of the request as it is not correspondence. I shall therefore not consider this document in this decision notice.
23. I shall consider firstly whether the documents identified during my investigation (and listed in paragraph 10 above) fall within the terms of Mr Nicolson's request. Only if I consider any document to do so, will I consider any exemption or exception claimed by the Ministers to apply to that document.
24. For the remaining documents, those identified (listed in paragraph 10 above), the Ministers submitted that whilst the documents related in some degree to the information requested, strictly speaking the documents were outwith the scope of the request. They submitted that the documents are about a PQ regarding reserved and devolved powers in relation to nuclear power stations, whereas Mr Nicolson's request was for "correspondence...relating to the possible siting of new nuclear power stations in Scotland."
25. I accept the Ministers' submission that document 2 does not fall within the terms of the request since it is not correspondence between the Ministers and the UK government. Having read this document, I am of the view that it falls outwith the scope of the request.
26. Within documents 4 and 5 there are email exchanges which, as far as discernible in the supplied information, seem only to involve officials from the then Scottish Government, and so they are not correspondence with UK Government departments. As such, these do not fall within the terms of Mr Nicolson's request. On this basis, I have excluded the email of 2 June 2005 [16:03] in document 4 and the emails of 02 June 2005 [10:24] and [10:34] in document 5 from further consideration in this decision.
27. Having studied documents 1, 3, 4 and 5, I am of the view that the remaining parts fall within the terms of Mr Nicolson's request. I have noted all of the Ministers' comments on this matter and, whilst I acknowledge that these emails relate to devolved and reserved powers, I have noted that the questions about these were being asked in the context of a question concerning the development or extension of the life of nuclear power stations.



28. There is nothing in Mr Nicolson's request that states that the correspondence requested was to relate only to actual proposals with regard to the siting of any new nuclear power station. I consider it reasonable to view Mr Nicolson's request as seeking correspondence (including emails) which gives consideration of the extent of devolved and reserved powers in respect of planning for proposals for the development of new nuclear power stations. I consider that such exchanges could be said to *relate to* the possible siting of new nuclear power stations, even where there was no specific proposal under consideration.
29. Following my investigation, I am satisfied that the information identified and detailed above (excluding the items detailed in paragraphs 25 and 26) is information held by the Ministers falling within the scope of Mr Nicolson's request.

### **EIRS or FOISA?**

30. Environmental information is defined in regulation 2 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 the various restrictions and exceptions contained in the EIRs.
31. I considered the relationship between FOISA and the EIRs in detail in the Hawkins Decision and I will not repeat my reasoning in full in this decision. The Ministers' submissions in this case drew my attention to comments made in relation to the Hawkins case and I would note that the reasoning set out in the Hawkins Decision is assumed also to apply here. Broadly, my general position on the interaction between the two regimes is as follows:
  - The definition of what constitutes environmental information should not be viewed narrowly.
  - 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.
  - Any request for environmental information therefore must be dealt with under the EIRs.
  - In responding to a request for environmental information under FOISA, an authority may claim the exemption in section 39(2).
  - If the authority does not choose to claim the section 39(2) exemption, it must deal with the request fully under FOISA, by providing the information, withholding it under another exemption in Part 2, or claiming that it is not obliged to comply with the request by virtue of another provision in Part 1 (or a combination of these).



- I am entitled (and indeed obliged), where I consider 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.
32. The implication of the Hawkins Decision for my consideration of Mr Nicolson's request is therefore that I must firstly determine whether the information withheld is environmental information. If it is, I must go on to consider the Ministers' handling of the request both in terms of the EIRs and FOISA.
33. The Ministers submitted that the information under consideration in this case, were it to be held to fall within the terms of the request, did not fall within the scope of the definition of environmental information in regulation 2 of the EIRs. They noted that the information related to the answering of an oral Westminster PQ about devolved and reserved powers in relation to the siting of new nuclear power stations in Scotland, but there are, and were at the time of the request, no proposals to site new nuclear power stations in Scotland. The Ministers submitted that it was their firm view that in terms of sub-paragraph (c) of the definition of environmental information in the EIRs these documents do not relate to measures affecting or likely to affect the elements and factors referred to in sub-paragraphs (a) and (b).
34. I have noted that the correspondence identified by the Ministers and which falls within the scope of Mr Nicolson's request, is concerned with the question of devolved and reserved powers that would hold in relation to any future proposals to create new nuclear power stations, and it was created in the context of discussions around where powers would lie were such proposals to be made. As such, these exchanges relate to proposals for such development and siting, even where there was nothing specific under consideration.
35. Having considered the information which I have found to fall within the terms of Mr Nicolson's request, I have concluded that it is entirely environmental information. The emails comprise discussions which relate to planning matters and measures, albeit at that stage hypothetical, which would have an impact on elements of the environment. It is information directly relating to nuclear energy which is one of the factors falling within paragraph (b) affecting or likely to affect the elements of the environment referred to in paragraph (a). I am also satisfied that the information requested falls within the scope of paragraph (c) of that definition. Therefore, for these reasons, I am satisfied that the information in question falls within the definition of environmental information in regulation 2(1).
36. Having concluded that the information under consideration in this case is environmental information, and given that the Ministers have not chosen to apply the exemption in section 39(2) of FOISA to it, I must now go on to consider how the Ministers dealt with (or should have dealt with) Mr Nicolson's request under both FOISA and the EIRs.



## Consideration of the information withheld under the EIRs

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37. When asked for their comments on the case under the terms of the EIRs, the Ministers stated that, should I disagree with their view and find the information under consideration to be environmental information, they would consider that they were not required to disclose the attachment to document 1 under regulation 6(1)(b), and that (the relevant parts of) documents 3, 4 and 5 were excepted from disclosure under regulation 10(4)(e) (which applies to internal communications) of the EIRs.
38. The Ministers stated that the reasons for withholding the documents under the exception quoted would be the same as their reasons for withholding them under the FOISA exemptions, and that the public interest arguments for maintaining the exception would be the same as the FOISA exemptions.
39. The Ministers submitted that should I find that Document 1 fell within the terms of the request, the email part of this document could be released to Mr Nicolson and no exception was applied to this information. Having found that document 1 falls within the request, and that no argument has been made to suggest that the Ministers were entitled to withhold it when first considering Mr Nicolson's request, I have concluded that the Ministers breached the requirements of regulation 5(1) of the EIRs by withholding this. I therefore require the Ministers to release the email part of document 1 to Mr Nicolson.

### **Application of regulation 6(1)(b) - Form and format of information**

40. The email in Document 1 attaches a copy of the official record of a Westminster oral PQ. The Ministers submitted that they would not be required to disclose this attachment in terms of regulation 6(1)(b) of the EIRs.
41. Regulation 6(1)(b) of the EIRs states that where an applicant requests that environmental information be made available in a particular form or format, a Scottish public authority shall comply with that request unless the information is already publicly available and easily accessible to the applicant in another form or format.
42. In respect of the attachment to document 1, I accept the Ministers' submission that this official record is in the public domain and is information which is easily accessible to Mr Nicolson in terms of regulation 6(1)(b) other than by requesting it under the EIRs. Therefore, I accept that the Ministers were not required to make it available to Mr Nicolson under the terms of the EIRs.



43. There is a duty to provide reasonable advice and assistance in regulation 9(1) of the EIRs, and I have previously noted that I would expect a Scottish public authority relying on this provision to provide an applicant with sufficient information to allow location of the information. This has happened in this case and I have consequently found that the Ministers have complied with the duty in regulation 9(1).

#### **Application of regulation 10(4)(e) – internal communications**

44. Under regulation 10(4)(e) of the EIRs, a Scottish public authority may refuse to make environmental information available to the extent that the request involves making available internal communications.
45. This regulation directly reflects Article 4.1(e) of 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, done at Aarhus, Denmark on 25 June 1998 (the Aarhus Convention). The EIRs do not expand upon what is meant by internal communications.
46. 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. Even where the exception applies, the information must be released unless, in all the circumstances of the case, the public interest in making the information available is outweighed by that in maintaining the exception.
47. For information to fall within the scope of this exception, it need only be established that the information is an internal communication. Only if I decide that a document is an internal communication will I go on to consider the public interest test in respect of that document.
48. The Ministers were invited to provide submissions on why specific emails in documents 3, 4 and 5 fell within the terms of regulation 10(4)(e).
49. They quoted from the Aarhus Convention Implementation Guide, which – they commented – provides only very limited guidance on the internal communications exception. They quoted:

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



50. The Ministers said that it is not “customary practice” or a “norm of administrative practice” for them to release communications such as these e-mails, and so they would take the view that their approach was in accordance with the Guide. They also commented that section 30(b) of FOISA allows such information to be withheld, subject of course to the harm and public interest tests.
51. As regards the definition of ‘internal communications’, again the Ministers drew my attention to the fact that the Aarhus Convention Implementation Guide says very little:

“The second part of this exception concerns “internal communications”. Again, Parties may wish to clearly define “internal communications” for implementing the Convention. In some countries, the internal communications exception is intended to protect the personal opinions of government staff.”
52. This lack of specific guidance, the Ministers submitted, seems to suggest that countries have some scope to have their own definitions of “internal communications”. Paragraph 82 of the Ministers’ “Access to Environmental Information – Guidance for Scottish Public Authorities and Interested Parties on the Implementation of the EIRs 2004” says that “information contained in any internal communications of or between Scottish public authorities... may be excepted from the duty to release if it is of a confidential nature”. It also goes on to say that “This also extends to inter-agency correspondence and correspondence between government departments” and “the concept is of some form of relationship, of consultation or of joint working; and it may be the relationship that decides the confidentiality. It is not just geographically ‘internal’.”
53. The Ministers highlighted that the split between devolved and reserved functions relating to energy is not straightforward and by necessity there has to be a close working relationship between the Scottish and UK Governments and the joint working on a draft PQ was such an example.
54. In these circumstances, the Ministers submitted, the e-mail exchanges between the then Scottish Government and the Scotland Office would be internal communications for the purposes of the EIRs.
55. I note that regulation 12(8) of the Environmental Information Regulations 2004, applying to UK public authorities, states that internal communications includes communications between government departments. However, the EIRs contain no such overt statement. In any case, this is of limited assistance, given that the information in question comprises of communications between administrations, rather than between government departments.



56. I am aware that the Ministers, as a necessity of devolved government, will exchange communications and information with the Scotland Office. I am aware that it may not be customary or normal administrative practice for them to disclose documents such as 3, 4 or 5.
57. There may well be occasions where communications between two separate public authorities will be capable of being considered to be internal communications for the purposes of regulation 10(4)(e). However, I am unable in this case to accept that communications between the Scottish Government and the separate UK administration are internal communications for the purposes of the EIRs.
58. In interpreting this exception, I have had regard to the provisions of regulation 10(2) of the EIRs, which states that in applying the exceptions in regulations 10(4) and 10(5), authorities shall:
- (a) interpret those paragraphs in a restrictive way; and
  - (b) apply a presumption in favour of disclosure.
59. Having regard to these provisions I am unable to accept that this exemption should be construed as widely as the Ministers suggest.
60. In particular, I have found the Ministers' submissions to be circular. They state that it is not customary practice to disclose such communications and, accordingly, that they should be considered to be internal communications and so exempt. It seems to me that according to this reasoning, almost any communication between the Ministers and other organisations in the course of their work (perhaps not even restricted to the public sector) could be considered to be internal communications for the purposes of regulation 10(4)(e), unless the Ministers were already in the habit of disclosing these.
61. The communications concerned were clearly exchanged between two separate public authorities, and so, on a simple level, they are not internal. While I recognise that the interpretation of internal communications for the purposes of the EIRs may on occasion go beyond communications within a single public authority, I would expect an authority to be able to highlight particular aspects of the administrative and legal relationship between two bodies to show why communications between them should be considered to be internal.
62. Having studied the wording of the exception in the EIRs and the Directive I am of the view that in this instance emails between the Ministers and the UK Government cannot be said to fall within the definition of internal communications.



63. The Ministers have not put forward any argument that persuades me that the communications under consideration in this case should be considered to be internal. For that reason, I do not accept that the exception in regulation 10(4)(e) has been correctly applied in this case.
64. As I have found that this exception in regulation 10(4)(e) of the EIRs does not apply to the information withheld in this case, I am not required to go on to consider the public interest test under regulation 10(1) of the EIRs.

### **Conclusion under the EIRs**

65. In terms of the EIRs, I have found that the Ministers correctly withheld the attachment to the email in item 1 because it was already in the public domain and easily accessible to Mr Nicolson at the time of his request.
66. As no exception has been applied to the covering email in item 1, I found that the Ministers acted in breach of regulation 5(1) of the EIRs by withholding this.
67. I have concluded that the exception in regulation 10(4)(e) does not apply to the parts of items 3, 4 and 5 that fall within the scope of Mr Nicolson's request, and so find the Ministers acted in breach of regulation 5(1) by withholding this information.

### **Consideration of the information withheld under FOISA**

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68. As noted above, I have concluded that the information under consideration in this case is environmental information, and that Mr Nicolson was entitled to receive this under the terms of the EIRs. Nothing in FOISA can take away the rights under EIRs and so my conclusions set out above would remain, even if I were to find that some or all of the information under consideration was exempt from disclosure under FOISA. In future, I will not always go on to consider a case under the terms of both FOISA and the EIRs if I find that one set of legislation requires disclosure.
69. Nonetheless, I am aware in this case that the Ministers disagreed strongly with my view that the information under consideration is environmental information. In these circumstances, I consider it worthwhile to set out my consideration of the case under FOISA to demonstrate the outcome under that law as well as the EIRs.



70. When considering this case under FOISA, the Ministers applied the exemption in section 25 of FOISA to the attachment to document 1. The exemptions in sections 28(1) and 30(b)(ii) were applied to the email exchanges in documents 3, 4, and 5. I will consider each of these exemptions in turn below.
71. Before doing so, I again note that the Ministers have not sought to apply any exemption to the covering email in document 1. Having found that document 1 falls within the terms of the request, and that no argument has been made to suggest that the Ministers were entitled to withhold it when first considering Mr Nicolson' request I have concluded that the Ministers breached the requirements of part 1 and particularly section 1(1) of FOISA by withholding this. I require the Ministers to release the email part of document 1 to Mr Nicolson.

#### **Application of section 25(1)**

72. As noted above, the email in document 1 attaches a copy of the official record of a Westminster oral PQ. The Ministers submitted that the attachment fell within the terms of section 25(1) of FOISA as being the official record of a Westminster oral PQ, and so reasonably accessible to Mr Nicolson.
73. I accept the Ministers' submission that this official record is in the public domain and is information which Mr Nicolson can reasonably obtain, in terms of section 25(1), other than by requesting under section 1(1) of FOISA.
74. Similarly to my finding in relation to regulation 9(1) of the EIRs, I have found that the Ministers complied with the duty to provide reasonable advice and assistance to requestors in section 15(1) of FOISA by providing information to enable Mr Nicolson to identify this PQ.

#### **Application of section 28(1)**

75. The Ministers submitted that section 28(1) *may* apply to documents 3, 4, and 5. They said that when the information was shared with the Ministers there was no expectation that the information would be put in the public domain.
76. As noted above, the Ministers indicated that they would wish to consult the Scotland Office on the information to which this exemption had been applied, should I conclude that the information fell within the terms of this request. However, no further comments or submissions on this exemption were put forward following the confirmation (more than 3 months before the issuing of this decision) that I was likely to conclude that this information fell within the terms of the request. In the circumstances, I have considered this exemption in the light of the limited submissions put to me by the Ministers alongside my consideration of the content of the documents.



77. Section 28(1) allows information to be withheld if its disclosure would, or would be likely to, prejudice substantially relations between any administration in the United Kingdom and any other such administration. “Administration in the United Kingdom” is defined in section 28(2) of FOISA. In this case the Ministers consider that the disclosure of the documents relating to Mr Nicolson’s request would cause substantial prejudice to relations between the Scottish Administration and the UK Government. The exemption in section 28(1) is a qualified exemption, and so is subject to the public interest test required by section 2(1)(b).
78. As I have said in previous decision notices, it is my view that all information requests must be considered on an individual basis, and decisions to withhold or release information must relate to the specific information in each case. Section 28(1) does not give a blanket exemption for all correspondence between the Ministers and the UK Government. I do not accept that the release of documents in one case should be seen as setting a precedent for the routine release of documents in all cases, which I accept might cause substantial prejudice to relations between the two administrations. In order for the exemption to apply to the information withheld in this case, the Ministers must be able to demonstrate that the release of this particular document would, or would be likely to, prejudice substantially relations between the two administrations.
79. After examining the contents of the documents withheld, I have concluded that they do not fall within the terms of the exemption. The documents relate to the answering of an oral PQ. Much of what is contained within these documents is in the public domain in respect of the discussion of reserved/devolved powers about nuclear energy. There is nothing within the content and tone of these documents that suggests to me that disclosure would, or would be likely to, prejudice substantially the relationship between the two administrations, and the Ministers have provided no submissions relating to the specific circumstances of this case to suggest that this would be likely.
80. Given that I do not accept that the disclosure of documents 3, 4 or 5 would, or would be likely to, prejudice substantially relations between any administration in the United Kingdom and any other such administration, I have concluded that the exemption in section 28(1) does not apply in this case.
81. As I have found that section 28(1) of FOISA does not apply to any of the documents under consideration, I am not required to consider the public interest in section 2(1)(b) in relation to this exemption.



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

82. The Ministers submitted that the exemption in section 30(b)(ii) of FOISA applied to documents 3, 4 and 5. This section provides that information is exempt information if its disclosure under FOISA would, or would be likely to, inhibit substantially the free and frank exchange of views for the purposes of deliberation. This is a qualified exemption, and so is subject to the public interest test required by section 2(1)(b).
83. The Ministers submitted that these documents involve an exchange of views and release would inhibit substantially such exchanges in the future with a reduction in the quantity and quality of such debates.
84. In reaching this decision, I have also taken into consideration the arguments about the application of this exemption put forward by the Ministers in their letter of 2 May 2007 and discussed in detail (albeit in relation to the exemption in section 30(b)(i)) in my decision *089/2007 Mr James Cannell and the Scottish Executive*.
85. The main consideration in determining whether this exemption applies is not so much whether the information constitutes an exchange of views— although obviously that will be relevant in many cases – but rather whether the release of the information would, or would be likely to, have the substantially inhibiting effect required for the exemption to apply. In this connection, I look for authorities demonstrating a real risk or likelihood that actual harm will occur at some time in the near (certainly the foreseeable) future, not simply that harm is a remote possibility. Also, the harm in question should take the form of substantial inhibition from expressing advice in as free and frank a manner as would be the case if disclosure could not be expected to follow. The word "substantial" is important here: the degree to which a person will or is likely to be inhibited in expressing themselves has to be of some real and demonstrable significance.
86. I have also repeatedly noted in my decisions that it cannot necessarily follow from my requiring release of one particular piece of information in particular circumstances that information of that general variety will require to be disclosed routinely in the future. In considering this exemption, I must always look at the actual information in the context of a particular case.



87. I have considered the contents of these documents carefully, taking into consideration the Ministers' comments. I have noted the nature and content of the exchanges, which are largely factual and neutrally expressed. Much of the information exchanged in these emails has since gone into the public domain in the form of a response to the relevant PQ (and was in the public domain at the time of Mr Nicolson's request). I cannot accept that disclosure of the information under consideration here would ever have had (or would have been likely to have had) a substantially inhibiting effect on officials providing similar information or comment in future.
88. In the light of these observations, I am unable to accept that the information in documents 3, 4, and 5 is exempt under the terms of section 30(b)(ii) of FOISA. As I have found that section 30(b)(ii) of FOISA does not apply to document 5, I am not required to consider the public interest in section 2(1)(b) in relation to this exemption.

### **Conclusion under FOISA**

89. Having considered this case also in terms of FOISA, I have again found that the Ministers correctly withheld the attachment to the email in item 1 because it was already in the public domain and reasonably accessible to Mr Nicolson at the time of his request and so exempt under the terms of section 25(1) of FOISA. The Ministers complied with the duty to provide advice and assistance under section 15(1) of FOISA, by providing Mr Nicolson with details of the relevant PQ to enable him to access this should he so choose.
90. I have found that the Ministers breached Part 1 and section 1(1) of FOISA by withholding the remaining information that I have found to fall within the scope of Mr Nicolson's request.
91. As no exemption has been applied to the covering email in document 1, I found that the Ministers acted in breach of section 1(1) of FOISA by withholding this.
92. With respect to documents 3, 4 and 5, I have concluded that neither of the exemptions relied upon by the Ministers applied. Therefore, I have concluded that the Ministers again acted in breach of the requirements of section 1(1) by withholding these.



## Decision

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In this decision, I have considered a request for information that I have judged to be environmental information as defined within regulation 2 of the Environmental Information Scotland Regulations 2004 (EIRs). As set out above, authorities are obliged to consider such requests in accordance with the requirements of both the EIRs and the Freedom of Information (Scotland) Act 2002 (FOISA). My decision has therefore considered whether the Scottish Ministers (the Ministers) acted in accordance with each of these laws.

### FOISA

I find that the Ministers did not deal with Mr Nicolson's request for information in accordance with Part 1 of FOISA.

I have found that the Ministers acted in accordance with Part 1 of FOISA by withholding the information attached to the email in document 1 from Mr Nicolson. By providing information that would allow Mr Nicolson to access this information, I have found that the Ministers complied with the duty to provide advice and assistance to Mr Nicolson under section 15(1) of FOISA.

I found that no exemptions applied to the email in document 1 or (the relevant parts of) documents 3, 4 and 5, and so the Ministers acted in breach of section 1(1) by withholding these.

### The EIRs

I also find that the Ministers failed to comply fully with the requirements of the EIRs. I have found that the Ministers acted in accordance with the EIRs by withholding the information attached to the email in document 1 from Mr Nicolson. By providing information that would allow Mr Nicolson to access this information, I have found that the Ministers complied with the duty to provide advice and assistance to Mr Nicolson under regulation 9(1).

I have found that no exception applied to the email in document 1 or (the relevant parts of) documents 3, 4, and 5, and so the Ministers acted in breach of regulation 5(1) by withholding these.

### Steps to be taken

I require the Ministers to provide the covering email in document 1, and the relevant parts of documents 3, 4, and 5 (excluding those emails identified in paragraph 26 of this decision) to Mr Nicolson.

I require the Ministers to take these steps within 45 days after the date of intimation of this decision notice.



## **Appeal**

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Should either Mr Nicolson 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**  
**15 April 2008**



## Appendix 1

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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.

##### 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.
- (2) For the purposes of paragraph (a) of subsection 1, the following provisions of Part 2 (and no others) are to be regarded as conferring absolute exemption –
  - (a) section 25;

##### 15 Duty to provide advice and assistance

- (1) A Scottish public authority must, so far as it is reasonable to expect it to do so, provide advice and assistance to a person who proposes to make, or has made, a request for information to it.

##### 25 Information otherwise accessible

- (1) Information which the applicant can reasonably obtain other than by requesting it under section 1(1) is exempt information.



## **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;

## **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-

[...]

- (ii) the free and frank exchange of views for the purposes of deliberation;

## **39 Health, safety and the environment**

[...]

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



## Environmental Information (Scotland) Regulations 2004

### 2 Interpretation

(1) In these Regulations –

[...]

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

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



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

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

## **6 Form and format of information**

- (1) Where an applicant requests that environmental information be made available in a particular form or format, a Scottish public authority shall comply with that request unless -
  - (a) [...]
  - (b) the information is already publicly available and easily accessible to the applicant in another form or format.

## **9 Duty to provide advice and assistance**

- (1) A Scottish public authority shall provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to applicants and prospective applicants.

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

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



- (4) A Scottish public authority may refuse to make environmental information available to the extent that –
- (...)
  - (e) the request involves making available internal communications