



Scottish Information
Commissioner

Decision 114/2007 – Professor Neil Kay and the Scottish Executive

Information about the proposal for a “Users’ Charter” on Gourock-Dunoon ferry services

Applicant: Professor Neil Kay
Authority: The Scottish Executive
Case No: 200600666
Decision Date: 19 July 2007

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Decision 114/2007 – Professor Neil Kay and the Scottish Executive

Request for information about discussions regarding Western Ferries proposal for a “Users’ Charter” on ferry services between Gourock and Dunoon.

Relevant Statutory Provisions and other Sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) (General entitlement); 2(1) (Effect of exemptions); 29(1)(a) (Formulation of Scottish Administration policy etc.); 30(b)(i) & (ii) (Prejudice to effective conduct of public affairs); 32(1)(a)(ii) (International relations); 33(1)(b) (Commercial interests and the economy); 36(1) (Confidentiality).

The full text of each of these provisions is reproduced in Appendix 1 to this decision. The Appendix forms part of this decision.

Facts

Professor Kay asked the Scottish Executive (“the Executive”) to provide written records of any decisions, actions or conclusions in respect of meetings held between the Executive, Western Ferries and other parties to discuss Western Ferries’ proposal for a “Users’ Charter” on ferry services between Inverclyde and Cowal (Gourock-Dunoon).

The Executive published 12 documents on its website, with some information redacted. Other information was withheld on the grounds that it was exempt under one or more of the exemptions in the Freedom of Information (Scotland) Act 2002 (FOISA).

After an investigation, the Commissioner found that the Executive had partially complied with Part 1 of FOISA in responding to Professor Kay’s request, but ordered the Executive to release certain information to him.



Background

1. On 1 February 2006, Professor Kay wrote to the Executive to request copies of written records of any decisions, actions or conclusions in respect of meetings held between the Executive, Western Ferries and other parties to discuss Western Ferries' proposal for a "Users' Charter" on ferry services between Inverclyde and Cowal (Gourock-Dunoon). The dates of the meetings were as given in an answer to Parliamentary Question S2W-22324.
2. The Executive responded on 28 February 2006. It advised Professor Kay that information from 12 documents relevant to his request had been published on its website, after the redaction of some information which was deemed to be exempt under FOISA. The Executive had also withheld other documents on the grounds that the information within them was exempt from disclosure under one or more of the following exemptions in FOISA: 29(1)(a) (Formulation of Scottish Administration policy etc.); 30(b)(i) & (ii) (Prejudice to effective conduct of public affairs); 33(1)(b) (Commercial interests and the economy) and 36(1) (Confidentiality).
3. On 1 March 2006 Professor Kay asked for a review of the Executive's decision to withhold some of the information he had asked for, setting out detailed reasons why the information should be released and why he did not accept that it was exempt from disclosure.
4. The Executive replied on 30 March 2006, upholding its initial response in full.
5. Professor Kay applied to me for a decision on 31 March 2006. He complained that the Executive had not commented on the detailed points he had made in his request for review, or given any new reason for refusing him the information he had requested. He stated that the grounds for his application were the same as in his request for review.
6. The case was allocated to an investigating officer and Professor Kay's application was validated by establishing that he had made a request for information to a Scottish public authority, and had applied to me only after requesting the authority to review its response to his request.



The Investigation

7. A letter was sent to the Executive on 6 April 2006, advising that an application had been received and an investigation into the matter had begun, and seeking comments from the Executive in terms of section 49(3)(a) of FOISA.
8. The Executive was asked to supply copies of the information withheld from Professor Kay. It was asked to confirm which exemptions it had relied upon and to provide an analysis of its reasons for applying those exemptions, including the application of the public interest test where required by FOISA.
9. The Executive replied on 5 May 2006, providing the information requested along with details of the documents which had been wholly or partially withheld and those which had been released.
10. The Executive indicated that in addition to the exemptions previously cited, it considered that information within one document was exempt from disclosure under section 32(1)(a)(ii) of FOISA (International relations).
11. The Executive considered that the documents relevant to Professor Kay's request fell into three categories, each of which it had considered separately:
 - minutes of meetings
 - external correspondence, including emails and letters
 - internal exchanges between officials and between officials and Ministers.

Background to the case

12. At the time of Professor Kay's request, there were two operators providing scheduled ferry services between Gourock and Dunoon. Caledonian MacBrayne is wholly owned by Scottish Ministers and receives an annual subsidy from the Executive. Western Ferries receives no subsidy from the Executive and for a number of years has expressed concerns about the subsidy arrangements for Caledonian MacBrayne.
13. In October 2005 the Executive published adverts in the Official Journal of the European Union and other publication and procurement outlets, seeking expressions of interest from potential operators willing to provide a fully commercial service without subsidy and without the timetable restrictions that had previously applied to the Caledonian MacBrayne operation.
14. On 31 July 2006 the Transport Minister announced that three companies, Caledonian MacBrayne, V-Ships and Western Ferries, had been invited to tender for the Gourock-Dunoon ferry service. The tender has since closed without any bids being submitted.



15. This Decision Notice takes into account the circumstances which existed at the time the Executive dealt with Professor Kay's request and request for review. At the time of Professor Kay's request, the closing date for expressions of interest had passed, and the invitations to tender had not yet been issued.
16. The "Users' Charter" to which Professor Kay referred was a set of proposals put forward by Western Ferries, which the Executive considered could offer some useful guarantees to ferry users in terms of fares and service standards. The Users' Charter would be an agreement between the company, the Executive and Argyll & Bute Council which would provide the Cowal community with certain guarantees over the provision of vehicular traffic and which would lead to improvements in frequency of sailings, improved on-shore facilities, guarantees over future fare increases and replacement of the existing fleet.
17. Information already released by the Executive in response to Professor Kay's request shows that Western Ferries took the view that the Users' Charter would be required only in a situation where Western Ferries were the sole provider of ferry services between Inverclyde and Cowal, as competition from another operator would put a constraint on fare increases (minute of meeting of 9 November 2004). The Executive accepted Western Ferries' view that the Users' Charter was more appropriate for a sole operator situation, but advised that the possibility of unsubsidised competition could not be ignored.
18. The Executive has commented that its discussions with Western Ferries about a Users' Charter were, to an extent, overtaken by the new proposals in which the Executive was effectively seeking to put in place something close to a Users' Charter arrangement but via a competitive tendering process.

The Commissioner's Analysis and Findings

19. In coming to a decision on this matter, I have considered all of the information and the submissions that have been presented to me by both Professor Kay and the Executive and I am satisfied that no matter of relevance has been overlooked.



Information released / Information falling within scope of request

20. In his request, Professor Kay referred to six meetings detailed in the answer to the Parliamentary Question S2W-22324. The Executive advised that the issue of the Users' Charter was not discussed during the meeting held on 15 December 2004 and that the minute of that meeting held no information relating to his request.
21. Professor Kay appealed against this decision. He pointed out that in a letter written the next day, the Managing Director of Western Ferries referred to:

“...the users' charter which, as stated by your colleagues, is now going to be utilised as part of this commercial invitation.”

Professor Kay took this to indicate that the Users' Charter was implicit in the discussions of 15 December 2004, and that the minute of that meeting therefore fell within the scope of his request.
22. I have examined the minute of the meeting of 15 December 2004 (document 28 – see paragraph 25 below) and have not found that the matters discussed relate to any of the content of the Users' Charter. It is not clear to me that the statement of the Managing Director of Western Ferries, referred to in the previous paragraph, referred specifically to the discussions at the meeting of 15 December 2004. If the matter was discussed, it was not minuted. I have therefore accepted that the minute of this meeting does not fall within the scope of Professor Kay's request.
23. The Executive identified 34 documents containing information covered by Professor Kay's request (see Appendix 2, which gives details of the documents – Appendix 2 forms part of the decision). Document 32 was published in full on the Executive's website, as was document 6 with the removal of one sentence which I accept falls outside the scope of Professor Kay's request.
24. Information from another ten documents was also published on the Executive's website; this included the meeting minutes referred to above in paragraph 20. I have accepted that in eight of those documents the remaining, unpublished information falls outside the scope of Professor Kay's request and no additional relevant information has been withheld from him (documents 3, 5, 14, 29, 30, 31, 33 and 34). The other two documents which were partly published (7 and 23) contain some information which I accept falls outside the scope of Professor Kay's request while information which is covered by his request was withheld under various exemptions in FOISA. The application of exemptions is considered later in this Decision Notice.



25. On further consideration, the Executive found that two documents (26 and 28) fell completely outside the scope of Professor Kay's request, and I accept this view. I found that the information in documents 20 and 27 also fell outside the scope of his request and did not require to be considered in this Decision Notice.

Information withheld

26. The remaining documents contain information covered by Professor Kay's request but which the Executive believes to be exempt from disclosure under FOISA.
27. In its reply to Professor Kay and in its submission to my Office, the Executive framed its arguments in terms of the different types of document covered by the request: minutes, internal exchanges and external correspondence. Exemptions were considered as they related to each type of document. Although I accept this approach, it is important to stress that some of the exemptions cited by the Executive are not "class-based". I therefore intend to consider the application of each exemption as it relates to the information within the documents, rather than consider its application to a whole category of documents.

Application of exemption in Section 29(1)(a)

28. The Executive has applied the exemption in section 29(1)(a) to all information withheld from Professor Kay, with additional exemptions cited in relation to each document.
29. For information to fall under the section 29(1)(a) exemption, it must relate to the formulation or development of government policy, i.e. to the development of options and priorities for Scottish Ministers, who will subsequently determine which options should be translated into political action and when. The formulation of government policy suggests the early stages of the policy process where options are considered, risks are identified, consultation takes place and recommendations and submissions are presented to Scottish Ministers. Development suggests the processes involved in improving upon or amending already existing policy and could involve the piloting, monitoring, reviewing, analysing or recording the effects of existing policy.
30. The reasoning behind the section 29(1)(a) exemption in FOISA is to ensure that, where appropriate, Scottish Administration policy can be formulated and developed effectively by allowing the Administration to discuss matters in a candid and frank manner. The section 29(1)(a) exemption is a qualified exemption which means that the application of this exemption is subject to the public interest test required by section 2(1)(b) of FOISA.



31. Professor Kay has argued that the exemption in section 29(1)(a) cannot apply to the information in this case, because extant EC legislation and communication relating to the conduct and administration of ferry services limits the powers of the Executive to formulate or develop policy in this area. He takes the view that the Executive's powers are limited to the imposition of public service or economic or social objectives (such as pricing and regularity of the service) that the ferry operator would not adopt were it considering its own economic interest. He believes that conditions relating to and potentially furthering the commercial objectives of any operator are for the operator to decide, rather than the Executive.
32. In support of his views, Professor Kay cited the 1992 Maritime Cabotage Regulation and the follow-up Communication from the European Commission of 2003, concerning the imposition of public service obligations on shipping companies participating in regular services to, from and between islands.
33. The Executive did not address this point in any of its responses or in its submission to me, and it is not within my remit to decide whether or not the Executive was legally empowered to develop policy in this particular area. The relevant factor for me to consider is whether the Executive was in fact engaged in a process of policy development regarding the Gourock-Dunoon ferry service.
34. The documents in this case make it clear that consultation was taking place, and the Minister for Transport was considering options presented to him: these are activities associated with policy formulation. It is clear from the Executive's response that it regarded the process as one of policy development. Discussions about the proposed Users' Charter were included in this process. I have therefore concluded that the Executive was justified in citing the exemption in section 29(1)(a) in respect of information relating to the formulation or development of policy, notwithstanding Professor Kay's concerns about the legal scope for the Executive's policy development.
35. I have found that where the Executive applied the exemption in section 29(1)(a), it was justified in doing so by the content of the information withheld. However, section 29(1)(a) is subject to the public interest test required by section 2(1)(b) of FOISA and I must therefore consider whether, in all the circumstances of the case, the public interest in disclosing the information withheld is outweighed by the public interest in maintaining the exemption.



The public interest test – submission from Professor Kay

36. Professor Kay did not have the benefit of access to the documents under consideration but has commented on the general public interest issues associated with this case.
37. Professor Kay has pointed out that the future of the Gourock-Dunoon ferry route has major implications for users, dependent communities, other ferry operators and the taxpayer. He believes that these groups all have a right to be assured that future arrangements for the ferry services on the route are open, transparent and fair. He takes the view that the documents and information released so far raise legitimate questions as to whether this has, or can be seen to have been, achieved. He believes that these questions can only be settled through full disclosure of all the information falling within the scope of his request.
38. Professor Kay also noted that it was only through a local newspaper picking up on a remark that it became known that the Executive had held meetings with Western Ferries and Argyll & Bute Council to discuss the proposed Users' Charter. He believes that this may reduce public confidence in the Executive's actions and intentions in this area, and that confidence will be further eroded by decisions to withhold or redact relevant information and documents. He believes public confidence can only begin to be restored by a policy of full disclosure.

The public interest test – submission from the Executive

39. As noted previously, the Executive has withheld each of the documents in this case under several exemptions, and has provided its reasons for applying each of the exemptions to the information under consideration. The Executive, believes that, on balance, the public interest is best served by upholding each of the exemptions cited and withholding the information, and has put forward several arguments in support of this view. In explaining why the public interest lies in maintaining the exemptions, the Executive has provided generic public interest arguments rather than considering the public interest in relation to each exemption cited.
40. I have summarised below the generic public interest arguments submitted by the Executive, and will then consider those arguments in relation to individual exemptions (where required to do so by section 2(1)(b) of FOISA).



41. Firstly and in relation to information in the minutes of meetings with Western Ferries and correspondence with external parties, the Executive stated that there is a public interest in Western Ferries continuing to provide an affordable and efficient ferry service between Inverclyde and Cowal. The Executive believed that if certain aspects of its discussions with the company became public knowledge this would provoke an adverse reaction from local ferry users sufficiently strong to harm the company's business, potentially leading to higher fares or a reduced service: these developments would not be in the public interest.
42. The Executive went on to argue that it is in the public interest that the competitive tendering exercises carried out by the Executive are robust, transparent and offer value for money for the tax-payer. The Executive believes that the willingness of companies to participate in such processes may be reduced and the prospect of subsequent legal challenge may be increased if commercially sensitive information which companies have supplied is released to competitors. The Executive took the view that, given the importance of tendering processes in securing good value for money for the tax payer, these outcomes would not be in the public interest.
43. The Executive also submitted that it was vital for Scottish public affairs that Ministers and officials should be able to deliberate different options for the delivery methods of policy outcomes. (This argument was also advanced in relation to the internal exchanges withheld.) The policy development process sometimes involves discussions with third parties, including commercial bodies and public authorities, and these meetings will be minuted. The Executive took the view that to allow this process to work effectively all parties concerned must have some confidence that the confidentiality of exchanges will be maintained, and that it was important for officials to be able to conduct meetings within an environment that allows for the free and frank exchange of views and advice. The Executive argued that there is a basic public interest in a system that facilitates good administration and policy making; otherwise, the effectiveness of government would be prejudiced. For these reasons, the Executive believed that the public interest lay in non-disclosure of the information withheld.



44. Finally, the Executive considered that “the benefits of officials having the ability to have a free and frank exchange of views eventually led to the creation of the new policy” and stated that the announcement that the Gourrock-Dunoon route was to be advertised for operators to run on a commercial basis (8 December 2004) was “welcomed by all those with interest”. The Executive concluded that it was therefore difficult to envisage why it would be in the public interest to know how it reached its decision, adding:

“...the important factor is that it did, and it did so by exploring and deliberating, often discarding different delivery options before reaching a solution which was mutually acceptable. As such, we do not consider that it would be in the public interest to release substantial information relating to the discussions and deliberations about the Users’ Charter proposal when these were largely overtaken by the Minister of Transport’s announcement on 8 December 2004.”

Conclusions on the public interest test in relation to section 29(1)(a)

45. In balancing the public interest in this case, I have borne in mind that the Executive has already released some information from the minutes and correspondence relating to those meetings. I have also considered how the general arguments about the public interest relate to the specific information withheld before determining whether the public interest in disclosure outweighs the public interest in withholding the information.
46. Taking the Executive’s arguments in turn, I first considered the argument put forward in paragraph 41. I do not accept that the outcome predicted by the Executive would be likely to have followed disclosure. The Executive has not provided any evidence or reasoning to support its assertion that a strong public backlash against Western Ferries would occur if certain information became public knowledge. On the basis of the arguments put forward, I find that the Executive has not demonstrated that the public interest in disclosure of the information withheld under section 29(1)(a) of FOISA is outweighed by the public interest in maintaining the exemption.



47. In relation to the argument summarised in paragraph 42, I have not found that any of the information withheld was supplied to the Executive as part of a competitive tendering exercise, or that Western Ferries was participating in such a process during the period in which the relevant meetings and exchanges of correspondence took place. The meetings held between Western Ferries and the Executive were not directly related to a tendering process, and I do not accept that the effects of disclosure of the information withheld would equate to disclosure of information which had been provided by a company as part of a formal tendering process. This issue is discussed in greater detail later in this Decision Notice in relation to the exemption in section 33(1)(b). I do not find that the public interest consideration summarised in paragraph 42 carries great weight with respect to the exemption in section 29(1)(a).
48. I will now turn to the argument summarised in paragraphs 43 and 44. In general, I accept the Executive's argument that it can be in the public interest for the process of policy formulation and development to be able to be carried out with some degree of privacy, so that (for instance) officials are not inhibited from considering a wide range of policy options, expressing their views upon them, and discussing problems that present themselves during the process. In deciding whether the public interest in disclosure outweighs the public interest in withholding the information, I have taken this into account.
49. I consider that there is a general public interest in making information accessible where disclosure would enhance scrutiny of decision-making processes and thereby improve accountability and participation. As I stated in decision 077/2006 (Paul Hutcheon and the Scottish Executive), this goes to the heart of freedom of information legislation. Without an adequate knowledge of the basis upon which decisions are made, the public will not have an opportunity to call public authorities to account; nor can they hope to participate in the decision-making process and contribute to the formation of policy and legislation if that process is hidden from view.
50. When Professor Kay made his information request, the future of the Gourock-Dunoon ferry route had already been the subject of public discussion for several years. It was known (through Parliamentary Questions and articles in the Dunoon Observer) that in 2004 the Executive had met representatives of one of the companies interested in providing a ferry service for the route, and that that operator had put forward proposals for an agreement which would provide certain guarantees for the service, understanding that it would be the sole service provider. The Executive chose a different way of delivering its policy, as announced on 8 December 2004. However, discussions with the company then continued during 2005.



51. In the circumstances it seems to me that it is important to acknowledge and to take into account the public interest in disclosure of information from discussions about the future of a ferry service so important to its users, particularly if the information increases understanding of how the decision announced on 8 December 2004 was reached, and the context in which it was taken.
52. In coming to my view that certain information need not be disclosed I have concluded that the information should be withheld to provide officials with the space to put forward options and to consider relevant matters and that the general public interest in disclosing the information is outweighed by that in maintaining the exemption.
53. However in other instances I have decided, in the particular circumstances of this case, that the information is such that the public interest in understanding what matters were taken into account by the Executive lies in its disclosure and is not outweighed by the public interest in maintaining the exemption. I am of the view that the information is important in allowing an insight into the factors which were in play when the Executive determined its policy on a matter of some controversy and significance.
54. My decision in relation to individual documents (part or whole) is detailed in Appendix 2. Where I have determined that the information is exempt from disclosure under section 29(1)(a) and that it is not in the public interest to release the information, I do not intend to consider in every case whether the other exemptions claimed by the Executive apply.

Section 33(1)(b) – Commercial interests

55. Section 33(1)(b) of FOISA states that information is exempt information if its disclosure under FOISA would, or would be likely to, prejudice substantially the commercial interests of any person (including, without prejudice to that generality, a Scottish public authority).
56. There are certain elements to section 33(1)(b) of FOISA which an authority needs to demonstrate when relying on this exemption. Where an authority is arguing that the commercial interests of a third party will be harmed, the authority must indicate the nature of those commercial interests and how these interests would, or would be likely to, be substantially prejudiced.
57. The exemption in section 33(1)(b) is subject to the public interest test required by section 2(1)(b) of FOISA. This means that even where an authority considers that section 33(1)(b) of FOISA applies to the information, it must still go on to consider whether, in all the circumstances of the case, the public interest in disclosing the information is outweighed by that in maintaining the exemption and release the information if that is not the case.



58. In relation to information withheld from the minutes of meetings with Western Ferries (documents 1, 7 and 23) the Executive has argued that disclosure of the information withheld under section 33(1)(b) would jeopardise the commercial interests of Western Ferries. The first reason submitted to me was based on the Executive's fear that Western Ferries' business could be harmed if its passengers became aware of certain aspects of its discussions with the Executive (see 41). As noted above in 46, I find this argument to be unsupported by any evidence.
59. The Executive also pointed out that Western Ferries remained in the bidding process for operating the Gourock-Dunoon ferry service and that disclosure of certain information, including the draft Users' Charter (document 17), could undermine the company's bid. The Executive considered it possible that some of the views expressed by the company could be drawn upon in the preparation of its bid, as could some of the information provided to the Executive.
60. As noted previously, I have not found that any of the information withheld was supplied to the Executive as part of a competitive tendering exercise, or that Western Ferries was in the process of tendering during the period in which the relevant meetings and exchanges of correspondence took place. However I accept that at the time when Professor Kay made his request, Western Ferries had indicated its intention regarding the tendering process: it had by then submitted an expression of interest in response to the Executive's invitation of 7 October 2005, and was waiting to hear whether it would be invited to submit a tender (invitations were issued in July 2006). In reaching my decision I have not taken into account events that have subsequently unfolded, but rather what was reasonable to expect of the Executive in coming to its decision at the time Professor Kay made his request.
61. I have not been provided with any submission from Western Ferries giving its views on whether disclosure of the information withheld would damage its commercial interests: instead, I must form my determination from the Executive's representation of those interests.
62. In considering whether disclosure of the information withheld under section 33(1)(b) would, or would be likely to, prejudice substantially the commercial interests of the company, I am aware that some information about Western Ferries' proposals for the Gourock-Dunoon route has been disclosed in the information already released. I do not accept that the exemption can apply to information which is substantially the same as information which has already been disclosed.



63. However, I noted previously that some of the information withheld would be likely to indicate the company's position in bidding for the tender, and particularly so in respect of document 17, which is a draft Users' Charter. I also found that some of the documents contained information which related closely to the headings of the invitation to tender issued in July 2006 and which, if disclosed at the time when Professor Kay made his request, would have been likely to put Western Ferries at a disadvantage in a competitive tendering situation. I accept that disclosure of information which would reveal details likely to be included in a tender bid by the company would, at the time of Professor Kay's request, have been likely to prejudice substantially the commercial interests of Western Ferries, and that this information is covered by the exemption in section 33(1)(b).
64. The Executive also argued that disclosure of the information withheld under section 33(1)(b) would undermine the integrity of the Executive's tendering process. The Executive did not provide any detailed reason for this view or set out the harm that would be caused to commercial interests as a consequence of disclosure.
65. As I have not found that any of the information withheld was supplied to the Executive as part of a competitive tendering exercise or that Western Ferries was engaged in such a process at the time of Professor Kay's request, I take the view that disclosure would be unlikely to have the effect of undermining either the integrity of the Executive's tendering process or public / commercial confidence in that process. I do not accept that the argument put forward carries sufficient weight to justify withholding information under section 33(1)(b): the Executive is required to show that substantial prejudice to commercial interests would (or would be likely to) follow disclosure of the information.
66. The Executive has withheld certain information from internal exchanges under section 33(1)(b) of FOISA (documents 1, 8, 15 and 24). It explained that these documents outline the commercial sensitivities of the negotiations at the time and include great detail on the commercial nature of the parties involved in the discussions and the delicate climate in which the negotiations and discussions were taking place. The Executive pointed out that these documents could be considered confidential insofar as the authors would not have expected them to be released into the public domain.



67. As noted previously, the test required in order to uphold the exemption in section 33(1)(b) is whether disclosure of the information would, or would be likely to, prejudice substantially the commercial interests of any person (including a Scottish public authority). As discussed previously, where I have found that disclosure of information would reveal details likely to be included by Western Ferries in a tender bid, and which would otherwise not have been known, I have accepted that the exemption in section 33(1)(b) should apply. This applies to certain information in documents 1, 15, 17 and 24. In these instances I have therefore found it unnecessary to go on to consider the arguments put forward by the Executive which relate more generally to the commercial sensitivities of the negotiations in which the parties were involved.
68. Regarding document 8, I found that not all the information withheld fell within the scope of Professor Kay's request. Of the information that was covered by his request and which was not exempt from disclosure under any other exemption considered in this Decision Notice, I did not find that any information should be withheld under section 33(1)(b). None of the remaining information provided any more detail about the commercial environment in which the negotiations were taking place than has already been disclosed in other documents relating to Professor Kay's request.
69. Where I have found that the exemption in section 33(1)(b) applies to the information withheld, I am required to go on to consider the public interest test required by section 2(1)(b) of FOISA and consider whether, in all the circumstances of the case, the public interest would be better served by the disclosure of the information or the maintaining of the exemption.
70. The public interest arguments submitted by the Executive have already been outlined in paragraphs 39 - 44 above. No specific reasons have been given why it would not be in the public interest for information exempt under section 33(1)(b) to be disclosed; however, having found that disclosure of certain information would be likely to substantially prejudice Western Ferries' commercial interests, I would require more than general arguments in favour of disclosure to find that the balance of the public interest lay in disclosure. I have not found any reason for disclosure that would outweigh the harm caused by disclosure, to Western Ferries' commercial interests and to the fairness of the competitive tendering process for the Gourock-Dunoon route. I have therefore found that the general public interest in disclosure of information is outweighed in this instance by the public interest in withholding the information.

Section 36(1) - Confidentiality



71. Section 36(1) exempts information from disclosure if it is information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings. One type of communication covered by this exemption is communications between legal adviser and client. For the exemption to apply to this particular type of communication, certain conditions must be fulfilled. For example:
- The information withheld must relate to communications with a legal adviser. This clearly includes communications with solicitors, and would also include communications with Counsel (although there was no involvement of Counsel in this case).
 - The legal adviser must be acting in his/her professional capacity and the communications must occur in the context of his/her professional relationship with his/her client
 - The privilege does not extend to matters known to the legal adviser through sources other than the client or to matters in respect of which there is no reason for secrecy
 - The privilege does not extend to communications which relate to fraud or the commission of an offence
72. The Executive applied this exemption to information in documents 4, 7, 19 and 21. Having examined the documents withheld under section 36(1), I accept that, with the exception of document 7, these are communications between a solicitor and their client (the Executive) to which a claim of confidentiality could be maintained in legal proceedings.
73. Document 7 contains one sentence which indicates the view of the Executive's legal advisor but which was a summary provided by an Executive official in a meeting with Western Ferries. The Executive has stated that the Executive's legal advice was not revealed during the discussions minuted in document 7: the views expressed were merely a preliminary opinion based on the limited information that was provided. These views were shared with representatives of two external organisations. I find that in these circumstances the Executive cannot claim that the preliminary opinion provided by its legal advisor is information to which a claim of confidentiality could be maintained in legal proceedings. The exemption in section 36(1) has therefore been misapplied to this information. Other exemptions have been applied to document 7 which must also be considered before deciding whether the information should be released or withheld (see paragraph 111 below).



74. The exemption in section 36(1) is a qualified exemption, which means that the application of this exemption is subject to the public interest test set out in section 2(1)(b) of FOISA and consider whether, in all the circumstances of the case, the public interest would be better served by the disclosure of the information or the maintaining of the exemption.
75. As I have noted in previous decision notices (for instance, 033/2006, Mr O'Donnell and East Dunbartonshire Council), the courts have long recognised the strong public interest in maintaining the right to confidentiality of communications between legal adviser and client on administration of justice grounds. Many of the arguments in favour of maintaining confidentiality of communications were discussed in a House of Lords case, *Three Rivers District Council and others v Governor and Company of the Bank of England* (2004) UKHL 48. I accept that there will always be a strong public interest in maintaining the right to confidentiality of communications between legal adviser and client.
76. The Executive has argued that it is critical that its decisions are informed by legal advice when relevant, and that any disclosure of legal advice has a high potential to prejudice the Executive's ability to defend its legal position. In this case, the quality of the Executive's decision making would (it has argued) be substantially impaired if officials had not received advice from their legal advisor on aspects of the Users' Charter proposals.
77. On balance I have found that the public interest lies in preserving the confidentiality of communications between legal adviser and client, and that the information withheld under section 36(1) should not be disclosed. Accordingly, I find that documents 4, 19 and 21 should be withheld under this exemption.

Section 30(b)(i) and (ii)

78. Section 30(b)(i) and 30(b)(ii) of FOISA allow information to be withheld if its disclosure under FOISA would, or would be likely to, inhibit substantially the free and frank provision of advice or the free and frank exchange of views for the purposes of deliberation, respectively. In applying these exemptions the chief consideration should not be whether the information constitutes advice or opinion, but whether the release of the information would or would be likely to have the effect set out in the statute – i.e. inhibit substantially the free and frank provision of advice or the free and frank exchange of views for the purposes of deliberation.



79. The exemptions under section 30(b) of FOISA acknowledge that the prospect that information which reveals internal thinking processes may be disclosed could, in itself, be detrimental to the ultimate quality of decision making within a public authority. The inhibition caused by this prospect may lead to discussions being less robust and candid, insufficient records being created, hard choices being avoided and, ultimately, the quality of government being undermined.
80. As before, where I have already determined that the information is exempt from disclosure and that it is not in the public interest to release the information, then I do not intend to consider in every case whether the exemptions in section 30(b)(i) and (ii) have also been correctly applied.
81. In considering the application of any exemption, I must always look at the actual information withheld, not simply the category of information to which it belongs or the type of situation in which the request has arisen. In other words, in considering these particular exemptions, I must consider whether the disclosure of that information would, or would be likely to, in all the surrounding circumstances, have the substantially inhibiting effect described in section 30(b) of FOISA. 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.
82. In section 30(b) of FOISA, the chief consideration is not whether the information itself constitutes advice or the exchange of views for the purposes of deliberation, but whether the release of the information that has been withheld would, or would be likely to, inhibit substantially the free and frank provision of advice or the free and frank exchange of views for the purposes of deliberation.
83. Given the harm test contained in these exemptions (“inhibit substantially”), the standard to be met in applying the test in sections 30(b)(i) and (ii) of FOISA is high. When considering the application of the exemptions in section 30(b) of FOISA, each request should be considered on a case by case basis, taking into account the effects anticipated from the release of the particular information involved. This is likely to involve consideration of:
- the subject matter of the advice or exchange of views;
 - the content of the advice or exchange of views;
 - the manner in which the advice or exchange of views is expressed and



- whether the timing of release would have any bearing (for instance, if a decision was still being considered, and further views were still being sought, releasing advice or views might be more substantially inhibiting than once a decision has been taken.

Submission from the Executive in relation to section 30(b)(i) and (ii)

84. In relation to information within the minutes of meetings, the Executive stressed that it is crucial for Ministers, through officials, to have a free and frank exchange of advice and views during the policy development cycle, either between themselves or with representatives of external organisations. In this case, that included engagement with local stakeholders (I take this to mean Western Ferries and Argyll & Bute Council). The Executive fears that if the views of stakeholders were exposed to scrutiny through Freedom of Information requests, stakeholders may consider themselves unable to express their views in a free and frank manner, and that this would have a detrimental impact on the Executive's ability to conduct its business.
85. In a letter dated 2 May 2007, the Executive also provided me with a further submission regarding its views on the exemptions in section 30(b)(i) and (ii), and has advised me that it wishes these views to be taken into consideration in relation to any case in which these exemptions have been cited.
86. While I have considered the arguments put forward by the Executive in its letter of 2 May 2007, my views on the Executive's revised position on section 30(b) are set out fully in Decision 089/2007 (Mr James Cannell and the Scottish Executive) and I do not consider it necessary to add anything in relation to these arguments in this decision notice.
87. The Executive found that the exemptions in section 30(b)(i) and (ii) were particularly relevant to the redacted record of the discussions at the meeting of 8 June 2004 (document 1) and 11 August 2004 (document 7). Their reasons are considered below, at paragraphs 110 and 111 respectively.
88. In relation to information from internal exchanges, the Executive argued that it is essential for officials and Ministers to have confidence that the confidentiality of their exchanges will be maintained in order for Ministers to be provided with well thought out advice based on an exploration of all alternative options. It stated that these factors are also applicable for the exchange of views between officials, and explained that during the process in which the new policy for the Gourock-Dunoon route was evolving, it was necessary for officials to deliberate the advantages and disadvantages of different options, and that this often required officials to seek the advice of professional colleagues. The Executive submitted that it is essential that these discussions can take place in a climate where it is possible to have a free and frank exchange of views for the purposes of deliberation, otherwise the whole process of policy making in this case would have been weakened.



89. Except in a few instances, the Executive did not give more detailed reasons for believing that disclosure of specific information in the documents withheld would produce a substantially inhibiting effect upon officials or Ministers.
90. In relation to information from external exchanges, the Executive provided specific reasons, relating to the context in which the exchange took place, for applying either or both exemptions in 30(b)(i) and (ii) to documents 9, 10 and 17. In this decision notice I have already found that document 17 is exempt from disclosure under section 33(1)(b) and therefore I will not consider whether the exemption in section 30(b)(i) and (ii) should also be upheld here. The Executive's arguments in respect of documents 9 and 10 are considered in full detail from paragraph 101 onwards.

Western Ferries' views

91. The documents reveal Western Ferries views on a range of matters concerning the need for tendering and the basis on which tendering should be considered.
92. I need also to consider whether Western Ferries would have expressed their views in the manner and in the detail recorded here if this might later be disclosed. It seems to me that a distinction has to be drawn between those views which forcibly expressed the company's view of matters generally, and which have been expressed publicly in similar if not identical terms, and those which go into some detail about the company's position, which have not been publicly revealed.
93. Generally I have already concluded that information about the company's detailed proposals is already exempt under s33. Where it is not then I must consider whether s30(b)(i) or (ii) applies.
94. The timing of Professor Kay's request is relevant to my assessment: by the time he made his request the competitive tendering process had started, and whatever views Western Ferries may or may not have held previously about the need for such a process were now superseded by the company's participation in that process (which was by then public knowledge). Disclosure of these views at the time Professor Kay asked for information was therefore unlikely to have any direct impact upon future exchanges between the Executive and the company regarding the tendering process.
95. I then considered whether disclosure would, or would be likely to inhibit substantially the expression or recording of similar views by officials or by third parties participating in meetings with officials. It seems to me unlikely that officials would fail to record the views of Western Ferries or other third parties especially where they believed there were matters which required to be considered or that Ministers should be alerted to such views, for example prior to any meeting or exchange of correspondence.



96. In this instance I have concluded that substantial inhibition is unlikely to occur, as it is clear that by the time disclosure was requested, Western Ferries had committed itself to participation in the tendering process and its previously-held views were either of historic interest and would not have affected participation in tendering, or related to long-standing views which the company has publicly expressed.

Exchanges between officials and between officials and Ministers

97. I accept that some of the information withheld acquired additional sensitivity from the context within which the discussions took place, i.e. at a time when the Executive had not finally reached the decision to put the route out to competitive tendering, and at a time when Western Ferries was known to be in dispute with the Executive over the issue of subsidies to Caledonian MacBrayne. The fact that when Professor Kay made his request, Western Ferries had signalled its interest in tendering competitively for the route also imparts a greater sensitivity to some of the advice and views expressed in the documents withheld.
98. I have accepted that to disclose some of the information withheld under section 30(b)(i) and (ii) would, or would be likely to, inhibit substantially the free and frank provision of advice or the free and frank exchange of views in similar situations in future. This is particularly so where disclosure would have been likely to affect the tendering process for the Gourock-Dunoon ferry route, by revealing information likely to be included in Western Ferries' tender bid.
99. Otherwise I have generally found that the arguments submitted in respect of exchanges between policy officials, or policy officials and Ministers are not compelling in this case, confined as it is to information relating to the Users Charter.
100. However, I have accepted that the exchanges recorded in the documents withheld include some information which, if disclosed, would, or would be likely to, inhibit the free and frank provision of advice or the free and frank exchange of views in similar situations in future. I have reached this conclusion after considering both the context in which the exchanges took place (as explained by the Executive) and after considering the factors listed in paragraph 83 above.

Document 9



101. Document 9 is an email from an official within the Executive to the Managing Director of Western Ferries. The Executive has explained that as the discussions on the prospect of a Users' Charter were at a relatively early stage, information was provided to Western Ferries to allow their proposals to be developed into a tangible output for the Executive's consideration. The Executive took the view that without the ability to have such a free and frank exchange of views for the purpose of deliberation, the issue may not have been developed to the extent that it was and the Executive may not have ended up with the proposals that ultimately emerged.
102. I accept that such communications can play a valuable role in progressing policy discussions. However, the Executive has not explained why disclosure of this information, at the time Professor Kay asked for it, would inhibit officials from engaging in similar communications in future, and I have not found any reason to support this view. The information withheld does not reveal detailed thinking about the Users' Charter, but focuses on certain guidance documents which are publicly available on the Executive's website. It is known that the Executive had discussions with Western Ferries about a proposed Users' Charter: it seems to me to be quite unexceptional for the Executive to have directed Western Ferries to relevant guidance documents during those discussions. Professor Kay's request was made after the draft Users' Charter had been produced and discussed, and the information in document 9 was no longer a subject of current discussion.
103. Bearing these circumstances in mind, I cannot accept that disclosure of this information would have a substantially inhibiting effect upon officials providing similar advice or views in future. I find that the Executive was wrong to withhold the information in Document 9 under section 30(b)(i) and (ii) of FOISA.

Document 10

104. The Executive has advanced particular reasons for believing that document 10 is exempt from disclosure under section 30(b)(ii), expressing the view that disclosure would reveal Argyll & Bute Council's position on the successful delivery of ferry services between Inverclyde and Cowal. The Executive argued that the same key issues were at the centre of discussions about the service specification for the Gourock-Dunoon tendering process, and that if the Council's position were to be publicly exposed this could have a detrimental effect on the Executive's tendering plans.



105. I have not accepted this argument. Firstly, I do not believe that it would be assumed by anyone not involved in the tendering discussions that the information in document 10 would be key to those discussions. The document was clearly produced in relation to the draft Users' Charter rather than for any other purpose. Nor does it follow that the Council's position, as expressed in an email in August 2004, would not or could not have changed by early 2005, the time at which the Executive was considering Professor Kay's request and discussing the service specification for the tendering process.
106. I also found that some of the information is substantially the same as information which has already been disclosed, in relation to the scope of the Users' Charter.
107. Finally, the argument put forward by the Executive does not relate to the question of inhibition caused by disclosure of the information, which is the central consideration in applying the exemption in section 30(b)(ii). I therefore do not accept that this exemption has been correctly applied to the information in document 10.

Documents 1, 7 and 23

108. The Executive also found the exemptions in section 30(b)(i) and (ii) to be particularly relevant to the redacted record of the discussions at the meeting on 8 June 2004 (document 1) and 11 August 2004 (document 7) because of the issues discussed and because of the timing of the discussions. The Executive has explained that these meetings took place at a time when Western Ferries had yet to provide any tangible proposals regarding the Users' Charter, which up until then had only been discussed orally. Document 7 includes a reference to the preliminary views of the Executive's legal advisor.
109. The Executive considers that it would be clearly detrimental to its ability to conduct business if officials were unable to express their views in a free and frank manner so that policy options can be explored and deliberated. It also found this exemption to be applicable to document 23, explaining that it contains very frank views on the draft discussion document on the Users' Charter.



110. I found that some of the information in document 1 consisted of advice or views which, if disclosed at the time of Professor Kay's request, would be likely to have detrimental consequences for the parties involved to the extent that disclosure would be likely to inhibit substantially the free and frank provision of advice or exchange of views for the purposes of deliberation in future. Being mindful of the prohibition in section 45 of FOISA (Confidentiality of information obtained by or furnished to the Commissioner), I cannot give details of the nature of this information, but it had a bearing on matters other than the proposed Users' Charter and which had yet to be resolved.
111. Regarding document 7, some of the document's contents have already been found to be exempt from disclosure under other exemptions considered, and where this is the case I have not gone on to consider whether the exemption in section 30(b)(ii) should also be upheld. (The exemption in section 30(b)(i) was not applied to document 7). Of the remaining information in the document, I found one sentence should be withheld, as it provides the preliminary views of the Executive's legal advisor. As noted previously, I have found that the Executive was wrong to withhold this information under section 36(1), but I accept that it is advice which, if disclosed in this context, would be likely to have a substantially inhibiting effect upon the free and frank exchange of views in similar situations in future.
112. In document 23 I did not find that the exemptions in section 30(b)(i) and (ii) could apply to any of the information withheld. I found that, as advised by the Executive, the document did contain some frank views, but that these did not relate directly to the subject of the Users' Charter and fell outside the scope of Professor Kay's request. Other information which might have had a detrimental effect if disclosed has been withheld under other exemptions such as section 33(1)(b), and I have accepted that this decision should be upheld for reasons stated previously in this Decision Notice. However, I found that some of the contents of this document were not covered by any exemption cited by the Executive, and that they should be disclosed. Details of my decision are in Appendix 2.

Section 30(b)(i) and (ii) – public interest test

113. Where I have found that the exemptions in section 30(b)(i) or (ii) were correctly applied, I must go on to consider whether in all circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information. If the two are evenly balanced, the presumption should always be in favour of disclosure. The Executive's submission on the public interest in relation to this case is summarised in paragraphs 39 – 44.



114. In considering the public interest as it relates to the exemptions in section 30(b)(i) and (ii), I accept that the disclosure of information which would or would be likely to substantially inhibit the free and frank provision of advice, or the free and frank exchange of views, would not, in general, be in the public interest for the reasons put forward by the Executive. As I noted in paragraph 48, there is a clear public interest in ensuring that officials are not inhibited from considering a wide range of policy options, expressing their views upon them, and discussing problems that present themselves during the policy development process.
115. Against this, I have considered the public interest arguments summarised in paragraphs 37 & 38 and paragraphs 49 - 51. On balance, I have found that disclosure of the particular information to which the exemption in section 30(b)(i) and (ii) applies would add little to public understanding of the decision-making process regarding the Users' Charter, or offer significant benefits in terms of accountability of a public authority. I find that the public interest in the disclosure of the information withheld under section 30(b)(i) and (ii) is outweighed by the public interest in avoiding the substantial inhibition to officials discussed in previous paragraphs, and that where the exemption applies it should therefore be upheld.

Section 32(1)(a)(ii)

116. Section 32(1)(a)(ii) of FOISA exempts information if its disclosure would, or would be likely to, prejudice substantially relations between the United Kingdom and any international organisation or international court. The exemption is subject to the public interest test required by section 2(1)(b) of FOISA.
117. The Executive has applied the exemption in section 32(1)(a)(ii) to all information in document 15 with the exception of paragraphs 17-23 of Annex A. I have only considered the application of this exemption in relation to information which falls within the scope of Professor Kay's request and which I have not already found to be exempt from disclosure under the exemptions previously considered in this decision notice. For clarity, I found the following information to fall within the scope of Professor Kay's request:

Paragraphs 2 – 4, paragraph 5 (points (i) and (ii)), Annex A paragraphs 7 & 8, 11 – 13, 29 & 30, 32, 36 & 38.

I do not accept that paragraph 42 of Annex A falls within the scope of the request.

118. Details of the information withheld under other exemptions can be found in Appendix 2 to this Decision Notice.



119. The Executive has provided me with a description of the political context in which the views expressed in this document should be considered. It takes the view that disclosure of this document would substantially prejudice relations between the United Kingdom and the European Commission. However, the Executive has not provided any specific reasons why the disclosure of the advice and views in this document would lead to such a consequence.
120. In my guidance on the application of this exemption (Freedom of Information (Scotland) Act 2002 Briefings series) I advised that before applying any of the exemptions under section 32(1)(a), public authorities should be aware that they may be required to demonstrate that disclosure would indeed substantially prejudice the relations or interests in question. I also provided an example of a situation in which information withheld by the United Kingdom government had been disclosed under the US Freedom of Information Act without causing substantial prejudice between the two administrations.
121. I have found that at the time of Professor Kay's request it was public knowledge that the Executive was engaged in discussions with the European Commission on the issue of the subsidy available to Caledonian MacBrayne. The record of the debate in the Scottish Parliament on 8 December 2004 contains many references to the need to clarify the European Commission's view on this matter¹. In addition, on Tuesday 8 March 2005 (at which point the Executive was reviewing its response to Professor Kay's request of 1 February 2005), the Local Government and Transport Committee of the Scottish Parliament considered a letter from the Transport Minister (dated 18 February 2005) in which he made it clear that he had recently had discussions with the Transport Commissioner on this issue, and that further discussions were taking place.²
122. After taking into account the fact that some information in document 15 was already public knowledge, and in the absence of any substantial argument from the Executive to support its use of the exemption, I have found that the exemption in section 32(1)(a)(ii) was wrongly applied to the limited amount of information which remained for me to consider in document 15.

Conclusions

123. My conclusions about the application of exemptions and the public interest in withholding or disclosing the information are detailed in the schedule of documents attached to this Decision Notice.

¹ <http://www.scottish.parliament.uk/business/officialReports/meetingsParliament/or-04/sor1208-02.htm>

² <http://www.scottish.parliament.uk/business/committees/lg/papers-05/lgp05-09.pdf>



Decision

I find that the Scottish Executive (the Executive) partially complied with Part 1 of FOISA in responding to Professor Kay's request. However, I also find that the Executive failed to comply with Part 1 of FOISA by wrongly withholding some of the information requested by Professor Kay under the exemptions it cited and, in doing so, failed to deal with Professor Kay's request in accordance with section 1(1) of FOISA.

I require the Executive to provide Professor Kay with the information indicated in Appendix 2 within 45 days of receipt of this decision notice or, where relevant, as indicated on the copy to be sent under separate cover to the Executive.

Appeal

Should either Professor Kay or the Executive wish to appeal against my decision, there is an appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days of receipt of this notice.

Kevin Dunion
Scottish Information Commissioner
19 July 2007



Appendix 1

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.

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



32 International relations

- (1) Information is exempt information if-
 - (a) its disclosure under this Act would, or would be likely to, prejudice substantially-
 - (...)
 - (ii) relations between the United Kingdom and any international organisation or international court

33 Commercial interests and the economy

- (1) Information is exempt information if-
 - (...)
 - (b) its disclosure under this Act would, or would be likely to, prejudice substantially the commercial interests of any person (including, without prejudice to that generality, a Scottish public authority).

36 Confidentiality

- (1) Information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings is exempt information.



APPENDIX 2

Y = exemption applies, public interest not in disclosure unless stated

N = exemption misapplied

NC = exemption not considered

| No. | Date/ Item | Exemptions applied | Exemptions - decision | Release / Withhold |
|-----|-----------------------------------------|--------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 1 | 8 June 2004 / minute | 29(1)(a) 30(b)(i) & (ii) 33(1)(b) | 29(1)(a) - Y 30(b)(i) & (ii) - Y 33(1)(b) - Y | Withhold |
| 2 | 28 June 2004 / internal exchange | 29(1)(a) 30(b)(i) & (ii) | 29(1)(a) - Y 30(b)(i) & (ii) - Y | Withhold |
| 3 | 19 July 2004 / minute | Partly Released | | Information within scope of request already released |
| 4 | 21 July 2004 / internal exchange | 29(1)(a) 30(b)(i) 36(1) | 29(1)(a) - NC 30(b)(i) - NC 36(1) - Y | Withhold |
| 5 | 26 July 2004 / external correspondence | Released | | Information within scope of request already released |
| 6 | 6 August 2004 / external correspondence | Released | | Information already released |
| 7 | 11 August 2004 / minute | 29(1)(a) 30(b)(ii) 33(1)(b) 36(1) | 29(1)(a) - Y but public interest lies in disclosure 30(b)(ii) - Y for paragraph 25, first two sentences only. 33(1)(b) - N except last 3 bullet points in paragraph 26 36(1) - N | Some information already released and some information outside scope of request. Release paragraph 15 - first 2 bullet points; paragraph 16; paragraph 19; para 24; paragraph 25 apart from 1 st two sentences; paragraph 26 apart from last three bullet points; paragraph 27 and paragraph 28 in full. |
| 8 | 17 August 2004 / internal exchange | 29(1)(a) 30(b)(i) & (ii) 33(1)(b) | Found not all within scope. 29(1)(a) - Y but public interest lies in disclosure 30(b)(i) & (ii) - Y for comments on A&BC views; Y for | Release information as indicated on copy provided to Executive. |



| | | | | |
|----|------------------------------------------|------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------|
| | | | last two paragraphs. 33(1)(b) – N for information within scope of request | |
| 9 | 19 August 2004 / external correspondence | 29(1)(a) 30(b)(ii) 33(1)(b) | 29(1)(a) – Y but public interest lies in disclosure. 30(b)(ii) - N 33(1)(b) - N | Release |
| 10 | 19 August 2004 / external correspondence | 29(1)(a) 30(b)(ii) 33(1)(b) | 29(1)(a) – Y but public interest lies in disclosure 30(b)(ii) - N 33(1)(b) - N | Release |
| 11 | 19 August 2004 / internal exchange | 29(1)(a) 30(b)(i) & (ii) | 29(1)(a) – Y, public interest lies in disclosure. 30(b)(i) & (ii) – Y for some of information | Some information outside scope of request. Release information as indicated on copy provided to Executive. |
| 12 | 20 August 2004 / internal exchange | 29(1)(a) 30(b)(i) & (ii) | 29(1)(a) – Y but public interest lies in disclosure 30(b)(i) & (ii) – Y for one paragraph. | Some information outside scope of request. Release information as indicated on copy provided to Executive. |
| 13 | 20 August 2004 / external exchange | 29(1)(a) 30(b)(i) & (ii) | 29(1)(a) – Y but public interest lies in disclosure of some information. 30(b)(i) & (ii) – N | Release after redacting paragraph 2 from “The main reason...” to end of paragraph. |
| 14 | 26 August 2004 / external correspondence | Partly released | | Information within scope of request already released |
| 15 | 28 September 2004 / internal exchange | 29(1)(a) 30(b)(i) & (ii) 32(a)(ii) 33(1)(b) | 29(1)(a) – Y 30(b)(i) & (ii) – Y (some parts) 32(a)(ii) - N 33(1)(b) – Y for part of one sentence in paragraph 8 | Found some information withheld to be outside scope of request. Release as indicated on copy provided to Executive. |
| 16 | 6 October 2004 / internal exchange | 29(1)(a) 30(b)(i) & (ii) | 29(1)(a) – Y but public interest lies in disclosure of some of the information. | Release page 1 paragraph 3 with redaction of points 3a and 3c. Also release |



| | | | | |
|----|------------------------------------------|--------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------|
| | | | 30(b)(i) & (ii) - N | date/recipient. |
| 17 | 7 October 2004 / external correspondence | 29(1)(a) 30(b)(i) & (ii) 33(1)(b) | 29(1)(a) - Y 30(b)(i) & (ii) - NC 33(1)(b) - Y | Withhold – 33(1)(b) (Covering email to be disclosed as part of doc. 18) |
| 18 | 7 October 2004 / external correspondence | 29(1)(a) 33(1)(b) | 29(1)(a) – Y but public interest lies in disclosure. 33(1)(b) - N | Release whole document, not just part previously deemed to fall within scope. |
| 19 | 8 October 2004 / internal exchange | 29(1)(a) 30(b)(ii) 36(1) | Only considered first email; other information already considered in documents 17 & 18. 29(1)(a) – NC 30(b)(ii) - NC 36(1) – Y | Withhold email from Graham Laidlaw; other information already considered as part of documents 17 and 18. |
| 20 | 11 October 2004 / internal exchange | 29(1)(a) 30(b)(ii) | | Information outside scope of request - withhold |
| 21 | 14 October 2004 / internal exchange | 29(1)(a) 30(b)(ii) 36(1) | 29(1)(a) - Y 30(b)(ii) - NC 36(1) – Y | Withhold |
| 22 | 15 October 2004 / internal exchange | 29(1)(a) 30(b)(ii) | 29(1)(a) – Y 30(b)(ii) - N | Withhold |
| 23 | 9 November 2004 / minute | 29(1)(a) 30(b)(ii) 33(1)(b) | 29(1)(a) – Y but public interest lies in disclosure 30(b)(ii) - N 33(1)(b) – Y (one sentence) | Some information outside scope of request. Release information as indicated on copy provided to Executive. |
| 24 | 10 November 2004 / internal exchange | 29(1)(a) 30(b)(i) & (ii) 33(1)(b) | 29(1)(a) - Y 30(b)(i) & (ii) - NC 33(1)(b)- N | Withhold |
| 25 | 16 November 2004 / internal exchange | 29(1)(a) 30(b)(i) & (ii) 33(1)(b) | 29(1)(a) - Y 30(b)(i) & (ii) - NC 33(1)(b)- N | Withhold |
| 26 | 17 November 2004 / internal exchange | Deemed to be completely outside scope of request | | Information outside scope of request – withhold. |
| 27 | 1 December 2004 / internal exchange | 29(1)(a) 30(b)(i) & (ii) 33(1)(b) | 29(1)(a) - NC 30(b)(i) & (ii) - NC 33(1)(b) - NC | Information outside scope of request – withhold. |



| | | | | |
|----|---------------------------------------------|--------------------------------------------------|--|------------------------------------------------------|
| 28 | 15 December 2004 / minute | Deemed to be completely outside scope of request | | Information outside scope of request – withhold. |
| 29 | 16 December 2004 / external correspondence | Partly released | | Information within scope of request already released |
| 30 | 20 January 2005 / external correspondence | Partly released | | Information within scope of request already released |
| 31 | 11 July 2005 / external correspondence | Partly released | | Information within scope of request already released |
| 32 | 9 August 2005 / external correspondence | Released | | Information already released |
| 33 | 22 September 2005 / minute | Partly released | | Information within scope of request already released |
| 34 | 30 September 2005 / external correspondence | Partly released | | Information within scope of request already released |