



Scottish Information
Commissioner

**Decision 218/2007 Professor A D Hawkins and
Transport Scotland**

*Request for information regarding the Aberdeen Western Peripheral
Route*

**Applicant: Professor A D Hawkins
Authority: Transport Scotland
Case No: 200600654
Decision Date: 19 November 2007**

**Kevin Dunion
Scottish Information Commissioner**

Kinburn Castle
Doubledykes Road
St Andrews
Fife
KY16 9DS



Decision 218/2007 – Professor A D Hawkins and Transport Scotland

Request for information regarding the Aberdeen Western Peripheral Route – several documents released. Two documents containing relevant communications were withheld. The Commissioner took the view that these contained environmental information. The Commissioner found that exemptions under FOISA and exceptions under the EIRs applied to these documents, but the public interest in maintaining these was outweighed by the public interest in disclosure of the information – he required that the two documents should be released.

Relevant Statutory Provisions and other Sources

Freedom of Information (Scotland) Act 2002 sections 1(1) and (3) (General entitlement); 2 (Effect of exemptions); 29(1)(a) and (b), (4) (definitions of “government policy” and “Ministerial communications”) and (5) (Formulation Scottish Administration policy etc.); 30(b)(i) (Prejudice to effective conduct of public affairs); 39(2) (Health, safety and the environment); 66 (Saving for existing powers of disclosure) and 73 (Interpretation) (definition of “information”)

Environmental Information (Scotland) Regulations 2004 (EIRs) regulations 2 (Interpretation) (definition of “environmental information”); 3(3) (Application); 5(1)-(3) (Duty to make available environmental information on request); 10(1), (4) and (5) (Exceptions from the duty to making environmental information available); 17 (Enforcement and appeal provisions) and 20 (Application of the Act)

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

Facts

Professor A D Hawkins (Professor Hawkins) emailed the Transport Minister requesting a range of information and documentation relating to the decision on the route for the Aberdeen Western Peripheral Route (AWPR) announced in December 2005. Transport Scotland (an agency of the Scottish Ministers) sought clarification of the request and subsequently responded to the clarified request. A range of information was provided, but Transport Scotland withheld certain communications on the basis that they were exempt from disclosure under the terms of section 30(b) of the Freedom of Information (Scotland) Act 2002 (FOISA).



This decision was upheld by Transport Scotland on review. Professor Hawkins was dissatisfied with the response he received from Transport Scotland and submitted an application for a decision by the Scottish Information Commissioner.

During the investigation, the Scottish Ministers (the Ministers) claimed additionally that the exemptions in sections 29(1)(a) and 29(1)(b) of FOISA applied to the information withheld from Professor Hawkins. (The exception under regulation 10(4)(e) of the EIRs was also relied on by the Ministers towards the end of the investigation.)

Following an investigation, the Commissioner found that Transport Scotland had failed to deal with Professor Hawkins' request for information in line with Part 1 of FOISA and, in particular, section 1(1) of FOISA.

Furthermore, he was of the view that the information contained within the documents was environmental information and, therefore, Transport Scotland had failed to deal with the request in line with the Environmental Information (Scotland) Regulations 2004 (the EIRs) and, in particular, regulation 5 of the EIRs.

He required disclosure of the two documents withheld.

Background

1. Before setting out the details of Professor Hawkins' information request, it will be helpful to provide some background information on the matters to which this relates. The AWPR is a new road that is being developed with the aim of improving travel in and around Aberdeen and the north-east of Scotland. It is scheduled for completion in 2011 and will provide a link between towns to the north, south and west of Aberdeen. More information on this project can be found on the following website: www.awpr.co.uk. On 1 December 2005, the Transport Minister announced the chosen route for the AWPR. This was a combination of two route options that had been under consideration (the Milltimber Brae option and the Peterculter/Stonehaven option).
2. Professor Hawkins emailed the Scottish Ministers on 12 December 2005. His email was marked for the attention of the Transport Minister and asked for a wide range of information and documentation relating to the decision on the route for the AWPR, and the Transport Minister's announcement of 1 December 2005.
3. Professor Hawkins' request stated that it was made under the terms of FOISA. It sought



- Information on the “legal and administrative status” of the announcement;
 - surveys, reports and documents used to arrive at the decision on the route;
 - documents prepared when appraising the merits of alternative routes;
 - correspondence, notes and minutes from the Minister or his civil servants in relation to the decision on the route and the evaluation of merits of the different options;
 - documents relating to the costs of surveys and design surveys on one option;
 - documents relating to private/public partnership arrangements proposed in relation to the chosen option and any documents in relation to the possibility of this route being a toll road; and
 - all correspondence between the Minister, his civil servants, Aberdeenshire Council and the AWPR Team over the months of October, November and December 2005.
4. Transport Scotland emailed Professor Hawkins on 15 December 2005, noting that some of his requests were unclear and very broad ranging. It requested that he clarify his request in line with section 1(3) of FOISA.
5. Professor Hawkins emailed Transport Scotland on 19 December 2005 clarifying his request and responding to specific questions raised by Transport Scotland. I will not detail the clarified request in full. The part relevant to this decision confirmed that Professor Hawkins wanted to access to:
- “communications in relation to the choice of option for the route which were exchanged between the Minister and his senior staff, or sent by the Minister or his senior staff to the AWPR team during November 2005.”
6. Transport Scotland wrote to Professor Hawkins on 17 January 2006 responding to his clarified request. It explained that no information was held in relation to some parts of his request, because various types of preparatory work in relation to the chosen route had yet to be undertaken. Transport Scotland disclosed a range of documents to Professor Hawkins in response to other parts of his request. However, it refused to release any communications between officials and Ministers relating to the decision about the chosen route. This information was withheld on the basis that it was exempt from disclosure under section 30(b) of FOISA.



7. On 31 January 2006 Professor Hawkins wrote to Transport Scotland stating he was dissatisfied with its response and asked it to review its decision.
8. On 3 March 2006 Transport Scotland wrote to Professor Hawkins in response to his request for review, confirming that it upheld its decision to withhold the communications associated with the AWPR decision under section 30(b) of FOISA. Some factual information contained within these was supplied to him, however.
9. Professor Hawkins wrote to my Office on 28 March 2006, stating that he was dissatisfied with the outcome of Transport Scotland's review and applying to me for a decision to withhold the communications associated with the AWPR decision.
10. The case was then allocated to an investigating officer and the application validated establishing that Professor Hawkins 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 his request.

The Investigation

11. As noted above, Transport Scotland is an agency of the Ministers and, in line with agreed procedures, the investigating officer wrote to the Ministers on 13 April 2006, giving notice that an application had been received and that an investigation into the matter had begun and inviting comments as required under section 49(3)(a) of FOISA (which, in line with regulation 17 of the EIRs, applies for the purposes of the EIRs as it applies for the purposes of FOISA, subject to the modifications specified in regulation 17(2)). The Ministers were asked to supply my Office with, amongst other items, a detailed analysis of the application of section 30(b) of FOISA and copies of the information withheld.
12. The Ministers responded on 2 May 2006, providing their comments on the application and copies of the three documents that had been withheld from Professor Hawkins by Transport Scotland.
 - Document 1 concerns arrangements for a meeting to discuss the options for the route. The document itself does not include discussion of the various options.
 - Document 2: a minute on the subject of the proposed route of the AWPR, together with two Annexes (A and B).



- Document 3: a series of emails between officials and Ministers on the subject of the route of the AWPR.
13. The Ministers indicated that they did not believe that document 1 actually fell within the scope of Professor Hawkins' request, because it related to the arrangements for a meeting, rather than the substance of any relevant communications. I agree with this assessment, and this document will not be considered further in this decision.
 14. Documents 2 and 3 both contain communications from November 2005 between the Transport Minister and officials relating to the decision on the route of the AWPR and so they both fall within the scope of Professor Hawkins' request. The Ministers indicated that they considered both of these items to be exempt from disclosure under the exemption in section 30(b)(i) of FOISA. They also cited further exemptions that had not been relied upon in Transport Scotland's initial handling of the request. The Ministers claimed that both documents were exempt under section 29(1)(a) of FOISA, and that document 3 was also exempt under section 29(1)(b) of FOISA.
 15. In subsequent correspondence with the Ministers, the investigating officer sought to clarify their position on various aspects of this case. These included the interpretation of Professor Hawkins' request for information and the steps undertaken to locate and retrieve the requested information.
 16. 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.
 17. In August 2007, the investigating officer alerted the Ministers to the fact that, having considered the documents withheld in this case, I was of the view that these contained environmental information. The Ministers were asked to comment on this matter and 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 Professor Hawkins was environmental information.
 18. The Ministers responded on 16 August 2007. They submitted that Transport Scotland had acted correctly in considering the request under the terms of FOSIA rather than the EIRs. Having reached this conclusion, the Ministers declined to consider the request under the terms of the EIRs at that stage.
 19. I met with the Ministers on 17 October 2007 to discuss my approach to cases such as these in more detail. The Ministers subsequently wrote to me on 5 November 2007 to say that they still considered my approach to be incorrect, but that if I continued to disagree with their view and decided to consider the application from Professor Hawkins under the EIRs, then they would wish to apply the exception at regulation 10(4)(e) of the EIRs to the documents in question, given that they are all internal communications.



20. I will consider the Ministers' submissions in more detail within my analysis and findings below.

The Commissioner's Analysis and Findings

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

Information falling under the scope of the request

22. Although only two documents are to be considered in this decision, I am satisfied that the Ministers have identified all relevant communications that fall within the scope of Professor Hawkins' clarified request. As noted in paragraph 5 above, this sought communications in relation to the choice of option for the route which were exchanged between the Minister and his senior staff, or sent by the Minister or his senior staff to the AWPR team during November 2005.
23. Given the formulation of this request, it would not necessarily encompass all communications that led to the decision on the AWPR. Communications between the Transport Minister and other Ministers, or communications solely between officials, for example, will fall outside the scope of this request. Communications that pre-date or post-date November 2005 would also fall outside the scope of this request.
24. I am aware that in correspondence regarding his request for review, and in his application for a decision, Professor Hawkins has indicated that he wishes to access communications that would fall outside the scope of his clarified request (and also, I would note, the original formulation of his request). However, I am satisfied that the Ministers have acted correctly by identifying only those documents falling within the parameters specified by Professor Hawkins when he clarified his request in December 2005. In considering this matter, I am not able to consider whether Transport Scotland should provide any further information to Professor Hawkins.



EIRs or FOISA?

25. Environmental information is defined in regulation 2 of the EIRs, (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 regulations 10 and 11 of the EIRs.
26. Documents 2 and 3 contain communications between Ministers and officials with regard to the choice of route for the AWPR. This decision was one that would have significant environmental implications as a consequence of the large scale road building on the route concerned and subsequent traffic levels. This would include traffic emissions levels affecting the air quality in the areas through which the route passed, as well as emissions contributing to climate change and would also lead to changes to the natural and built environment in these areas.
27. As the contents of documents 2 and 3 relate not only to a decision that would have significant environmental implications, but also contain and discuss specific aspects of the environmental impact, I reached an initial view that the information under consideration in this case was environmental information. The investigating officer relayed this initial view to the Ministers in an email dated 9 August 2007. She asked for their comments on this point, and as to whether it would have been appropriate to consider Professor Hawkins' request under the terms of the EIRs. The Ministers were also asked to confirm whether they would consider documents 2 and 3 to fall under the scope of any of the exceptions from disclosure contained within the EIRs.

The Ministers' submissions on the EIRs

28. The Ministers responded to this request from my Office on 16 August 2007. They indicated that in considering this matter, they had regard to the provisions of guidance which they had published *Access to Environmental Information: Guidance for Scottish Public Authorities and Interested Parties on the Implementation of the Environmental Information (Scotland) Regulations 2004*. (I will comment on this Guidance later in this decision.) The Ministers noted the terms of paragraphs 10 and 11 of this guidance, which consider the relationship between FOISA and the EIRs. They read as follows:

10. Where parallel regimes are potentially applicable, the FOISA will apply unless information is environmental information, to which the [EIRs] regime will apply instead. If the information is personal data, the Data Protection Act 1998 will apply instead. There should be no overlap. Regulation 11 and paras 115-117 below deal with the DPA in more detail.



11. An authority should decide under which regime a request falls most appropriately. In general, it may be most practical and transparent to deal with the request entirely under the appropriate regime. If a larger request appears to fall into environmental information and other information it may be possible to deal with the parts under the [EIRs] and FOISA regimes. However, care should be taken to avoid confusion eg of the precise provisions of the regimes where the regimes differ in detail. Whichever information regime is used, the DPA requirements for personal data will need to be met.

29. Having considered this guidance, the Ministers submitted that the information within document 3 concerned discussions between Ministers about the costs of the AWPR project and so was not “environmental information” The Ministers accepted that there was environmental information contained within document 2, but this was mostly contained within an annex which had already been disclosed to Professor Hawkins.
30. The Ministers asserted that, while the information falling under the scope of Professor Hawkins’ request fell under both FOISA and the EIRs, the clear majority would be covered by FOISA. They went on to state that, in line with paragraph 11 of their guidance (set out in paragraph 28 above), they believed that the most practical way forward was to handle the request under FOISA. They accepted, again informed by paragraph 11 of their guidance, that a request can be handled under both FOISA and the EIRs, but claimed that care should be taken to avoid confusion. They stated that the limited amount of environmental information being withheld under FOISA exemptions would also have been withheld under the equivalent EIR exceptions and, given that the public interest considerations were the same, their approach caused no detriment to Professor Hawkins and was probably easier to understand.
31. The Ministers initially declined to provide any submissions as to the exceptions within the EIRS that they would apply. This was on the basis that since they remained of the view that they were correct to deal with Professor Hawkins’ request under FOISA, they had not considered which of the EIR exceptions would apply. (However, as noted above, the Ministers later decided that they wished to apply the exception at regulation 10(4)(e) of the EIRs to the information.)



32. The Ministers went on to claim that where a request straddles both FOISA and EIRs, an authority is entitled to make a judgement as to which regime it would be most appropriate to apply. They submitted that this judgement can be questioned by me only if it is likely to be detrimental to the applicant. The Ministers noted further that they could see nothing in either FOISA or the EIRs that would allow a subsequent change of regime without the agreement of all parties. The Ministers suggested that I had the right to disagree with a public authority as to which regime should have been applied and to say so in my decision, and that in such circumstances, it would be open for the applicant to resubmit his request to the public authority under the other regime.
33. The Ministers concluded that it was entirely reasonable for them to deal with Professor Hawkins' request under the terms of FOISA, especially since he had specified that he was making his request under FOISA. They noted that they did not see how the non-environmental information requested by Professor Hawkins could have been dealt with under the EIRs, and the only other option would have been to split the request, dealing with part of the request under FOISA and part under the EIRs. The Ministers suggested that their approach was the most straightforward for both themselves and for Professor Hawkins.

Commissioner's consideration of the Ministers' submissions on the EIRs

34. The Ministers' submissions, described above, have raised some important points of law that have implications beyond the particular circumstances of Professor Hawkins' case.
35. In what follows, I will consider the arguments put to me by the Ministers in relation to this case and in doing so I shall seek to make clear my understanding of the relationship between FOISA and the EIRs, and what should happen in cases where I reach the view that the EIRs should have been applied by a public authority where the public authority has applied FOISA. However, first of all I wish to establish the extent to which this case involves environmental information.

Do documents 2 and 3 contain environmental information?

36. When a request for information is received by a public authority, it may not be at all clear whether it entails consideration of information which, in whole or in part, is environmental. That may only become evident when considering the nature and contents of the specific information found to fall within the scope of the request.
37. In this case, I must first consider whether documents 2 and 3 contain environmental information. In doing so, I have reviewed the contents of these documents, having regard to the definition of environmental information contained within regulation 2 of the EIRs and the Ministers' submissions.



38. These communications all relate directly to the decision on the route for the AWPR and factors, whether financial or environmental, which influenced this decision.
39. Document 2, for example, contains references to emissions levels, a factor which can influence the state of the air and the atmosphere. This information clearly falls under part (b) of the definition of environmental information in regulation 2 of the EIRs. There is also information on cost benefit analysis of the route options, which falls within part (e) of the definition of environmental information.
40. However, in my view, the definition of what constitutes environmental information should not be viewed narrowly. I regard both documents 2 and 3 as containing information on measures, including activities, policy and plans (which in turn would require legislation) which would be likely to affect the elements and factors referred to in part (a) and (b) of the definition of environmental information.
41. I have noted the Ministers' comments about document 3, which suggest that this contains information only relating to discussions of the costs of route options. I do accept that some parts of documents 2 and 3 relate less directly than other parts to the environmental consequences of the route choice, and relate to matters e.g. around the costs of options or presentation of the decision.
42. However I am unable to agree with the Ministers that the majority of the information withheld from Professor Hawkins is not environmental information. The documents comprise information about measures and activities, in respect of a road building programme, which is likely to affect the state of the elements of the environment, principally the air and landscape, and information about factors such as emissions likely to affect the elements of the environment. This information also includes cost benefit and other economic analyses and assumptions within the road building plans. I conclude, therefore, that the information contained within documents 2 and 3, taken together, falls within the definition of environmental information.
43. I would also note that, when first responding to Professor Hawkins' request for information, Transport Scotland supplied a range of information, a significant proportion of which was also environmental information.
44. Having concluded that the information withheld from Professor Hawkins is environmental information, I now turn to consider the implications of this conclusion.



Can an authority choose to consider a request for environmental information under FOISA rather than the EIRs?

45. In the circumstances, it may be helpful for me to set out my understanding of the relationship between FOISA and the EIRs. Both laws set out rights to access information. In each case, a general right is created, and in each case information may be withheld in certain circumstances.
46. If an information request is considered under FOISA, then information must be provided (subject to certain other considerations set out in Part 1 of FOISA), unless one of the exemptions from disclosure set out in Part 2 of FOISA is judged to apply. The majority of exemptions are subject to the public interest test required by section 2(1)(b) of FOISA. This test requires that, even if an exemption applies, the information must be disclosed unless, in all the circumstances of the case, the public interest in maintaining that exemption outweighs the public interest in the disclosure of the information.
47. Under the EIRs, environmental information that has been requested must be disclosed as required by regulation 5 unless the information falls within the scope of a number of exceptions from disclosure, set out in regulations 10 and 11 of the EIRs.
48. All of the exceptions set out in regulations 10(4) and (5) of the EIRs are subject to a public interest test set out in regulation 10(1)(b). Regulation 10(1) provides that a public authority may refuse a request to make environmental information available if it falls under the scope of one of the exceptions in regulations 10(4) and (5) and, in all the circumstances of the case, the public interest in making information available is outweighed by that in maintaining the exception. Further, regulation 10(2) of the EIRs specifies that, in considering the application of the exceptions contained in regulations 10(4) and (5), the public authority shall interpret those exceptions in a restrictive way and apply a presumption in favour of disclosure.
49. Under both FOISA and the EIRs, there is no requirement that a public authority applies any exemption or exception from disclosure that may apply. This is clear from section 66 of FOISA and regulation 3(3) of the EIRs.
50. While the EIRs provide a right of access to a subset of all recorded information that is held by public authorities (i.e. that falling under the scope of the definition of environmental information), FOISA provides for access to any recorded information, which may of course include environmental information. There is no provision which automatically excludes information from consideration under FOISA when it is subject to the separate right under the EIRs.



51. Therefore, where environmental information is concerned, there are two separate statutory frameworks for access to that information and, in terms of the legislation, an authority is required to consider the request under both FOISA and EIRs.
52. When a written request for information is received by a public authority, it comes under the scope of section 1 of FOISA whether or not it is for environmental information, given the wide definition of “information” contained in section 73 of FOISA, i.e. “information recorded in any form”. The definition does not exclude environmental information.
53. However, if the information falls within the definition of environmental information, authorities have both an **obligation** and an **option**. They have the obligation of dealing with the request under the EIRs and they have the option of claiming the exemption at section 39(2) of FOISA, which means they do not, at the same time, have to respond to the request under FOISA.
54. In this case, the Ministers have agreed that at least part of the information which has been withheld from Professor Hawkins is environmental information. However, to summarise their arguments, they consider that the majority of the information is non-environmental, and, given that they see no detriment to Professor Hawkins in dealing with his request fully under FOISA, they are entitled to make a judgement as to which regime it would be most appropriate to apply. As noted earlier, the Ministers referred to their own guidance in coming to this view.
55. I have concluded that all of the information in this case is environmental information. However, even if I agreed with the Ministers’ view that only some of the information is environmental, I do not accept that the Ministers’ approach of considering the request only and entirely under FOISA is lawful. I take the view that, for any information that is environmental, even if it is considered under FOISA, the information must be considered under regulation 5 of the EIRs. Regulation 5 clearly provides that “a Scottish public authority that holds environmental information shall make it available when asked to do so by any applicant.” This right is not diminished by the fact that non-environmental information may also have been requested.



56. In my view, the Ministers are mistaken in their belief that they can choose to deal within environmental information under FOISA instead of EIRs and in that respect their guidance, although well intentioned, is misleading. (I should say, in passing, that this guidance was published by the Scottish Government in September 2005. It replaced earlier guidance on the Environmental Information Regulations 1992 as amended by the Environmental Information (Amendment) Regulations 1998. The guidance acknowledges, in paragraph 8, that it “is **not** (original emphasis) legally binding. Only the Scottish Information Commissioner and the courts can give an authoritative decision on the interpretation of the regulations.” Unlike the *Code of Practice on the Discharge of Functions by Scottish Public Authorities under the Environmental Information (Scotland) Regulations 2004* which was formally laid before Parliament, in July 2006, after consultation with me, the Guidance has no statutory basis.)
57. I also disagree with the Ministers’ assertion that because Professor Hawkins had specified that he was making his information request under FOISA, there was no reason not to consider the request under FOISA.
58. I would note that there is no obligation under either FOISA or the EIRs for a request to specify the right of access to information that is being invoked in making the request. On receipt of a request for information, the onus is on the public authority to reply in line with its legal obligations, wherever they should arise. A reference to one law within an information request should not be interpreted as indicating that applicants have (or even could have) waived their rights under another access regime, or that the law they cite is the most appropriate route for their request. Applicants may be unaware of their rights or be unaware that the information identified as falling within the scope of their request contains environmental (or, as the case may be, non-environmental) information.

Handling requests for environmental information under FOISA

59. As I noted above, FOISA contains no provision that absolutely excludes environmental information from its scope. Therefore, as with any other request, any recorded environmental information requested from a Scottish public authority must be provided unless the information is exempt from disclosure under Part 2 of FOISA (or unless any provision within Part 1 of FOISA provides that the authority is not obliged to comply with the request).
60. Section 39(2) of FOISA provides that 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 [EIRs]; or
 - (b) would be so obliged but for any exemption contained in the [EIRs].



61. Section 62 of FOISA confers the power to the Scottish Ministers to make regulations in relation to environmental information to implement the relevant provisions of the Aarhus Convention. The EIRs were in fact made under section 2(2) of the European Communities Act 1972, but under regulation 20 of the EIRs, section 39(2) and (3) of FOISA apply to the EIRs as they apply to regulations made under section 62 of FOISA. The effect of section 39(2) is therefore to provide that information is exempt if it is environmental information as defined within the EIRs.
62. While the intended effect of this exemption might well have been simply to carve environmental information out of the scope of FOISA, this is not its effect. This exemption, for example, is subject to the public interest test contained in section 2(1)(b) of FOISA. It is difficult to see how the public interest test was intended by Parliament to have been applied, but I will not dwell on this point further in this decision. Instead, I want to consider in more detail the implications of a decision by a public authority *not* to apply the exemption in section 39(2) when dealing with a request for environmental information.

What if an authority chooses not to apply the exemption in section 39(2)?

63. As with any other exemption within FOISA, an authority may choose not to apply the section 39(2) exemption when considering a request for information to which it might apply. If this approach is adopted, then a public authority is required to consider the request fully under the terms of FOISA and should:
- a) provide the environmental information requested under the terms of FOISA; or it may
 - b) withhold some or all information on the basis that it is exempt from disclosure under one or more of the exemptions contained in Part 2 of FOISA; or
 - c) claim that some other provision within Part 1 of FOISA provides that the authority is not obliged to comply with the request.
64. I accept that an authority can choose to respond to any request for environmental information without relying upon the exemption in section 39(2) of FOISA. If this approach is adopted, the authority is legally obliged to consider the request fully in terms of FOISA as Transport Scotland has done when responding to Professor Hawkins' request.



65. However, if an authority chooses not to rely upon the exemption within section 39(2), this does not mean that FOISA then replaces or can be applied as an alternative to the EIRs. The separate right to access environmental information still exists whether an authority chooses also to consider it under the terms of FOISA. Whether or not the exemption in section 39(2) is applied, an authority must consider a request for environmental information under the terms of both access regimes (although where section 39(2) is the only FOISA exemption being relied on, the consideration under FOISA is likely to be relatively limited).
66. In these circumstances I must therefore also consider a request for environmental information under both laws, to establish whether the authority's responses to the request complied with the requirements of FOISA and also those of the EIRs.
67. In this case, the Ministers indicated during the investigation that they chose to consider the information that they acknowledged to be environmental information under the terms of FOISA. However, they did not consider any of the information withheld under the terms of the EIRs, and they also declined to do so until the end of my investigation, at which point they cited the exception at regulation 10(4)(e) and made it clear that they were not relying on the exemption at section 39(2) of FOISA.
68. Having concluded above that the information withheld from Professor Hawkins is all environmental information, and having set out my understanding of the relationship between FOISA and the EIRs, I therefore consider that the Ministers were wrong to not respond to Professor Hawkins' request in line with the EIRs.

Can I consider a case under EIRs when an authority has considered it under FOISA?

69. The Ministers have expressed the view that, if I believe that Transport Scotland acted incorrectly in handling Professor Hawkins' information request under FOISA, I should issue a decision highlighting this error, and requiring the Ministers to consider any new request under the terms of the EIRs.
70. The Ministers consider that I am only entitled to question their judgement as to the choice of regime if the effect of choosing a particular regime is likely to be detrimental to Professor Hawkins.
71. I accept that, in this particular case, it is unlikely that there will be any detriment to Professor Hawkins in having his request considered under FOISA. However, I do not accept that I am only entitled to question a public authority's judgement where there will be detriment to an applicant.



72. When he made an application to me for a decision, Professor Hawkins made no reference to either regime (nor was he under an obligation to do so). Instead, he made it clear that he simply wished to appeal against the refusal by Transport Scotland to provide the information that he had sought.
73. An application made to me under FOISA or the EIRs will take the same format – as noted above, regulation 17(1) of the EIRs makes it clear that the provisions of Part 4 of FOISA (Enforcement) shall apply for the purposes of the EIRs as they apply for the purposes of FOISA, subject to certain modification specified in regulation 17(2).
74. Under regulation 5 of the EIRs, any request for environmental information (as defined in regulation 2) must be considered under the EIRs. Consequently, when I come to determine an application which I consider to involve environmental information, I must consider whether the request has been dealt with in line with the EIRs. Where I find that it was not, I must issue a decision stating that the authority did not deal with the request in accordance with the EIRs. The decision notice must also, in line with section 49(6) of FOISA (as modified by regulation 17(2) of the EIRs), specify:
- the provision of the EIRs with which the authority has failed to comply
 - the respect in which it has so failed
 - the steps which I consider the authority must take to comply with the provision in the EIRs and
 - the time within which those steps must be taken.
75. It is therefore clear to me that where I consider that a request for environmental information has not been dealt with in line with the EIRs, I am not restricted to deciding that the request has been dealt with under the wrong legislation, but am entitled, indeed obliged, to go on to consider the manner in which the public authority failed to deal with the information request etc. Clearly, as has been the case here, before issuing a decision, I will seek submissions from the public authority as to whether it considers that it failed to apply the correct regime and, if so, what exceptions it would have applied.



76. In passing, I note the decision of the Information Tribunal in *Kirkaldie and the Information Commissioner*¹. In that case, a public authority dealt with an information request from Mr Kirkaldie under the Freedom of Information Act 2000 (the 2000 Act). The public authority refused to provide the information to Mr Kirkaldie and he made an application to the Information Commissioner for a decision as to whether he was entitled to receive the information. The Information Commissioner considered the matter under the 2000 Act and upheld the decision of the public authority. Mr Kirkaldie subsequently appealed to the Information Tribunal.
77. The Tribunal considered that the request was for environmental information and that it should therefore have been dealt with under the UK Environmental Information Regulations 2004 (the 2004 Regulations). However, the Tribunal went further and decided that it was entitled to come to a decision as to whether the information was subject to any of the exceptions in the 2004 Regulations.
78. In paragraph 44 of its decision, the Tribunal recognised that it would be possible for a public authority (and, presumably, for the Commissioner) to switch between an exemption in the 2000 Act and an exception in the 2004 Regulations, providing that a similar exemption or exception applied.
79. In what follows below, I will first consider the Executive's consideration of Professor Hawkins' request under the terms of FOISA. I will then go on to consider this same request under the EIRs given the conclusions set out above. Normally, however, where the information is predominantly environmental but the EIRs have not been applied or where the exemption in section 39(2) exemption has not been claimed, it might be more useful to first consider the EIRs, given that, if there are no exceptions in the EIRs which would permit a public authority to refuse to disclose information, a public authority is not entitled to rely on an exemption (or other provision) in FOISA which would allow a public authority to withhold the environmental information.

¹[http://www.informationtribunal.gov.uk/Files/ourDecisions/Mr%20M%20S%20Kirkaldie%20v%20Information%20Commissioner%20\(4%20July%202006\)v8307.pdf](http://www.informationtribunal.gov.uk/Files/ourDecisions/Mr%20M%20S%20Kirkaldie%20v%20Information%20Commissioner%20(4%20July%202006)v8307.pdf)



Consideration of Professor Hawkins' request under the terms of FOISA

80. As noted above the Ministers did not apply the exemption under section 39(2) of FOISA when considering Professor Hawkins' request. Instead, they refused to supply the information withheld under the terms of the exemptions contained in sections 30(b)(i), 29(1)(a) and 29(1)(b). I will consider these exemptions in turn below.

Section 30(b)(i) of FOISA – Prejudice to effective conduct of public affairs

81. The Ministers have argued that the exemption in section 30(b)(i) of FOISA applies to documents 2 and 3. 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 provision of advice. This is a qualified exemption, and so is also subject to the public interest test required by section 2(1)(b).
82. The Ministers' submissions to my office highlighted the nature and content of the documents concerned, and went on to state that officials could feel constrained from offering full and frank advice on future occasions if they were concerned that their comments would be made public a matter of months after providing the advice.
83. In reaching this decision, I have also taken into considered the arguments about the application of this exemption put forward by the Ministers in their letter of 2 May 2007 and discussed in detail in my decision *089/2007 Mr James Cannell and the Scottish Executive*.
84. As I noted in decision 089/2007, the main consideration in determining whether this exemption applies is not so much whether the information constitutes advice – 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.



85. 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.
86. In this case, the documents withheld substantially comprise advice from officials to the Transport Minister on the options for the AWPR route and the costs and benefits of these and on other related matters. I have noted that the advice is largely evidence and factually-based rather than expressing the opinions of particular officials.
87. The Ministers' submissions on the application of the exemption in section 30(b)(i) of FOISA in this case have all been made in relatively general terms, suggesting that disclosure of exchanges of the type requested by Professor Hawkins would always have such an inhibitive effect.
88. Given that I do not accept that disclosure of advice to Ministers will always have a substantially inhibitive effect, and having considered the contents of the documents withheld from Professor Hawkins, I am not persuaded that the Ministers have demonstrated that the disclosure of these particular items would be likely to inhibit substantially the free and frank provision of advice.
89. Therefore, I have concluded that the Ministers' application of the exemption under section 30(b)(i) of FOISA was not justified in this instance. Since I am satisfied that this information is not exempt under section 30(b)(i) of FOISA, I am not required to consider the public interest test in relation to the use of this exemption.

Section 29(1)(a) – formulation and development of government policy

90. In terms of section 29(1)(a) of FOISA, information held by the Scottish Administration is exempt information if it relates to the formulation or development of government policy. Section 29(1)(a) of FOISA is a qualified exemption, which means that even if the exemption applies, the application of this exemption is subject to the public interest test required by section 2(1)(b) of FOISA.
91. For information to fall under the section 29(1)(a) exemption in FOISA, it must relate to government policy, i.e. to the development of options and priorities for Scottish Ministers, who will subsequently determine which options should be translated into political action and when.
92. The Ministers submitted to my office that both of the documents under consideration related to the formulation of Scottish Government policy in relation to the AWPR.



93. I am satisfied that the Scottish Ministers' decision on the route of the AWPR was a policy decision, which in turn forms part of their overall policy with respect to the development of the AWPR. Having examined the contents of documents 2 and 3, I am satisfied that the information contained in each relates directly to the formulation of the Scottish Government's policy on the route and on the overall development of the AWPR.
94. Therefore, I conclude that documents 2 and 3 are both exempt from disclosure under the exemption in section 29(1)(a) of FOISA as claimed by the Ministers.
95. As noted above, the section 29(1)(a) exemption of FOISA is a qualified exemption which means that since the exemption applies, it is subject to the public interest test. However, before considering the public interest, I will first go on to consider the other exemption under section 29 of FOISA relied upon by the Ministers to withhold document 3.

Section 29(1)(b) – Ministerial communications

96. The Ministers have also claimed that document 3 is exempt from disclosure under the terms of section 29(1)(b) of FOISA.
97. Section 29(1)(b) of FOISA provides that information held by the Scottish Administration is exempt if it relates to Ministerial communications. The definition of 'Ministerial communication' is contained within sections 29(4) and (5) of FOISA which are reproduced in the Appendix to this decision.
98. For information to fall under this exemption there must be a communication between Ministers. I accept that this exemption is not limited to direct written communications between Ministers, such as a letter or e-mail from one Minister to another, but could also cover records of discussions between Ministers.
99. Document 3 contains a series of emails. Some of these were exchanged between Ministers. Some of the emails were exchanged between other parties, but having considered their contents, I am satisfied that they relate to the Ministers' exchanges.
100. Consequently, I am satisfied that the exemption in section 29(1)(b) applies to document 3 in its entirety. This exemption is also a qualified exemption, and so I will now turn to consider the public interest test required by section 2(1)(b) of FOISA.



Public Interest Test

101. Each of the exemptions I have found to be correctly applied in this case is subject to the public interest test laid out in section 2(1)(b) of FOISA. In this instance, I will consider the public interest as it relates to these two exemptions together.
102. Section 2(1)(b) of FOISA is worded in such a way as to assume that disclosure would be in the public interest rather than in withholding it. The test is that in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption. Therefore, it is for the authority to show why, on public interest grounds, the information should not be released. To proceed otherwise would leave us in a position where innocuous and non-sensitive information relating to policy formulation or ministerial communications would rarely be released because no resounding public interest argument could be found to justify disclosure.
103. The Ministers' submissions on this case acknowledged that there is a clear public interest in the issues underlying the choice of route for the AWPR, but suggested that the information under consideration in this case would add little to public debate on this matter.
104. In relation to the exemption in section 29(1)(a), the Ministers noted that the decision regarding the route of the AWPR was recent, and asserted that policy making in this area is (and was at the time of the request) not yet settled. They noted that the Scottish Ministers would have a role to play in deciding if the AWPR development should ultimately proceed. They claimed that disclosure of advice leading up to the ultimate decision could jeopardise Ministers' ability to properly consider matters and reach a conclusion.
105. The Ministers submitted that there is a strong public interest in high quality policy making and implementation, and for the Government to succeed in upholding that public interest, Ministers and officials need to be able to consider all available options and debate them rigorously, to expose all their merits and demerits and to understand their possible implications. They claimed that their candour in doing so will be affected by their assessment of whether the content of their discussions will be disclosed in the near future. The Ministers also suggested that inappropriate disclosure may also distort the public perception of advice provided by officials, and the prospect of disclosure may also affect the impartiality of advice provided.



106. In relation to the application of the exemption in section 29(1)(b), the Ministers asserted that there is a strong public interest in maintaining the convention of collective responsibility of Ministers, and the opportunity to have full and frank discussions of policy at the highest level. They indicated that disclosure would be harmful to the public interest by changing the rules and practices under which Government now functions to the detriment to the policy making process.
107. Professor Hawkins has submitted that the information withheld should be made available as disclosure would:
- enhance the scrutiny of decision-making processes and thereby improve accountability and participation,
 - contribute to ensuring effective oversight of expenditure of public funds and ensure that the public obtain value for money in the construction of the AWPR and
 - ensure fairness in relation to the choice of route with respect to the AWPR and enable the correction of misleading claims for its efficacy and value for money.
108. I have considered all of the submissions made by the Ministers and Professor Hawkins in relation to this case, along with the contents of the documents concerned.
109. I acknowledge that there will be occasions where it will be in the public interest to maintain these exemptions rather than disclose information relating to policy making processes or ministerial communications. However, I do not accept that this should automatically be accepted in each case. Each case, and the content and context of the information concerned, must still be considered on its own merits.
110. In this case, I have found that the public interest in maintaining each of the exemptions is outweighed by the significant public interest that can be identified in the disclosure of the information.
111. The Scottish Ministers' Code of Practice on the Discharge of Functions by Public Authorities under the Freedom of Information (Scotland) Act 2002 (the Section 60 Code) lists factors which may inform a decision about the public interest. These include:
- a) the general public interest that information is accessible, i.e. whether disclosure would enhance scrutiny of the decision-making process and thereby improve accountability and participation;
 - b) whether disclosure would contribute to debate on a matter of public interest;



- c) whether disclosure would contribute to ensuring effective oversight of public funds.
112. In this case, I have found that each of a - c above can be considered factors weighing in favour of release. I have noted that the decision regarding the route for the AWPR was a controversial decision that will have major impact on the communities concerned; which will involve significant public expenditure; and which has been the subject of considerable public debate and concern. I also take the view that (despite the Ministers' assertion that this would not be the case) the withheld information will aid understanding of the reasons for the decision and factors that determined the choice of route.
113. In reaching this conclusion, I have noted that the decision about the route of the AWPR had been made at the time of Professor Hawkins' information request. Therefore, I am not satisfied that the specific policy concerning the route would be prejudiced by disclosure of the information requested.
114. Given the significant public interest in disclosure of the information concerned, I am not persuaded that the competing public interests in protecting wider policy making processes (either with respect to the AWPR or other policy areas), or the protection of ministerial communications is sufficiently weighty to outweigh the public interest in disclosure in this case.
115. I am therefore satisfied that the public interest in the disclosure of documents 2 and 3 outweighs the public interest in maintaining the exemptions in section 29(1)(a) and (b) of FOISA in this instance and that Transport Scotland failed to comply with section 1(1) of FOISA by withholding these documents in response to Professor Hawkins' request for information.

Consideration of Professor Hawkins' request under the EIRs

116. I now turn to consider Transport Scotland's handling of Professor Hawkins' request from the point of view of the EIRs. As noted above, I have concluded that all the information withheld in this case is environmental information.
117. I would note that had I accepted the view set out by the Ministers, that only part of the information withheld was environmental, I would still have considered that Transport Scotland was wrong not to consider that part of the information under the EIRs.



118. As noted above, during the course of my investigation, I advised the Ministers of my view that the information under consideration was environmental information, and offered them the opportunity to make submissions as to whether any of the exceptions within the EIRs would apply if this information were considered under those regulations.
119. The Ministers initially declined to make any submissions as to whether, had they dealt with the request under the EIRs, they would have found the information to be excepted from disclosure under the EIRs, instead arguing that I should issue a decision finding simply that Transport Scotland had failed to consider Professor Hawkins' request under the appropriate law.
120. The Ministers therefore initially made no case to me to suggest that the information withheld from Professor Hawkins under the terms of FOISA should also be withheld under the EIRs.
121. In general, where no case is made to me to show why information can legitimately be withheld under the relevant access regime, I will conclude that the information should be disclosed. It is for a public authority to justify its decision to withhold information under the terms of the appropriate law.
122. Where I indicate to an authority in the course of an investigation that I am of the initial view that information under consideration is environmental information, I will normally provide an opportunity for the authority to make a submission indicating its view on whether information could be excepted from disclosure under the terms of the EIRs.
123. If no such case is made, having given fair notice to an authority, that I consider information to be environmental information, it is likely I will find that an authority failed to comply with the requirements of the EIRs and may require disclosure of the information concerned.
124. However, given the comments of the Information Tribunal in the *Kirkaldie* decision, and, of course, the fact that the Ministers stated that if I continued to disagree with their views and decided to consider Professor Hawkins' application under the EIRs, then, without prejudice to their views, they would wish to apply the exception at regulation 4(e) of the EIRs, I consider it appropriate to go on to consider whether the information withheld from Professor Hawkins is subject to the exception within regulation 10(4)(e) of the EIRs.
125. Regulation 10(4)(e) provides an exception from disclosure where the request involves making available internal communications. Both of documents 2 and 3 are internal communications that were exchanged within the Scottish Government, and so both items clearly fail within the scope of this exception.



126. The exception in regulation 10(4)(e) is subject to the public interest test. In considering this test, I have had regard to the submissions made by both the Ministers and Professor Hawkins in relation to the public interest test required by FOISA.
127. For the same reasons as my decision on the public interest under FOISA (see paragraphs 102-114 above), I find that in all the circumstances of this case the public interest in the disclosure of the information withheld from Professor Hawkins outweighs the public interest in the maintenance in the exception under regulation 10(4)(e) of the EIRs.
128. I therefore conclude that the Transport Scotland also acted in breach of regulation 5 of the EIRs by withholding documents 2 and 3 from Professor Hawkins.

Decision

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 therefore has considered whether Transport Scotland has acted in accordance with each of these laws.

FOISA

I find that Transport Scotland did not deal with Professor Hawkins' request for information in accordance with Part 1 of FOISA.

I have found that Transport Scotland misapplied the exemption in section 30(b)(i) of FOISA to documents 2 and 3. I have found that the exemption in section 29(1)(a) of FOISA applies to both of these documents, and that the exemption in section 29(1)(b) of FOISA applies to document 3. However, I have concluded that the public interest in maintaining these exemptions is outweighed by the public interest in the disclosure of the information concerned. Consequently, Transport Scotland failed to comply with section 1(1) of FOISA when it withheld these documents from Professor Hawkins.



The EIRs

I also find that Transport Scotland failed to comply with the requirements of the EIRs.

I find the exception in regulation 10(4)(e) of the EIRs applies to documents 2 and 3. However, I found that the public interest in disclosure of this information outweighed the public interest in the maintenance of this exception. Therefore, by failing to provide the information withheld from Professor Hawkins, I therefore find that Transport Scotland failed to comply with the requirements of regulation 5 of the EIRs.

Steps to be taken

I require Transport Scotland to provide copies of documents 2 and 3 to Professor Hawkins within 45 days after the date of intimation of this decision notice.

Appeal

Should either Transport Scotland or Professor Hawkins wish to appeal against this decision, there is a right to 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
19 November 2007



APPENDIX

Relevant Statutory Provisions

Freedom of Information (Scotland) Act 2002:

1 General entitlement

(1) A person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority.

...

(3) If the authority-

(a) requires further information in order to identify and locate the requested information; and

(b) has told the applicant so (specifying what the requirement for further information is),

then, provided the requirement is reasonable, the authority is not obliged to give the requested information until it has the further information.

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;

(b) Ministerial communications;

...

(4) In this section-

"government policy" means-

(a) the policy of the Scottish Administration; and

(b) in relation to information created before 1st July 1999, the policy of the Government of the United Kingdom;

...

"Ministerial communications" means any communications between Ministers and includes, in particular, communications relating to proceedings of the Scottish Cabinet (or of any committee of that Cabinet); and

....



- (5) In the definitions of "Ministerial communications" and "Ministerial private office" in subsection (4), "Minister" means a member of the Scottish Executive or a junior Scottish Minister.

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

...

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.
- (3) Subsection (2)(a) is without prejudice to the generality of section 25(1).

66 Saving for existing powers of disclosure

Nothing in this Act is to be taken to limit the powers of a Scottish public authority to disclose information held by it.

73 Interpretation

In this Act, unless the context requires a different interpretation –

...

“information” (subject to section 50(9) and 64(2)) means information recorded in any form

...



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);

...



3 Application

...

- (3) Nothing in these Regulations is to be taken to limit the powers of a Scottish public authority to disclose environmental information held by it.

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.
- (3) Any enactment or rule of law which would prevent the making available of information in accordance with these Regulations shall not apply.

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.

17 Enforcement and appeal provisions

- (1) The provisions of Part 4 of the Act (enforcement) including schedule 3 (powers of entry and inspection), shall apply for the purposes of these Regulations as they apply for the purposes of the Act but with the modifications specified in paragraph (2).
- (2) In the application of any provision of the Act by paragraph (1) any reference to-
 - (a) the Act is deemed to be a reference to these Regulations;
 - (b) the requirements of Part 1 of the Act is deemed to be a reference to the requirements of these Regulations;
 - (c) a Scottish public authority is deemed to be a reference to a Scottish public authority within the meaning of these Regulations;
 - (d) the code of practice under section 60 or 61 of the Act (issue of a code of practice by the Scottish Ministers) is deemed to be a reference to any code of practice issued under regulation 18(1);
 - (e) sections 29 (formulation of Scottish Administration policy), 31(1) (national security and defence), 32(1)(b) (international relations), 34 (investigations by Scottish public authorities and proceedings arising out of such investigations), 36(1) (confidentiality) and 41(b) (communications with Her Majesty etc. and honours), in section 52(1)(b) (exception from duty to comply with certain notices) of the Act is deemed to be reference to regulations 10(4)(e) and 10(5)(a), (b), (d) and (e);
 - (f) a notice under section 21(5) or (9) (review by a Scottish public authority) of the Act is deemed to be a reference to a notice under regulation 16(4); and
 - (g) the period allowed in section 21(1) of the Act is deemed to be a reference to the period specified in regulation 16(4).



20 Application of the Act

Section 39(2) and (3) of the Act shall apply to these Regulations as they apply to regulations made under section 62 of the Act.