

Decision Notice



Decision 140/2011 Mr Tommy Kane and the Water Industry Commission for
Scotland

Meeting notes, minutes and correspondence

Reference No: 201100261
Decision Date: 14 July 2011

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Summary

Mr Kane requested from the Water Industry Commission for Scotland (WICS) various board papers, meeting notes, minutes, correspondence and other records. WICS responded by providing some information to Mr Kane (including summaries of information held), while stating that other information was either not held or exempt from disclosure in terms of various sections of FOISA. Following a review, Mr Kane remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that, while WICS did not hold some of the information, and while WICS had correctly withheld certain information in terms of sections 30(b)(ii) and 36(1) of FOISA, it had partially failed to deal with Mr Kane's requests for information in accordance with Part 1 of FOISA.

The Commissioner found that by providing summaries which failed to accurately provide the information held and by incorrectly withholding other information under section 30(c) of FOISA (not being satisfied that the disclosure of this information would, or would be likely to, cause prejudice to the effective conduct of public affairs in the ways WICS had claimed), WICS failed to comply with section 1(1). The Commissioner required WICS to provide the information to Mr Kane.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (4), (5) and (6) (General entitlement); 2(1)(b) and (2)(a) (Effect of exemptions); 11(4) (Means of providing information); 17(1) (Notice that information is not held); 25(1) (Information otherwise accessible); 30(b)(ii) and (c) (Prejudice to effective conduct of public affairs) and 36 (Confidentiality)

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



Background

1. On 16 November 2010, Mr Kane wrote to WICS requesting the following information:

Request 1 (Given reference 10 88 by WICS):

- a) *A list of meetings and any notes and minutes from any meetings the Water Industry Commission had with any or all members of the Independent Budget Review, chaired by Crawford Beveridge and which reported in the summer 2010.*
- b) *All correspondence between the WICS and Independent Budget Review, chaired by Crawford Beveridge, discussing the Water Industry in Scotland. This should include e-mail, letters, text, voice mail or video recordings.*
- c) *A copy of the advice/ideas provided by Sir Ian Byatt to John Swinney around late 2008 early 2009, which discussed issues pertaining to the Scottish Water Industry.*
- d) *All correspondence between Sir Ian Byatt and Finance Minister, John Swinney, in 2008, 2009 and 2010, up until 11 November 2010.*

Request 2 (Given reference 10 89 by WICS):

- a) *The diary, of any activity/work on behalf of the Water Industry Commission, of Alan Sutherland, Sir Ian Byatt and other members of the Water Industry Commission from 24 October 2008 until 10 November 2010.*
- b) *A list of advisors that have assisted the WICS in their work from 1 November 2008 until 16 November 2010. This should include individuals contracted as advisors, or companies contracted as advisors and/or consultants. This should include what date they were contracted from and when they are contracted to.*
- c) *A record of the cost and payments made to any advisers and consultants hired by the WICS from 1 November 2008 until 16 November 2010.*

Request 3 (Given reference 10 91 by WICS):

Under the Freedom of Information (Scotland) Act please could you provide me with the following board papers? Mr Kane then provided a list of 32 numbered board papers from 2010.

Request 4: (Given number 10 92 by WICS)

Under the Freedom of Information (Scotland) Act please could you provide me with the following board papers? Mr Kane then provided a list of 22 numbered Board papers from 2009.



2. On 18 November 2010, WICS wrote to Mr Kane and stated that his requests 1, 3 and 4 were invalid. WICS noted that his requests were for specific documents and contended that the right provided under FOISA by virtue of section 8 was a right to information rather than a right to specific documents. Citing the Court of Session ruling in the case of *Glasgow City Council and the Scottish Information Commissioner*¹ in support of this position, WICS asked Mr Kane if he could be specific about the information within the specified documents he was looking for.
3. By return email, Mr Kane explained that in relation to request 1 it was the requested correspondence as a whole which would provide the specific information he was seeking. In relation to requests 3 and 4, Mr Kane stated it was the specific documents he was requesting and would like to see in their entirety.
4. On 17 December 2010, WICS wrote to Mr Kane in response to requests 2, 3 and 4. In relation to request 2a, WICS informed Mr Kane that Sir Ian, Mr Sutherland and Commission members no longer kept diaries. It provided information in response to requests 2b and 2c.
5. In relation to request 3, WICS responded by providing a schedule outlining briefly what each paper pertained to. It also advised that it considered the information in one paper to be exempt under section 25(1) of FOISA, as it was accessible on the Public Petitions Committee website. In relation to other information, it cited the exemption in section 27(2) of FOISA, on the basis that the information was intended for future publication (following the next price review). No description was provided of any of the withheld information.
6. In relation to request 4, WICS again provided a schedule outlining briefly what each paper pertained to, with the exception of certain information withheld under either section 25(1) or section 36(2) of FOISA.
7. WICS further responded on 20 December 2010 in relation to request 1. WICS provided information in response to requests 1b and d (in the form of a web-link and a summary of correspondence), while stating that it held no information falling within the scope of requests 1a and c.
8. On 6 January 2011, Mr Kane wrote to WICS requesting a review of its decision. In particular, Mr Kane disputed WICS's assertion that it held no information falling within the scope of requests 1a, 1c and 2a. In relation to requests 1d, 3 and 4, Mr Kane was dissatisfied that he had not been provided with the relevant letters and board papers in full.
9. WICS notified Mr Kane of the outcome of its review on 4 February 2011. In relation to the requests at 1a and 2a, WICS upheld its initial response and confirmed that no information was held. In relation to requests 1c (in respect of which it acknowledged that certain information was held) and d, WICS stated that any information it held was being withheld as exempt in terms of section 29(1)(a) of FOISA as it related to the formulation or development of Government policy. In addition, WICS stated that information falling within the scope of request 1d was exempt in terms of section 29(1)(b) of FOISA as a ministerial communication.

¹ <http://www.scotcourts.gov.uk/opinions/2009CSIH73.html>



10. In relation to requests 3 and 4, WICS again made reference to the Court of Session decision on the basis that FOISA provided a right to information rather than specific documents. In any event, WICS considered any relevant information it held to be exempt in terms of section 30(b) of FOISA, as its release would prejudice the effective conduct of public affairs.
11. On 9 February 2011, Mr Kane wrote to the Commissioner, stating that he was dissatisfied with the outcome of WICS's review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
12. The application was validated by establishing that Mr Kane had made information requests to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its response to those requests.

Investigation

13. On 15 February 2011, WICS was notified in writing that an application had been received from Mr Kane and was asked to provide the Commissioner with the information withheld from him. WICS responded with the information requested and the case was then allocated to an investigating officer.
14. On providing the withheld information to the Commissioner, WICS indicated that it wished to rely upon sections 25(1), 27(2), 36(1), 36(2) and 38(1)(b) in respect of elements of the withheld information.
15. The investigating officer subsequently contacted WICS, giving it an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking it to respond to specific questions. In particular, WICS was asked to justify its reliance on any provisions of FOISA it considered applicable to the information requested, with specific questions on the exemptions it had cited in correspondence. It was asked if there were reasons for withholding the information for which no exemption had been identified, or whether this could be released to Mr Kane.
16. WICS was also asked for further information in respect of the non-keeping of diaries, and for details of the searches undertaken to establish that certain information was not held. Finally, it was referred to the Commissioner's guidance on the subject and *Decision 017/2011 Sidlaw Executive Travel and Dundee City Council*² (in which the Commissioner had considered an argument that a request was invalid because the applicant had requested documents rather than information) and was invited to make further submissions as to why it considered certain of Mr Kane's requests to be invalid.

² <http://www.itspublicknowledge.info/applicationsanddecisions/Decisions/2011/201001746.asp>



17. WICS responded to the effect that it had taken cognisance of the points made by the investigating officer with regard to validity and made no submissions regarding the validity of any of Mr Kane's requests. WICS did not consider that any further information could be provided to Mr Kane. It stated that, in responding to Mr Kane's requests, it had followed its own Chairman's guidance and (in accordance with this guidance) had provided "summaries" of the requested information. It also provided submissions in support of its position that it did not hold certain information.
18. WICS provided submissions in support of its decisions to withhold certain information. Further correspondence on these followed in the course of the investigation. By the close of the investigation, WICS had confirmed (with supporting arguments) that it was withholding information under sections 30(b)(ii), 30(c) and 36(1) of FOISA.
19. WICS also advised that certain information (as indicated to Mr Kane in the course of dealing with his request) was withheld under section 25(1) of FOISA, as information which Mr Kane could reasonably obtain other than by requesting it under FOISA. Mr Kane did not raise this matter either in his requirement for review or in his application to the Commissioner, and the Commissioner cannot, therefore, consider it further in this decision.
20. The relevant submissions obtained from Mr Kane and WICS will be considered fully in the Commissioner's analysis and findings below.

Commissioner's analysis and findings

21. In coming to a decision on this matter, the Commissioner has considered all of the withheld information and the submissions made to him by both Mr Kane and WICS and is satisfied that no matter of relevance has been overlooked.

Section 1(1) – General entitlement

22. Section 1(1) of FOISA provides that a person who requests information from a Scottish public authority which holds it is entitled to be given that information by the authority, subject to certain provisions which, by virtue of section 1(6) of FOISA, allow Scottish public authorities to withhold information or provide it for a fee. The information to be given is that held by the authority at the time the request is received, as defined in section 1(4).
23. In this case, WICS indicated that it held some of the information requested and relied upon a number of exemptions to withhold elements of that information. In relation to the majority of the information not provided to Mr Kane, however, WICS did not rely upon any exemption, but rather stated that it had provided Mr Kane with what it considered to be a summary of the information held.
24. In providing Mr Kane with a summary in response to requests 1d, 3 and 4, WICS indicated that it was following its own Chairman's policy, which states:



“The best way to answer questions is usually to provide a careful summary of the information asked for. The original document may contain information not asked for. It is not helpful to questioners for them to be given text that can be open to misinterpretation and misunderstanding...”

Such summaries should be suitably succinct and clearly focussed on the question asked ...”

25. By the close of the investigation, WICS was not relying on any exemption under FOISA in respect of the documents marked “None” in the “Exemption applied” column of the attached Schedule. In response to his requests, Mr Kane was provided with summaries of most (but not all) of this information: in some cases, the absence of a summary was because WICS had initially withheld the information under an exemption.
26. The Commissioner has considered WICS’s arguments on this point, along with the information to which these summaries relate. He notes that the applicant has expressed no preference as to the means by which the requested information should be provided. In the absence of such an expressed preference, section 11(4) of FOISA permits a Scottish public authority to provide requested information by “any means which are reasonable in the circumstances”. The Commissioner acknowledges that there may be circumstances in which the provision of a summary of the information held by a Scottish public authority and falling within the scope of a particular request will be a reasonable means of providing that information. He is not, however, persuaded that the summaries provided by WICS in this particular case were adequate to meet the primary objective of section 1(1) of FOISA, that is the provision to the applicant of the information he had requested.
27. For a summary to fulfil this basic purpose, the Commissioner would require to be satisfied that it fully and accurately disclosed the information requested by the applicant and held by the authority. Clearly, this was not achieved where no summary was provided. In respect of those documents for which summaries were given to Mr Kane, the Commissioner has noted WICS’s stated position that these were adequate in the circumstances. Having considered the summaries and compared their content with that of the actual information withheld, however, he cannot accept this.
28. These summaries give simply a general indication of the subject matter of the information to which they relate, rather than actually summarising its content at any level of detail. In some cases, a summary of two or three lines purports to reflect the content of a document of several pages. In all the circumstances, he is not satisfied that any of the information provided to Mr Kane in the form of a summary represented full and accurate disclosure of the requested information, and consequently he is not satisfied that WICS responded to requests 1d, 3 and 4 in accordance with section 1(1) of FOISA. Clearly, it did not do so where no summary was provided. No specific provision of FOISA having been claimed in support of withholding any of this information (as specified in the attached Schedule), the Commissioner requires its disclosure.



29. The Commissioner strongly advises that WICS should review the internal guidance underpinning the authority's preferred approach of providing applicants with summaries of the information they have requested. As indicated above, while the provision of summary information may be acceptable in certain circumstances (i.e. where a summary is capable of reflecting the content of the information fully and accurately or where it helps to make information more capable of being understood by the applicant), it is doubtful whether a general policy of providing summaries is capable of fulfilling the authority's duty under section 1(1) adequately. If there is a concern about providing information the applicant has not in fact requested then this can be addressed by extracting information which falls within the scope of the request or redacting such information which falls outwith the scope of the request. In addition, the possibility that information can be open to misinterpretation and misunderstanding does not remove it from the ambit of the request. An authority concerned about the potential for misinterpretation or misunderstanding may wish to provide supplementary material to address any areas of ambiguity, but it is not entitled to withhold information simply because it may be misinterpreted or misunderstood.

Section 17 – Information not held

30. In terms of section 1(4) of FOISA, the information to be given to an applicant in response to a request under section 1(1) is (subject to exceptions which do not appear to be relevant in this case) that information held by the authority at the time the request is received. Where a Scottish public authority receives a request for information it does not hold, it must, in line with section 17(1) of FOISA, notify the applicant in writing that it does not hold the information.
31. WICS informed Mr Kane that it did not hold any information falling within the scope of requests 1a and 2a. WICS provided submissions to the Commissioner explaining how it had come to the conclusion that no information was held, including confirmation that WICS senior staff do not keep diaries or meeting notes. As detailed in *Decision 084/2011*³ (also involving Mr Kane and WICS), the Commissioner has been told that
- WICS' Directors do not record information as a result of meetings or conversations and take a mental note. If actions are required, the Directors will advise the appropriate staff verbally.
 - WICS' culture is one in which action points from a meeting may be noted (on paper), but little else. Once these action points are passed on to the appropriate member of staff, then any recorded information is destroyed.
 - If the meeting is held with an external organisation, the chair of the meeting is responsible for the minute.
 - The majority of meetings are arranged by telephone and the arrangements for the meeting are recorded in the individual's electronic calendar. These calendar entries are deleted once the expenses for the time period concerned are received.

³ <http://www.itspublicknowledge.info/applicationsanddecisions/Decisions/2011/201002160.asp>



32. The Commissioner continues to find surprising (and of some concern) the records management practices adopted by WICS which appear to underlie the non-recording or retention of a significant amount of relevant corporate information. However having considered all the submissions made by Mr Kane and WICS, the Commissioner has concluded that WICS took adequate steps in the circumstances to identify and locate all of the information it held which fell within the scope of these requests. He is also satisfied that, at the time WICS received the requests, it held no information falling within the scope of either of them.
33. WICS was, therefore, correct in responding to requests 1a and 2a in terms of section 17(1) of FOISA.

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

34. WICS intimated that it was relying upon section 30(b)(ii) of FOISA in withholding documents 3 and 4 (see attached Schedule), on the basis that disclosure would substantially inhibit the free and frank exchange of views for the purposes of deliberation and would not be in the public interest. In order for WICS to rely on the exemption in section 30(b)(ii) of FOISA, it must show that the disclosure of the information would, or would be likely to, inhibit substantially the free and frank exchange of views for the purposes of deliberation. The exemption is subject to the public interest test in section 2(1)(b) of FOISA.
35. As the Commissioner has said in previous decisions, it is his view that the standard to be met in applying the tests contained in the exemptions in section 30(b) of FOISA is high. In applying these exemptions, the chief consideration is not whether the information constitutes advice or opinion, but whether the disclosure of that information would, or would be likely to, inhibit substantially (as the case may be) the provision of advice or the exchange of views. The inhibition in question must be substantial and therefore of real and demonstrable significance.
36. In applying these exemptions, the Commissioner expects authorities to demonstrate a real risk or likelihood that actual inhibition will occur at some time in the near (certainly foreseeable) future, not simply that inhibition is a remote or hypothetical possibility. 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. The content of the withheld information will require to be considered, taking into account factors such as its nature, subject matter, manner of expression, and also whether the timing of disclosure would have any bearing: releasing advice or views whilst a decision was being considered, and for which further views were still being sought, for example, could be more substantially inhibiting than disclosure once advice had been taken.



37. In this case, the letters comprise an exchange between John Swinney and Sir Ian Byatt (WICS' Chairman) in relation to proposals for the financing of Scottish Water. WICS submitted, in light of the ever-increasing pressure on public sector budgets, that there was a need for officials from public authorities to be able to engage in finance-related dialogue openly and frankly without the fear of disclosure. The public disclosure of this exchange of views would, WICS argued, have the effect of substantially suppressing the candour and frankness with which such views were expressed. The possibility of public disclosure would be highly likely to move their focus away from the policy and decision-making process on matters of importance, such as the financing and regulation of another public authority, with an increased emphasis on taking care and forming and expressing a more considered, and perhaps more publicly acceptable, view during their deliberations and exchanges.
38. WICS continued that this was likely to lead to decisions being made which were not entirely in Scottish Water's interests, as they will not be made on the basis of complete and considered groundings. This, it claimed, would lead to substantial detriment in the policy and decision-making process. The sensitivity of the information contained in the letters, WICS claimed, was emphasised by the "Confidential" protective marking of its Chairman's letter. WICS also contended that, although the information contained in the letters was over two years old (and had been around two years old at the date of Mr Kane's request), it related to the period 2010 to 2014 (and consequently its disclosure would still have the effect of substantially inhibiting the free and frank exchange of views for the purposes of deliberation).
39. The Commissioner has taken into account the submission by WICS that documents were protectively marked as "Confidential". The use of the Government Protective Marking Scheme has been considered by the Commissioner in previous decisions and in *Decision 022/2008 Mr Peter MacMahon of The Scotsman and the Scottish Ministers*⁴ at paragraph 29, he emphasised:

"While protective marking and other indications of the providing administration's expectations as to disclosure will always be relevant, decisions on the disclosure of any information held by an administration need to be made in accordance with the terms of FOISA."

In other words, adequate reasons for the application of a particular exemption will still be required. Here, WICS has simply referred to the marking of the letter and provided no further submissions as to why the information in question should be considered confidential. In the circumstances, all the Commissioner can do is note the marking as evidence of the author's expectations: he must still, in the context of section 30(b)(ii), consider the information itself and all other relevant submissions.

⁴ <http://www.itspublicknowledge.info/applicationsanddecisions/Decisions/2008/200600389.asp>



In this case, having considered the information in this withheld correspondence in the light of the submissions received from WICS, the Commissioner accepts that the exemption applies. Although the content of both letters appears measured and considered, the views or comments in the information are expressed with a degree of frankness or candour. He acknowledges the relevance of the fact that the information covers a period which remained current at the time WICS dealt with Mr Kane's request and requirement for review (and indeed remains current now). In the circumstances future exchanges between the Minister and the Chairman on the same or largely similar issues could be expected to take place, Disclosure of content of the information in these documents 3 and 4 might reasonably be expected to have a significantly inhibiting effect on the nature of similar future free and frank exchanges of views. Consequently the Commissioner accepts that WICS was correct to apply section 30(b)(ii) of FOISA in withholding the information contained in documents 3 and 4.

Public interest test

40. As the Commissioner has found that the exemption in section 30(b)(ii) applies to the information in documents 3 and 4, he is required to go on to consider the application of the public interest test as it relates to this exemption.
41. As Mr Kane has indicated there is a public interest in "understanding the thinking of WICS on important areas of policy within the water industry". He believes that disclosure of these particular exchanges between the government and an "influential economic regulator" would give an insight into thinking on specific aspects of advice giving and policy making. That certainly would be the case. On the other hand there is a public interest in the government exchanging views and considering options with informed sources (some of which will not be taken forward or will be disagreed with), in a candid manner. The balance has to be addressed on a case- by -case basis. In this particular case concerning the information contained in these two letters the Commissioner is of the view that in all the circumstances of the case, the public interest in disclosing the information is outweighed by that in maintaining the exemption. Consequently, he accepts that WICS correctly withheld the information contained in documents 3 and 4 in terms of section 30(b)(ii) of FOISA.

Section 30(c) – Prejudice to effective conduct of public affairs

42. Section 30(c) of FOISA exempts information if its disclosure "would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs". The use of the word "otherwise" distinguishes the harm required from that envisaged by the exemptions in section 30(a) and (b). This is a broad exemption and the Commissioner expects any public authority citing it to show what specific harm would (or would be likely to) be caused to the conduct of public affairs by disclosure of the information, and how that harm would be expected to follow from disclosure.
43. As with the exemption in section 30(b)(ii), this exemption is subject to the public interest test laid down by section 2(1)(b) of FOISA.



44. WICS contended that the information in documents 29, 31, 31a, 31b, 37, 37a, 37b, 52a, 53, 54, 54a, 55, 55a, 56 and 56a (see attached Schedule) was exempt from disclosure under section 30(c) of FOISA. Since Documents 38 and 38a are duplicates of documents 37 and 37b respectively, the Commissioner does not find it necessary to consider these latter documents further in this decision.
45. WICS argued that the information in these documents was core and fundamental to its regulatory functions. The documents related to the preliminary stages of the relevant processes (with some of the processes concluding in 2014/2015) and had only been issued to interested parties directly involved in, or affected by, these processes. Disclosure of this information, which WICS considered to be highly sensitive, would, at this early stage (it was argued), substantially prejudice the carrying out by WICS of its core statutory regulatory functions. At this preliminary proposal formulation stage, WICS submitted that it required to be able to consult with relevant stakeholders in relation to the initiatives and processes to which the information related, in order to discuss issues openly and freely without the fear of disclosure. It went on to argue that when proposals were being formulated, they remained volatile and subject to change. It did not consider that sufficient time had passed in relation to each of the processes envisaged in the documents to justify disclosure of the information: the processes were long-term and WICS was still at a very early stage in their lifecycle.
46. WICS also identified the information in certain documents as being highly sensitive because it related to an ongoing review of Scottish Water's progress in relation to certain specified objectives. Again, it took the view that disclosure of this information would substantially prejudice the performance of its core statutory regulatory functions. WICS contended that it required to be able to issue objective opinion on Scottish Water's performance, as openly and frankly as possible without the fear of disclosure.
47. WICS further contended that certain information was of a technical and specialist nature and required the requisite knowledge and background for its content to be understood and placed in context. It argued that disclosure of this information would be highly likely to lead to confusion, and therefore misinterpretation and misapplication of the information, which would be substantially prejudicial to the effective conduct of public affairs.
48. The Commissioner notes WICS's concerns as to information being open to misinterpretation and misapplication. He does not, however, consider such potential, by itself, to constitute substantial prejudice to the effective conduct of public affairs. It is always open to public authorities to address any risk of misinterpretation or misapplication by providing background or contextual information when disclosing the information the applicant has requested (although the Commissioner would wish to make it clear that, even in the absence of such background or contextual information, he does not consider that disclosure of the information in question would, or would be likely to, prejudice substantially the effective conduct of public affairs).



49. As stated in his published guidance on the use of the exemption in section 30(c)⁵, and as noted above, the Commissioner expects any public authority citing this exemption to show what specific harm (which must be at the level of substantial prejudice) would, or would be likely to, be caused to the effective conduct of public affairs by release of the information under consideration. The Commissioner does not accept that WICS has demonstrated to his satisfaction what harm would (or would be likely to) follow disclosure, how that harm would manifest itself or when it would occur, other than to identify the need to conduct certain of its regulatory activities without fear of disclosure. This argument is generic in nature and no evidence has been provided to explain or justify its application to the withheld information. Having considered that information, it is not evident to the Commissioner from its content why its disclosure should cause substantial prejudice to the effective conduct of public affairs.
50. The Commissioner does not accept, therefore, that WICS was correct to withhold the information contained in documents 29, 31, 31a, 31b, 37, 37a, 37b, 52a, 53, 54, 54a, 55, 55a, 56 and 56a under the exemption in section 30(c) of FOISA.
51. As the Commissioner is not satisfied that the information was correctly withheld under section 30(c) of FOISA, he is not required to go on to consider the application of the public interest test in section 2(1)(b). No other exemption having been claimed to justify this information being withheld, he requires WICS to disclose the information to Mr Kane.

Section 36(1) – Confidentiality

52. WICS contended that the information in documents 60 and 60a (see attached Schedule) was exempt from disclosure in terms of section 36(1) of FOISA.
53. The exemption in section 36(1) of FOISA exempts from disclosure information in respect of which a claim of confidentiality of communications could be maintained in legal proceedings. Among the types of communication which fall into this category are those which are subject to legal professional privilege, one aspect of which is legal advice privilege. Legal advice privilege covers communications between lawyer and client in the course of which legal advice is sought or given.
54. For legal advice privilege to apply, certain conditions must be fulfilled. The communication must be with a professional legal advisor, such as a solicitor (including, in most cases, an in-house one) or an advocate. The legal adviser must be acting in their professional capacity as such and the communication must occur in the context of their professional relationship with their client. The information must be confidential between lawyer and client: 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.

⁵ <http://www.itspublicknowledge.info/nmsruntime/saveasdialog.asp?IID=2582&sID=117>



55. Having considered the content of documents 60 and 60a (the legal advice) and the circumstances under which it was obtained (i.e. in the context of a professional relationship between a legal advisor and their client, in the course of which confidential legal advice was requested and provided) the Commissioner is satisfied that the information meets all of the conditions set out in the above paragraph and is subject to legal advice privilege, and therefore is exempt information under section 36(1) of FOISA.
56. The exemption in section 36(1) is, however, a qualified exemption, which means that its application is subject to the public interest test set out in section 2(1)(b) of FOISA. Therefore, having decided that the information is exempt under section 36(1), the Commissioner must go on to consider whether, in all circumstances of the case, the public interest in disclosing the information is outweighed by the public interest in maintaining the exemption.

Public interest test

57. As the Commissioner has noted in a number of previous decisions, 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*, and the Commissioner will apply the same reasoning to communications attracting legal professional privilege generally.
58. In considering the public interest for the purposes of this exemption, WICS acknowledged a public interest in public authorities being open to scrutiny and accountable for their actions, particularly in relation to the discharge of statutory duties. On the other hand, it considered there to be a strong public interest in maintaining a right to confidentiality of communications between a solicitor and client, the proper administration of justice requiring that a solicitor was able to communicate with his or her client in complete confidence in the knowledge that these communications would not be made public.
59. Having considered the public interest arguments on both sides, and while accepting that there might be reasons which would justify disclosing legal advice of this kind in certain circumstances, in this instance the Commissioner is not satisfied that the public interest in disclosure of this particular legal advice is sufficiently compelling to outweigh the strong public interest in maintaining the confidentiality of communications between legal advisor and client. Consequently, he accepts that WICS correctly withheld the information contained in documents 60 and 60a in terms of section 36(1) of FOISA.



Retention of information covered by the request

60. Within the initial response to request 1d, WICS informed Mr Kane that it was withholding a letter dated 26 November 2009 under section 38(1)(b) of FOISA. When it provided the Commissioner with the withheld information, this letter was not included. When questioned on this, WICS stated that the letter was no longer held on its electronic database. It provided a description of the steps taken to locate the information, noting that the letter had been received in hard copy and appeared not to have been saved electronically. It acknowledged, however, that it had held the information when it dealt with Mr Kane's information request and requirement for review.
61. Having considered the submissions he has received on this point from WICS, the Commissioner has to conclude that the information in question is no longer held by the authority. On the other hand, WICS accepts that the letter was held when it received Mr Kane's request. Consequently, it was information which (by virtue of section 1(4) of FOISA) was caught by the request. Considering the terms of section 1(4) and (5) (see the Appendix below), along with WICS's submissions, there would appear to be no reason why this information should not have been retained until the applicant's rights under FOISA had been exhausted in relation to it. This is what the Commissioner considers should have happened, and in failing to secure such retention he finds that WICS failed to deal with Mr Kane's request in accordance with section 1(1) of FOISA. In the Commissioner's view, Scottish public authorities should have adequate systems in place to ensure that information is not lost or disposed of while a request relating to it is being dealt with, by the authority, by the Commissioner or by the courts.
62. The Commissioner would also note the provisions of section 65 of FOISA. Section 65 makes it a criminal offence for a Scottish public authority, or any individual employed by that authority, to alter, deface, block, erase or conceal a record held by the authority, where any of these acts are done with the intention of preventing the disclosure of information which has been requested under section 1 of FOISA. While in this case the information under consideration does not appear to have been destroyed intentionally, the existence of this provision underscores how seriously Parliament takes the destruction of requested information.

Conclusion

63. In conclusion, the Commissioner finds that WICS correctly withheld the information in documents 3 and 4 in terms of section 30(b)(ii) and 60 and 60a in terms of 36(1) of FOISA. He also accepts that WICS took adequate steps to identify and locate the information covered by requests 1a and 2a (and the information in the letter referred to in paragraph 62 above), and consequently was correct to give Mr Kane notice under section 17(1) of FOISA in respect of that information. However, he is not satisfied that the summaries provided to Mr Kane in response to requests 1d, 3 and 4 represented full and accurate disclosure of the information covered by these requests: in failing to provide the requested information fully and accurately, WICS failed to deal with these requests in accordance with section 1(1) of FOISA. In addition, the Commissioner finds that WICS was not entitled to withhold information under sections 30(c) of FOISA, for the reasons set out above. He therefore requires WICS to provide Mr Kane with the information incorrectly withheld, as specified in the attached Schedule.



DECISION

The Commissioner finds that the Water Industry Commission for Scotland (WICS) partially failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in dealing with Mr Kane's requests for information.

The Commissioner finds that WICS was correct to respond in terms of section 17(1) of FOISA in relation to certain requests (or parts of requests) and was entitled to withhold certain information under sections 30(b)(ii) and 36(1) of FOISA.

The Commissioner also finds, however, that by providing inadequate summaries of the information covered by requests 1d, 3 and 4, and by withholding information in terms of section 30(c) of FOISA, WICS failed to comply with Part 1 of FOISA and in particular section 1(1).

The Commissioner therefore requires WICS to provide Mr Kane with the information marked "No – disclose" in the attached Schedule of documents.

The information must be provided to Mr Kane by 29 August 2011.

Appeal

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

Kevin Dunion
Scottish Information Commissioner
14 July 2011



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.
...
- (4) The information to be given by the authority is that held by it at the time the request is received, except that, subject to subsection (5), any amendment or deletion which would have been made, regardless of the receipt of the request, between that time and the time it gives the information may be made before the information is given.
- (5) The requested information is not, by virtue of subsection (4), to be destroyed before it can be given (unless the circumstances are such that it is not reasonably practicable to prevent such destruction from occurring).
- (6) This section is subject to sections 2, 9, 12 and 14.

2 Effect of exemptions

- (1) To information which is exempt information by virtue of any provision of Part 2, section 1 applies only to the extent that –
..
 - (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.
- (2) For the purposes of paragraph (a) of subsection 1, the following provisions of Part 2 (and no others) are to be regarded as conferring absolute exemption –
 - (a) section 25;
...



11 Means of providing information

...

- (4) Subject to subsection (1), information given in compliance with section 1(1) may be given by any means which are reasonable in the circumstances.

...

17 Notice that information is not held

- (1) Where-

- (a) a Scottish public authority receives a request which would require it either-
- (i) to comply with section 1(1); or
 - (ii) to determine any question arising by virtue of paragraph (a) or (b) of section 2(1),

if it held the information to which the request relates; but

- (b) the authority does not hold that information,

it must, within the time allowed by or by virtue of section 10 for complying with the request, give the applicant notice in writing that it does not hold it.

...

30 Prejudice to effective conduct of public affairs

Information is exempt information if its disclosure under this Act-

...

- (b) would, or would be likely to, inhibit substantially-

...

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

- (c) would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs.



36 Confidentiality

- (1) Information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings is exempt information.
- (2) Information is exempt information if-
 - (a) it was obtained by a Scottish public authority from another person (including another such authority); and
 - (b) its disclosure by the authority so obtaining it to the public (otherwise than under this Act) would constitute a breach of confidence actionable by that person or any other person.



Schedule of documents

DOCUMENT NUMBER	DOCUMENT	DATE	Exemption applied	Correctly Withheld
1	John Swinney to all Chairs & Chief Executives	30/01/2008	None	No - disclose
2	John Swinney to Chairs of Scottish public bodies	31/10/2008	None	No - disclose
3	John Swinney to Sir Ian Byatt	20/11/2008	30(b)(ii)	Yes - withhold
4	Sir Ian Byatt to John Swinney	08/12/2008	30(b)(ii)	Yes - withhold
5	Sir Ian Byatt to John Swinney	15/12/2008	None	No - disclose
6	Sir Ian Byatt to John Swinney	11/01/2010	None	No - disclose
7	Sir Ian Byatt to John Swinney	10/03/2010	25(1)	N/A
8	John Swinney to Sir Ian Byatt	10/03/2010	25(1)	N/A
9	John Swinney to Sir Ian Byatt	15/03/2010	25(1)	N/A
10	John Swinney: pay policy	05/05/2010	None	No - disclose
11	Scottish Government Public Sector Pay Policy for Senior Appointments 2010-11 (pages 1-47)	April 2010	None	No - disclose
12	John Swinney to Sir Ian Byatt	06/05/2010	25(1)	N/A
13	Sir Ian Byatt to John Swinney	14/05/2010	25(1)	N/A
14	Sir Ian Byatt to John Swinney	02/06/2010	25(1)	N/A
15	John Swinney to Sir Ian Byatt	17/06/2010	25(1)	N/A
16	John Swinney to Sir Ian Byatt	29/07/2010	25(1)	N/A
17	Sir Ian Byatt to John Swinney	07/10/2010	None	No - disclose
18	John Swinney to Sir Ian Byatt	22/01/2009	None	No - disclose
19	John Swinney to Sir Ian Byatt	12/02/2009	None	No - disclose
20	Sir Ian Byatt to John Swinney	04/02/2009	None	No - disclose
21	John Swinney to Chairs of Scottish public bodies	05/06/2009	None	No - disclose
22	Scottish Government Public Sector Pay Policy for Senior Appointments 2009-10	June 2009	25(1)	N/A
23	John Swinney to Sir Ian Byatt	08/09/2009	None	No - disclose
24	Sir Ian Byatt to John Swinney	28/09/2009	None	No - disclose
25	Sir Ian Byatt to John Swinney	11/12/2009	None	No - disclose
26	CP 01/10	Jan-10	None	No - disclose
27	CP02/10	Feb-10	25(1)	N/A
27a	CP02/10	Feb-10	25(1)	N/A
27b	CP02/10	Feb-10	25(1)	N/A
28	CP09/10	Jan-10	None	No - disclose
29	CP13/10	Mar-10	30(c)	No - disclose
30	CP18/10	Mar-10	None	No - disclose

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30a	CP18/10	Mar-10	None	No - disclose
31	CP22/10	Mar-10	30(c)	No - disclose
31a	CP22/10	Mar-10	30(c)	No - disclose
31b	CP22/10	Mar-10	30(c)	No - disclose
32	CP24/10	Mar-10	None	No - disclose
33	CP25/10	May-10	None	No - disclose
34	CP27/10	May-10	None	No - disclose
34a	CP27/10	May-10	None	No - disclose
34b	CP27/10	May-10	None	No - disclose
35	CP31/10	May-10	None	No - disclose
36	CP32/10	May-10	None	No - disclose
37	CP37/10	May-10	30(c)	No - disclose
37a	CP37/10	May-10	30(c)	No - disclose
37b	CP37/10	May-10	30(c)	No - disclose
38	CP37/10 (same as document 37)	May-10	N/A	N/A
38a	CP37/10 (same as document 37b)	May-10	N/A	N/A
39	CP38/10	May-10	None	No - disclose
39a	CP38/10	May-10	None	No - disclose
40	CP40/10	May-10	None	No - disclose
41	CP41/10	Jun-10	None	No - disclose
42	CP43/10	Jun-10	None	No - disclose
42a	CP43/10	Jun-10	None	No - disclose
42b	CP43/10	Jun-10	None	No - disclose
43	CP45/10	Jun-10	None	No - disclose
44	CP52/10	Jun-10	None	No - disclose
45	CP53/10	Jul-10	None	No - disclose
46	CP58/10	Jul-10	None	No - disclose
47	CP62/10	Sep-10	None	No - disclose
48	CP63/10	Sep-10	None	No - disclose
48a	CP63/10	Sep-10	None	No - disclose
48b	CP63/10	Sep-10	None	No - disclose

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49	CP64/10	Sep-10	25(1)	N/A
49a	CP64/10	Sep-10	25(1)	N/A
49b	CP64/10	Sep-10	25(1)	N/A
50	CP69/10	Sep-10	None	No - disclose
50a	CP69/10	Sep-10	None	No - disclose
51	CP71/10	Sep-10	None	No - disclose
52	CP72/10	Sep-10	None	No - disclose
52a	CP72/10	Sep-10	30(c)	No - disclose
53	CP73/10	Sep-10	30(c)	No - disclose
54	CP74/10	Sep-10	30(c)	No - disclose
54a	CP74/10	Sep-10	30(c)	No - disclose
55	CP75/10	Sep-10	30(c)	No - disclose
55a	CP75/10	Sep-10	30(c)	No - disclose
56	CP76/10	Sep-10	30(c)	No - disclose
56a	CP76/10	Sep-10	30(c)	No - disclose
57	CP77/10	Sep-10	None	No - disclose
58	CP80/09	Jul-09	None	No - disclose
59	CO83/09	Jul-09	None	No - disclose
59a	CO83/09	Jul-09	None	No - disclose
59b	CO83/09	Jul-09	None	No - disclose
59c	CO83/09	Jul-09	None	No - disclose
59d	CO83/09	Jul-09	None	No - disclose
60	CP90/09	Jul-09	36(1)	Yes - withhold
60a	CP90/09	Jul-09	36(1)	Yes - withhold
61	CP94/09	Jul-09	None	No - disclose
61a	CP94/09	Jul-09	None	No - disclose
61b	CP94/09	Jul-09	None	No - disclose
62	CP98/09	Jul-09	25(1)	N/A
63	CP99/09	Jul-09	None	No - disclose
64	CP100/09	Sep-09	None	No - disclose
65	CP109/09	Sep-09	None	No - disclose
66	CP110/09	Sep-09	None	No - disclose
67	CP114/09	Sep-09	None	No - disclose
67a	CP114/09	Sep-09	None	No - disclose
67b	CP114/09	Sep-09	None	No - disclose
67c	CP114/09	Sep-09	None	No - disclose
68	CP119/09	Sep-09	None	No - disclose
69	CP120/09	Sep-09	None	No - disclose

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70	CP126/09	Oct-09	25(1)	N/A
71	CP128/09	Oct-09	None	No - disclose
72	CP133/09	Oct-09	None	No - disclose
73	CP138/09	Nov-09	None	No - disclose
74	CP153/09	Dec-09	None	No - disclose
75	CP157/09	Dec-09	None	No - disclose
75a	CP157/09	Dec-09	None	No - disclose
76	CP159/09	Dec-09	None	No - disclose
77	CP160/09	Dec-09	None	No - disclose
77a	CP160/09	Dec-09	None	No - disclose
78	CP161/09	Dec-09	None	No - disclose
78a	CP161/09	Oct-09	None	No - disclose
79	CP165/09	Dec-09	25(1)	N/A
80	CP34/10	May-10	None	No - disclose