



Decision 015/2005 – Mr John Hodgson (Chairman of the Skye Windfarm Action Group Ltd.) and the Scottish Executive

Request for correspondence and other information relating to the Edinbane wind farm proposal.

**Applicant: Mr John Hodgson (Chairman of the Skye Windfarm Action Group Ltd.)
Authority: Scottish Executive
Application: 200501047
Date of Decision: 21 July 2005**

**Kevin Dunion
Scottish Information Commissioner**

Kinburn Castle
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Decision 015/2005 – Mr John Hodgson (Chairman of the Skye Windfarm Action Group Ltd.) and the Scottish Executive

Request for correspondence and other information relating to the Edinbane wind farm proposal – information exempted under s.30(b)(i) and (ii) – whether release would substantially inhibit officials from free and frank provision or advice or exchange of views – whether information is covered by Environmental Information (Scotland) Regulations 2004.

Facts

Mr Hodgson, writing in his capacity as Chairman of the Skye Windfarm Action Group Ltd., asked the Scottish Executive to supply copies of all reports, correspondence, e-mails and any other relevant information between departments of the Executive, Highland Council, AMEC (the developer), Scottish Natural Heritage (SNH), the Scottish Environment Protection Agency (SEPA), the Royal Society for the Protection of Birds (RSPB) and other relevant bodies, on the subject of the Edinbane wind farm proposal.

The Scottish Executive confirmed that it held the information, but withheld the information under section 30(a), (b) and (c) of the Freedom of Information (Scotland) Act 2002 (FOISA).

The Scottish Executive upheld this decision after review; however, during the investigation it withdrew its reliance upon section 30(a). The Executive also decided to release certain categories of documents to the applicant during the investigation, withholding only internal exchanges of correspondence, background minutes from the Scottish Executive planner and internal exchanges of correspondence on the subject of the persistent correspondence from Mr Hodgson.

Outcome

The Commissioner found that the Executive had insufficient grounds for withholding the information in question under the exemptions cited. The nature of the information withheld was such that its release would not be likely to inhibit substantially the free and frank provision of similar advice or the free and frank exchange of views for the purposes of deliberation.

The Commissioner found that some of the information withheld from the applicant fell outside the scope of his request and could not be considered in this decision notice.

The Commissioner requires the Executive to provide the applicant with the information specified below in this decision after redacting personal data relating to other correspondents.



Appeal

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

Background

1. On 13 January 2005 Mr Hodgson made a request by email to the Scottish Executive (the Executive), asking for copies of all reports, correspondence, e-mails and any other relevant information between departments of the Executive, Highland Council, AMEC (the developer), Scottish Natural Heritage (SNH), the Scottish Environment Protection Agency (SEPA), the Royal Society for the Protection of Birds (RSPB) and other relevant bodies, on the subject of the Edinbane wind farm proposal. Mr Hodgson was writing in his capacity as Chairman of the Skye Windfarm Action Group Ltd.
2. Mr Hodgson received a letter from the Executive's Development Department Planning Division, dated 2 February 2005, confirming that it held the information requested in the form of exchanges of correspondence between that Department and other interested parties. However, this information was stated to be exempt under section 30(a), (b) and (c) of FOISA. The Executive argued that the disclosure of internal consideration and the views of a particular Minister would undermine the collective responsibility of the Cabinet and would, or would be likely to, prejudice substantially the effective conduct of public affairs. In addition, it considered that the release of the information could prejudice substantially the Highland Council's consideration of the planning application for the wind farm, which was understood to be still before that authority for determination.
3. Mr Hodgson wrote to the Executive to ask it to review this decision on 8 February 2005, stating that he did not accept that the provisions of section 30(a), (b) and (c) are intended to be a blanket under which everything relating to the Edinbane wind farm project could be stifled. He also disputed the Executive's statement that the release of the information could substantially prejudice Highland Council's consideration of the planning application, pointing out that the Council had already made a resolution to approve the application and that the Executive's own guidance (SPP1) notes that the planning service should be "fair, open, transparent and efficient". Finally, he argued that the public interest would be better served by releasing the information: this had been a controversial planning application which the



Scottish Ministers had refused to “call in”.

4. On 3 March 2005 the Executive wrote to Mr Hodgson upholding its decision to withhold the information on the grounds previously stated.
5. Mr Hodgson applied to me for a decision in an email dated 16 March 2005. He reiterated the arguments set out in his letter to the Executive of 8 February (paragraph 3 above) and appealed against the Executive’s decision on the grounds that it was wrong to use section 30 as a blanket exemption covering all the information he had requested. He also argued that the public interest in disclosure had not been fully considered, given the environmental impact of the proposed development, the involvement of the European Commission’s Environment Directorate Enforcement Unit, the financial benefits of the development for Scottish Ministers, and the need for public scrutiny of the planning consent procedures, especially as the developer has made an additional application to construct a wind farm in the Lewis Peatlands Special Protection Area.
6. The case was allocated to an Investigating Officer with my Office.

The Investigation

7. Mr Hodgson’s appeal was validated by establishing that he had made a valid information request to a Scottish public authority, and had appealed to me only after requesting the authority to review its response to his requests.
8. A letter was sent to the Executive on 14 April 2005, informing it that an appeal had been received and that an investigation into the matter had begun.
9. The Scottish Executive was first asked whether it had considered treating Mr Hodgson’s request under the Environmental Information (Scotland) Regulations 2004 (EIRs).
10. The Executive replied on 26 April 2005. The letter informed the investigating officer that the information held which was relevant to Mr Hodgson’s request comprised consideration of the planning process rather than the planning application itself or consideration of environmental issues. A copy of the Environmental Impact Assessment (EIA) produced by AMEC for Highland Council was held, and should have been considered under the EIRs, but Highland Council had already made this EIA available to Mr Hodgson. The Executive had therefore decided that Mr Hodgson’s request should be dealt with under FOISA. Having reviewed the information withheld I agree with the Executive’s decision. The information relates to a project which would certainly have an impact on the land, but the information does not refer specifically



to the state of the land, or to measures affecting the state of the land. It therefore falls outside the definition of “environmental information” in the EIRs.

11. In order to investigate the case, the Scottish Executive were then asked to supply:
 - a) copies of all correspondence between the Development Department or other Executive departments and other interested parties, relating to the Edinbane wind farm proposal;
 - b) any other information held by the Executive relating to the Edinbane proposal;
 - c) information about the way in which the request was reviewed;
 - d) copies of correspondence with Highland Council to support the view that the planning application process was not yet concluded by that authority; and
 - e) additional reasons for the application of the exemptions in section 30(a),(b) and (c).
12. In its reply dated 8 June 2005 the Executive supplied the following documents:
 - internal exchanges of email etc., 23 September 2002 – 24 September 2003
 - copy correspondence with RSPB and SNH
 - internal minutes from Scottish Executive planner
 - internal exchanges regarding Mr Hodgson’s persistent correspondence
 - correspondence with Highland Council and
 - correspondence regarding the Environmental Impact Assessment (EIA)
13. The reply from the Executive also provided information about the review process and clarified the current situation regarding the status of the wind farm planning application.
14. The Executive also informed the investigating officer that it had re-considered whether any of the information withheld should be released, and had decided that:
 - a) documents regarding the EIA (which had been overlooked during original consideration of Mr Hodgson’s request) should be released;
 - b) correspondence with the RSPB is covered by exemptions under sections 30(b) and (c) but could be released as on balance there is no public interest in withholding these documents. The Executive understands that Highland Council have already released this information to the applicant. One letter is marked “confidential” and the Executive sought the views of the



RSPB before releasing this document;

c) none of the remaining information is covered by section 30(a);

d) internal exchanges and minutes should still be withheld, under section 30(b)(i) and (ii).

15. The Executive later confirmed that Mr Hodgson had been provided with 7 documents relating to correspondence with Highland Council; 8 documents and exchange of emails 15 – 20 July 2004, relating to correspondence with RSPB and SNH; and 22 documents relating to the Environmental Impact Assessment correspondence.

The Commissioner's Analysis and Findings

16. The investigation focused on the remaining information withheld from the applicant:

a) background information from the Scottish Executive planning officer (4 pages);

b) internal exchanges of correspondence about the planning process for the Edinbane wind farm proposal (23 pages); and

c) internal exchanges on the subject of Mr and Mrs Hodgson's persistent correspondence with the Executive (5 pages).

17. The documents listed in paragraph 16 (a) above consist of factual background notes from the Scottish Executive planning officer about various aspects of the proposed wind farm development (as well as two other wind farm developments), in order to inform replies sent out by other officials to correspondents.

18. The documents listed in paragraph 16 (b) above are mainly routine exchanges of correspondence between officials of the Scottish Executive, in which advice is sought when drafting replied to enquirers about the wind farm proposal. Draft paragraphs for inclusion in the reply are submitted for consideration.

19. I first considered whether the information is exempt under sections 30(b)(i) and 30(b)(ii), which allow information to be withheld if it would, or would be likely to, inhibit substantially the free and frank provision of advice or the free and frank exchange of views for the purposes of deliberation.



20. In my view the standard to be met in applying the tests in sections 30(b)(i) and 30(b)(ii) is high. To qualify for the exemptions in 30(b)(i) and 30(b)(ii) the information withheld does not just have to constitute either “advice” or “opinion”, but the public authority must show that the release of the information would inhibit substantially the provision of advice or the exchange of views. The Executive’s own guidance to its staff on the application of section 30(b) points out that the word “inhibit” suggests a suppressive effect, so that communication would be less likely, or would be more reticent or less inclusive.
21. The four memoranda from the Scottish Executive planner which have been withheld simply provide factual background information about the proposed wind farm development, and the status of the planning application before Highland Council. I reject the argument that the release of such factual content is likely to inhibit substantially the provision of advice or the exchange of views in future.
22. The bulk of the internal exchanges of correspondence described above in para 15(b) is made up of emails between officials drafting replies to correspondents on the subject of wind farms. In some cases these involve draft paragraphs or statements to include in letters sent to Mr or Mrs Hodgson. For the most part the draft text simply reflects or summarises existing policy, guidance notes or technical standards used by the Scottish Executive as the basis for planning decisions. I do not accept that the release of this straightforward, factual “advice” would substantially inhibit officials from participating in this type of correspondence in future, although it is possible that officials would be more guarded in expressing their opinions of the correspondents.
23. Some of the internal email exchanges go further in offering opinions on whether particular information should be included in the final draft, or include discussion of the reliability of the technical standards or other documents on which the Executive have relied. I considered the following questions in order to assess whether the release of such information would have a substantial inhibiting effect on future exchanges of views or provision of advice:
 - Is the advice or opinion in any way controversial? For instance, does it conflict with or cast doubt upon the official policy on planning matters? If so, this might strengthen the argument for withholding the information under section 30(b), subject to the public interest test.
 - Where the exchanges relate to the drafting of a reply to a letter, is any information discussed that is not already in the public domain?
24. I found that in two cases, the email correspondence withheld from Mr Hodgson included statements which could cast doubt on evidence relied upon by the Executive. However, after applying the tests above I do not consider that the Executive is justified in withholding the



information on the grounds of section 30(b). The first document concerns a survey of people living near a particular wind farm which the Executive's website explains has been withdrawn because the survey results were based on the wrong grid reference, although the people surveyed were still those who lived closest to the wind farms. As this advice is already in the public domain I do not accept that the release of this information would substantially inhibit officials from providing such advice in future.

25. A second exchange of emails relates to a technical assessment of noise from wind farms, all of which is in the public domain. Where officials expressed any opinion or advice I do not regard this as casting doubt on official policy.
26. It seems to me that that making such opinion or advice public is unlikely to substantially inhibit officials from providing similar advice in future. Even if this were so, I believe that there is a strong public interest in releasing such information. Decision makers should be prepared to justify the basis on which planning decisions are based and to be accountable for the reliability of any research upon which they depend. Such openness can only improve accountability and so increase public confidence in the decision-making process.
27. I have therefore concluded that section 30(b)(i) and 30(b)(ii) do not apply to the information listed in paragraph 16 (a) and (b) above. The correspondence detailed there should be released to the applicant after redacting the names of other correspondents, in order to comply with section 38(1)(b) of FOISA. The Executive should also redact the last sentence in para. 5 of email sent 15 January 2003 from H Gibson to A Craig, subject "Edinbane letter", for the same reason. The Executive may also choose to redact information about other wind farm development proposals which falls outside the scope of Mr Hodgson's request.
28. The Scottish Executive also withheld 5 pages of internal correspondence relating to the volume of correspondence received from Mr Hodgson and his wife and the decision to designate them as "persistent correspondents". I consider that the contents of these emails fall outside the scope of Mr Hodgson's request of 13 January 2005, as the information does not relate directly to the Edinbane wind farm proposal. I will therefore not consider this correspondence in my decision. However, it remains open to Mr and Mrs Hodgson to apply for copies of this correspondence under the Data Protection Act 1998.

Decision

I find that the Executive has not dealt with Mr Hodgson's request for information in accordance with section 1(1) of the Freedom of Information (Scotland) Act 2002, as detailed in paragraphs 16 - 28 above.



I require the Executive to release the information detailed above in paragraph 16 (a) and (b) to Mr Hodgson after redacting personal data relating to other correspondents, as described in paragraph 27.

I am obliged to give the Executive at least 42 days in which to supply Mr Hodgson with the information as set out above. In this case, I require the Executive to take these steps within two months of the date of receipt of this notice.

Kevin Dunion
Scottish Information Commissioner
21 July 2005

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