

Decision Notice



Decision 036/2009 Mr Rob Edwards and the Scottish Ministers

Contents of file IMI 2/12: Civil Contingencies Committee

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Summary

This decision relates to a request from Mr Edwards for the contents of a file held by the Scottish Ministers (the Ministers), file IMI 2/12: Civil Contingencies Committee. The Ministers released a number of documents from the file to Mr Edwards, some of them redacted.

The Ministers also advised Mr Edwards that they did not hold some of the documents in the file for the purposes of FOISA, as they had been provided by the United Kingdom Government and were held in confidence. This meant that they fell out with the scope of FOISA. The Ministers also relied on a number of exemptions in FOISA for withholding certain. Mr Edwards was dissatisfied with this response and, following an internal review, applied to the Commissioner for a decision.

During the investigation, the Commissioner came to the view that some of the information which had been withheld from Mr Edwards was environmental information as defined by the EIRs. He therefore considered whether the Ministers should have made that information available to Mr Edwards under the EIRs.

The Commissioner found that the Ministers had been entitled, under both FOISA and the EIRs, to withhold some information contained in the file from Mr Edwards. He also found that some of the information requested by Mr Edwards was not held by the Ministers. In respect of the remainder, however, he found that the Ministers had not been justified in withholding the information under various exemptions in FOISA and exceptions in the EIRs and required its release.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2 (Effect of exemptions); 3(2)(a)(ii) (Scottish public authorities); 15(1) (Duty to provide advice and assistance); 26(a) (Prohibitions on disclosure); 28 (Relations within the United Kingdom); 29 (1)(a), (2), (3) and (4) (Formulation of Scottish Administration policy etc); 30 (b) and 30(c) (Prejudice to effective conduct of public affairs); 31 (National security and defence).

Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) and (2)(a) (Interpretation); 5(1) and (2)(b) (Duty to make available environmental information on request); 9(1) (Duty to provide advice and assistance); 10(1), (2), (4)(a), (e) and (5)(f) (Exceptions from duty to make environmental information available).

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 6 December 2005, Mr Edwards submitted eight information requests to the Ministers, citing both FOISA and the EIRs. Mr Edwards asked for copies of all documents contained in eight separate, named files, stipulating that the request in respect of each file should be treated as a separate information request. One of these files was file IMI 2/12: Civil Contingencies Committee.
2. The Ministers provided a substantive response to Mr Edwards on 24 April 2006. No reference was made to the EIRs in this response and it appeared from the response that the Ministers had chosen to deal with the request solely under FOISA.
3. The Ministers released a number of documents from the file, some of them with personal information redacted. They indicated that they did not hold some of the information contained in the file for the purposes of FOISA; in terms of section 3(2)(a)(ii) of FOISA, information is not held by a Scottish public authority if it is held in confidence, having been supplied by a Minister of the Crown or a department of the Government of the United Kingdom. The Ministers also indicated in their response that they were withholding certain information from Mr Edwards and were relying on the exemptions in sections 28, 29(1)(a), 29(1)(b), 30(c) and 31(1) of FOISA (in various combinations) to do so. The exemptions in sections 29 and 31 were relied upon for the redaction of certain information from the documents released to Mr Edwards.
4. Mr Edwards contacted the Ministers on 10 May 2006, asking them to review their decision to withhold information under sections 28, 29, 30 and 31 of FOISA. He commented that without having seen the information, it was difficult to judge whether the public interest did in fact (as the Ministers had argued) favour withholding and he asked for a formal review of the information withheld to check whether it might be in the public interest to release it..
5. The Ministers responded to Mr Edwards' request for a review on 2 June 2006, upholding their original decision. The Ministers indicated that they had reconsidered the handling of the original request, including the public interest test and agreed with the original conclusions reached. The Ministers did not indicate whether they had considered Mr Edwards' information request under the EIRs, but again it would appear that the request for review had been dealt with solely under FOISA..
6. On 6 June 2006, Mr Edwards applied to the Commissioner for a decision as to whether the Ministers had been correct to withhold information from him under exemptions in sections 28, 29, 30 and 31 of FOISA. The case was subsequently allocated to an investigating officer.
7. Mr Edwards' application was validated by establishing that he had made a valid information request to a Scottish public authority (i.e. the Scottish Ministers) and had applied to the Commissioner only after asking the Ministers to review their response to his request.



Investigation

8. A letter was sent by the investigating officer to the Ministers on 14 June 2006, notifying them of Mr Edwards' application asking the Ministers to comment on Mr Edward's application in terms of section 49(3) of FOISA. In particular, they were asked to explain their reliance on the various exemptions in FOISA they considered applicable to the information withheld.
9. The Ministers responded on 18 July 2006 and provided the Commissioner with file IMI 2/12, along with arguments and other information in support of their position.

Submissions from the Ministers

10. The Ministers provided the Commissioner with submissions regarding their reliance on section 3(2)(a)(ii) of FOISA, and various exemptions, for withholding from Mr Edwards certain information contained in file IMI 2/12 Parts 001 and Part 002.
11. In their original response to Mr Edwards, and their submissions to the Commissioner, the Ministers relied on the exemptions in sections 28, 29(1)(a), 29(1)(b), 30(c) and 31(1) of FOISA for withholding information from Mr Edwards. Information was also withheld because the Ministers did not consider they held it for the purposes of FOISA, as they believed section 3(2)(a)(ii) to apply.
12. Following a meeting with the Ministers in December 2006 to gain further clarification on their submissions, they agreed no longer to rely on the exemptions they had applied to one document (document 22), on the basis that they had already disclosed the information in this document as part of another document which had been released to Mr Edwards. The Commissioner is satisfied that this information has been released and therefore will not consider it further in this decision.
13. The Ministers also agreed to release the information in document 21 in Part 001 of the file to Mr Edwards, and therefore no longer wished to rely on the two exemptions cited for this document.. The Commissioner requires the Ministers to release this information to Mr Edwards.
14. In the course of the investigation, the Ministers also indicated that where they had cited section 30 of FOISA (without reference to a particular subsection), then this should be read as applying both section 30(b) and 30(c). They further indicated that wherever they had cited an exemption in section 29 of FOISA, they intended that this to refer to section 29(1)(a) only. In addition, they advised that they wished to rely on section 26(a) of FOISA to withhold certain information.
15. The Commissioner will consider the Ministers' reasoning for relying on these exemptions and other provisions further in the section on analysis and findings below.



Submissions from Mr Edwards

16. During the course of the investigation, the investigating officer sought comments from Mr Edwards on what, in his view, was the public interest in release of the documents in this file. He also indicated that he was not concerned about the withholding of personal details and therefore the Commissioner will not give further consideration to withheld information of this kind (specifically, that redacted from the documents released to Mr Edwards and the contents of documents 26, 40 and 64 in Part 001 of the file) in this decision.
17. As with the submissions from the Ministers, the submissions from Mr Edwards will be taken into account in the Commissioner's analysis and findings below..

Commissioner's analysis and findings

18. 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 Edwards and the Ministers and is satisfied that no matter of relevance has been overlooked.
19. Following communication with the Ministers, the Commissioner is satisfied that all but one of the documents identified by the Ministers as having been released to Mr Edwards have been so released. The Ministers advised that they would release the remaining document (email dated 13/11/2001 at 08:22hrs) around the time the Commissioner's decision was issued on this matter. The Commissioner requires the Ministers to release this document to Mr Edwards.

FOISA or EIRs?

20. In *Decision 218/2007 Professor A D Hawkins and Transport Scotland*, the Commissioner considered the relationship between FOISA and the EIRs at some length. Broadly, the Commissioner's position on the interaction between the two regimes is as follows:
 - a. The definition of what constitutes environmental information should not be viewed narrowly, but in line with the definition in the EIRs.
 - b. There are two separate statutory frameworks for access to environmental information and a Scottish public authority is required to consider any request for environmental information under both FOISA and the EIRs.
 - c. Any request for environmental information therefore must be dealt with under the EIRs.
 - d. In responding to a request for environmental information under FOISA, an authority may claim the exemption in section 39(2).



- e. If the authority does not choose to claim the section 39(2) exemption, it must, as well as dealing with the request under the EIRs, deal with the request fully under FOISA, by providing the information, withholding it under another exemption in Part 2, or claiming that it is not obliged to comply with the request by virtue of another provision in Part 1 of FOISA (or a combination of these).
 - f. The Commissioner is entitled (and indeed obliged) where he considers a request for environmental information has not been dealt with under the EIRs to consider how it should have been dealt with under that regime.
21. Firstly, therefore, the Commissioner must determine whether all or part of the information withheld from Mr Edwards is environmental information. If the Commissioner finds that all or part of the information is environmental information, then he must go on to consider the Ministers' handling of that environmental information in terms of the EIRs.
22. "Environmental information" is defined in regulation 2 of the EIRs (the definition is reproduced in full in the Appendix). Where information falls within the scope of this definition, a Scottish public authority holding that information has a duty to make it available, subject to various restrictions and exceptions contained in the EIRs, to the applicant.
23. In this case, Mr Edwards made his information request under both FOISA and the EIRs. During the investigation, the investigating officer asked the Ministers to confirm whether they had ever considered the request in terms of the EIRs and, if so, what conclusion the Ministers had reached. The Ministers confirmed that they had considered dealing with Mr Edwards' request under the EIRs. However, they took the view that the request was not for environmental information and so they dealt with it wholly under FOISA.
24. The Commissioner has considered carefully the information withheld from Mr Edwards and considers that some of it does in fact fall within the definition of environmental information set out in the EIRs.
25. In most cases it will be clear from the information request roughly what types of information are covered by the request. This means that it is easier for the Commissioner to explain why he does or does not consider certain information to be environmental without disclosing what the information actually says and falling foul of section 45. (Section 45 of FOISA makes it a criminal offence for the Commissioner or a member of his staff to disclose information which he has obtained, or which has been furnished to him, under or for the purposes of FOISA if the information is not at the time of the disclosure, and has not previously been, available to the public from another source. Subject to minor modifications, section 45 also applies in relation to the Commissioner's functions under the EIRs, by virtue of regulation 17 of the EIRs.)



26. However, in this case Mr Edwards has simply asked for the contents of a named file. Apart from knowing the name and number of the file (and what information was disclosed to him previously), he does not know what is contained in the file. This information is not available to the public from another source. As a result, it is very difficult for the Commissioner to explain what information he considers to fall within the definition of environmental information and why. In this instance, he can only confirm that he has considered all of the documents and come to a conclusion.
27. The Commissioner considers that the following documents (of those the Ministers are continuing to withhold) contain environmental information within the definition in regulation 2(1) of the EIRs, as defined by the following paragraphs of that definition respectively:

Part 001

- Document 2: paragraph (b)
- Document 5: paragraph (c)
- Document 7: paragraphs (b) and (c)
- Document 8: paragraphs (b) and (c)
- Document 10: paragraphs (b) and (c)
- Document 11: paragraph (c)
- Document 13: paragraph (c)
- Document 14: paragraph (b)
- Document 17: paragraphs (b), (c) and (f)
- Document 18: paragraph (c)
- Document 19: paragraph (c)
- Document 20: paragraph (b)
- Document 23: paragraph (c)
- Document 24: paragraph (c)
- Document 25: paragraph (c)
- Document 27: paragraph (c)
- Document 31: paragraphs (b), (c) and (f)
- Document 35: paragraphs (b), (c) and (f)
- Document 36: paragraphs (b) and (f)
- Document 38: paragraphs (b), (c) and (f)
- Document 39: paragraph (c)
- Document 41: paragraph (c)



- Document 42: paragraph (c)
- Document 43: paragraphs (c) and (f)
- Document 44: paragraphs (c) and (f)
- Document 45: paragraphs (c) and (f)
- Document 47: paragraphs (b) and (f)
- Document 48: paragraphs (b), (c) and (f)
- Document 51: paragraph (c)
- Document 53: paragraph (c)
- Document 54: paragraphs (b) and (c)
- Document 55: paragraphs (b), (c) and (f)
- Document 56: paragraphs (b) and (c)
- Document 57: paragraphs (b), (c) and (f)
- Document 63: paragraphs (c) and (f)

Part 002

- Document 4: paragraphs (a), (c) and (f)
 - Document 6: paragraph (f)
 - Document 7a: paragraphs (a), (c) and (f)
 - Document 14: paragraphs (c) and (f)
28. Given that the Commissioner is satisfied that the information listed in the previous paragraph is environmental information, and given that the Ministers did not consider this information under the EIRs or cite the exemption in section 39(2) of FOISA in relation to it, the Commissioner will go on to consider whether the Ministers were entitled to withhold the environmental information under both FOISA and the EIRs. The Commissioner considers that in this case he is able to do this without seeking further submissions from the Ministers on the EIRs, given that the EIRs contain clear equivalents of the provisions relied on in FOISA and the submissions made by the Ministers under FOISA are readily transferable to consideration of the equivalent provisions in the EIRs.

Application of FOISA

29. The Commissioner will first of all consider whether the Ministers dealt with Mr Edwards' request in line with Part 1 of FOISA. In all 82 documents were withheld from Mr Edwards, including documents 21 and 22 (dealt with above). Of these, the Ministers considered 22 documents not to be held, on the basis that section 3(2)(a)(ii) applied.



Section 3(2)(a)(ii) (Information supplied by the UK Government)

30. Section 1(1) of FOISA states that a person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority. However, in terms of section 3(2)(a)(ii) of FOISA, information is not considered to be held by a Scottish public authority if it holds that information in confidence, having been supplied it by a Minister of the Crown or by a department of the Government of the United Kingdom.
31. This does not mean, however, that the information is necessarily inaccessible under freedom of information legislation, because a request for that information can still be made to the relevant Minister of the Crown or UK Government department under the Freedom of Information Act 2000 (FOIA).
32. The Ministers argued that section 3(2)(a)(ii) applied to documents 9a, 10, 11, 13, 17, 43, 52, 53, 55, 57, 60, 61, 62 and 63 in Part 001 of the file, and also to documents 3, 4, 7, 7a, 9, 11, 14 and 15 in Part 002. They also submitted that if section 3(2)(a)(ii) was not found to apply in any given case, they would consider the information in question to be exempt under various combinations of exemptions.
33. The Commissioner's briefing on the exemption in section 28 of FOISA envisages that information supplied by UK Government Departments and intended to be held in confidence should normally be clearly marked as such. There may be cases, however, where such information without "in confidence" or other appropriate protective marking appears to an authority to be sensitive. In such cases, the Scottish public authority will wish to confer with the relevant UK Government Department to determine the status of the information..
34. In all cases, the authority will be expected to evidence its claim that the information was supplied in circumstances creating an obligation of confidentiality. The information must also remain confidential at the time the request is received.
35. In considering whether the Ministers were correct to classify the information in the documents listed above as being subject to this section, it is necessary for the Commissioner to be mindful, and take cognisance, of the terms of the Scotland Act 1998 (the Scotland Act). In particular the Commissioner needs to be aware of the contents of Schedules 4 and 5 of the Scotland Act, listing respectively the legislation the Scottish Parliament has no power to modify and the matters reserved to the UK Parliament.



36. The Ministers advised that some matters covered by the file in question were devolved to the Scottish Government, whereas others matters were reserved. They indicated that although certain matters were reserved they remained relevant to the other UK administrations and as a result there was discussion within and among the administrations on these issues. They stated that they relied on the provision of information by the UK Government on these issues, in order to have a full understanding of the situation at a UK level. They considered the work done in these areas by themselves and the other UK administrations to be inextricably linked, and therefore it was important that they continued to receive this information from the UK Government. While there was nothing specific in writing on this point, they believed there to be a long-standing tacit understanding that information shared among administrations was to be held in confidence.
37. It is clear from the Scotland Act that a number of the matters covered by the withheld information are reserved matters, for example in relation to nuclear safety and security and emergency powers. Other matters, such as emergency planning at more local level and most aspects of water and environmental protection, are devolved to the Scottish Parliament. In relation to contingency planning generally, there is a considerable need for joint working across the UK administrations.
38. Taking into consideration the scheme of the Scotland Act 1998 and the submissions from the Ministers, and having examined the information concerned, the Commissioner is satisfied that the information in documents 10, 13, 17, 55, 57, 61, 62 and 63 in Part 001 of the file, and that in documents 4, 7a and 14 (the last comprising 2 documents) in Part 002, should be considered not to be held by the Ministers in terms of section 3(2)(a)(ii) of FOISA. These documents are either marked “secret”, “restricted” or “confidential”, and the Commissioner is satisfied in the circumstances that they were (when Mr Edwards’ request was received) held in confidence by the Ministers having been supplied by a department of the Government of the United Kingdom.
39. Although documents 11, 43, 52 and 53 of Part 001 of the file do not contain any security markings, the Commissioner is satisfied in the circumstances that they were also covered by section 3(2)(a)(ii) (and therefore were not held by the Ministers) at the material time. He would point out, however, that this cannot be inferred simply from the fact that a document has been supplied by a department of the UK Government: not every communication between the two administrations is of necessity confidential and material supplied in confidence may lose that quality during the time it is held by the Ministers.
40. The Commissioner cannot accept that documents 9a and 60 in Part 001 of the file, or documents 3, 7, 9, 11 and 15 in Part 002, should have been regarded as not held by the Ministers by virtue of section 3(2)(a)(ii) of FOISA. Document 60 is an internal communication within the Scottish Government and there is nothing in it which could have originated either in a UK Government department or with a Minister of the Crown. While the Commissioner accepts that the information in document 9a records a communication with another UK Government department, there is nothing by way of specific marking or in its content which suggests that it was provided in confidence.



41. In the case of documents 3, 7 and 9 in Part 002 of the file (all copies of the same email), the Commissioner accepts that they refer to documents which would have been provided in confidence. However, he does not accept that the particular information recorded in these documents themselves was provided in confidence: there is no marking to suggest that this was the case, and no reasonable basis for inferring any obligation of confidentiality from the contents. Similarly, the Commissioner can identify no basis for regarding the information contained in documents 11 and 15 in Part 002 as having been provided in confidence.
42. As the Commissioner is satisfied that (by virtue of section 3(2)(a)(ii) of FOISA) the Ministers did not, when they received Mr Edwards' request, hold the information in documents 10, 11, 13, 17, 43, 52, 53, 55, 57, 61, 62 and 63 in Part 001 of the file, or that in documents 4, 7a and 14 in Part 002, he will not consider that information further.
43. As the Commissioner is not satisfied that the information in documents 9a and 60 in Part 001 of the file, or that in documents 3, 7, 9, 11 and 15 in Part 002, would have been subject to section 3(2)(a)(ii) of FOISA, he will go on to consider the exemptions the Ministers have cited in relation to these documents.
44. Where a person has requested information from a Scottish public authority and the information is not considered to be held by that authority by virtue of section 3(2)(a)(ii) of FOISA, the Commissioner would expect that person to be given notice that the information is not held, in terms of section 17(1) of FOISA. In addition, section 15(1) of FOISA imposes a duty on a Scottish public authority, so far as it is reasonable to expect it to do so, to provide advice and assistance to a person who proposes to make, or has made, a request for information to it. The Commissioner considers it reasonable to expect public authorities who wish to claim that particular information is not held by them in terms of section 3(2)(a)(ii), to advise the applicant that he/she has a right to request this information under FOIA from the relevant department of the UK Government and to provide reasonable advice on how he/she might do this.
45. The Commissioner notes that while they did give Mr Edwards notice that the information in question was not held, the Ministers did not provide him with any advice on making a request under FOIA for the information to which section 3(2)(a)(ii) was considered to apply. The Commissioner considers that it was reasonable to expect the Ministers to provide Mr Edwards with the name(s) of the UK Government department(s) which had provided them with the information, along with advice and assistance to identify the information he was seeking in such a way that the relevant department(s) might locate it. By failing to do so, the Commissioner considers that the Ministers failed to comply with the duty to provide advice and assistance under section 15(1) of FOISA.
46. The Commissioner therefore requires the Ministers to notify Mr Edwards of his right to request this information from the appropriate department(s) of the UK Government under FOIA, with appropriate advice and assistance to identify the information he is seeking.



47. The Ministers are withholding information under sections 26(a), 28, 29(1)(a), 30(b), 30(c) and 31(1) of FOISA. As indicated above, they have argued that any information considered not to be held in terms of section 3(2)(a)(ii) is in any event exempt under various of the above exemptions: where the Commissioner has found section 3(2)(a)(ii) not to apply to any particular information, he will consider that information under the exemptions cited in relation to it.

Section 28 (Relations within the United Kingdom)

48. Section 28(1) of FOISA exempts information if its disclosure would, or would be likely to, prejudice substantially relations between any administration in the United Kingdom and any other such administration. The Scottish Administration and the Government of the United Kingdom fall within the definition of “administration in the United Kingdom” in section 28(2) of FOISA.
49. For section 28(1) to apply, the harm resulting from disclosure must be at the level of substantial prejudice. There is no definition of substantial prejudice in FOISA, but the Commissioner's view is that in order to claim this exemption an authority must be able to satisfy him that the damage caused, or likely to be caused, by disclosing the information would be both real and significant, as opposed to hypothetical or marginal. For the harm to be likely, there would require to be at least a significant probability of it occurring, in the near or foreseeable future and not at some distant time.
50. The Ministers submitted that those withheld documents which had been received from the UK Government and which were not considered to be outwith the scope of the request by virtue of section 3(2)(a)(ii) were exempt in terms of section 28(1). They argued that disclosure would prejudice substantially relations between the two administrations.
51. In providing justification for their reliance on the exemption in section 28(1), the Ministers pointed out that the information contained within file IMI 2/12 Part 001 and Part 002 had been obtained from a variety of sources, in the UK and elsewhere, as the work of the relevant Scottish Government team covered a wide range of cross-cutting issues. They advised that the team had a policy lead on some of the issues covered within the file, while on others they were seeking to influence or receive information on matters affecting their responsibilities. Noting that issues could be relevant over long periods, they highlighted the importance of developing and maintaining good working relationships.



52. The Ministers argued in particular that release of this information would be harmful to relations between the Scottish and UK administrations, and to the effective work of the Scottish Government, it being of vital importance that clear and uninhibited lines of communication remained open between the two administrations. They submitted that they relied on these lines of communication to keep up to date on issues of common concern and inform their responses to relevant UK Government developments. In this connection, they referred to their Memorandum of Understanding with the UK Government and the subsidiary concordats with individual UK departments, highlighting the importance of mutual co-operation and trust to the devolution settlement. Given the complexity and sensitivity of the issues covered by the file, they submitted that a clear private space was required for inter-government discussions on them.
53. While the political landscape in Scotland may have changed since Mr Edwards made his request, it is important to remember that the Commissioner must consider the position as at May 2006, when the Ministers responded to Mr Edwards' request for review.
54. Having considered the information to which the Ministers have applied the exemption in section 28(1), together with their submissions, the Commissioner is satisfied that if certain of the withheld information were to be released then this would, or would be likely to, prejudice substantially relations between the Ministers and the UK Government. He accepts that the information contained in documents 9 (specifically document 9a), 12, 27, 50 and 51 in part 001 of the file and documents 3, 7 and 9 in Part 002 relates to communications between the Ministers and the UK Government concerning aspects of contingency planning, in which both administrations have a significant interest. The Commissioner also accepts that the comments recorded in these documents are frank and candid and that certain of the documents bear a "restricted" marking, which suggests an expressed condition on the part of the department providing the information that it should not be released to persons who do not have authorisation to see it: while not conclusive, he does regard this marking as relevant to his determination of whether the exemption applies.
55. The Commissioner notes that the information contained in documents 1 (other than paragraphs 1 and 2), 3 (other than paragraphs 1 and 2), 9 (both 9a and 9b), 16, 18, 23, 25, 29, 30, 31, 32, 35, 36, 39, 41, 42, 46, 48, 54 and 56 in Part 001 of the file relates to internally produced communications within the Scottish Government. As the Commissioner's briefing on section 28 indicates, internally produced documents can come within the scope of the exemption if they are, for example, recording details of comment on another administration's policy proposal or legislation. The Commissioner is satisfied that in this case the documents referred to do contain this type of information, relating to ongoing matters which were at the relevant time subject to discussion involving both administrations. The Commissioner is satisfied in the circumstances that if this information were to be released then this would prejudice substantially the relationship between the Ministers and the UK Government.



56. While the Commissioner is satisfied that the information contained in documents 4, 28, 34, 37, 59 and 60 in Part 001 and documents 1, 2, 5, 6, 8, 10, 11 and 15 (email dated 21 March 2005 at 23:55hrs only) in Part 002 relates to either internal Scottish Government communications commenting on proposed or developing UK Government policy or communications between the Ministers and the UK Government, he is not satisfied that the majority of this information is of such substance that release would have the effect of prejudicing substantially relations between the Ministers and the UK Government. The information in question relates to routine communications about meetings and the provision of papers concerning subjects being discussed with the UK Government. The Commissioner cannot accept in the circumstances that disclosure of these documents would be capable of having the effect envisaged by the Ministers. The Commissioner accepts that certain of the information in documents 11 and 15 might prejudice relations between the two administrations substantially if released, but believes that information to be capable of redaction.
57. The Commissioner is also not persuaded that the information in document 24 in Part 001 would come within the scope of the exemption in section 28. This document is an internally produced document of the Scottish Government, which includes neither comment on proposed policy or legislation, nor any other information which the Commissioner believes would allow it to engage the exemption.
58. The Commissioner is therefore not satisfied that the Ministers relied on the terms of section 28 of FOISA correctly in withholding the information in documents 1 (paragraphs 1 and 2), 3 (paragraphs 1 and 2), 4, 24, 28, 34, 37, 59 and 60 from Part 001 of the file and documents 1, 2, 5, 6, 8, 10, 11 and 15 from Part 002. The Ministers have applied other exemptions to this information and the Commissioner will go on to consider these later in this decision notice.
59. As the Commissioner is satisfied that the Ministers applied the exemption in section 28 of FOISA correctly to the information in documents 1 (other than paragraphs 1 and 2), 3 (other than paragraphs 1 and 2), 9 (both documents 9a and 9b), 12, 16, 18, 23, 25, 27, 29, 30, 31, 32, 35, 36, 39, 41, 42, 46, 48, 50, 51, 54 and 56 in Part 001 of the file, and documents 3, 7 and 9 in Part 002 of the file, he is now required to consider the application to this information of the public interest test in section 2(1)(b) of FOISA.

Public interest test

60. In considering the application of the public interest test in section 2(1)(b) of FOISA to the information withheld, the Ministers advanced the following arguments to justify their position that the public interest in maintaining the section 28(1) exemption outweighed that in disclosure:
- While their presumption was to release information where possible, it was also extremely important for them to maintain good relations with a range of other parties, including the UK Government, and to be able to exchange information with them on a confidential basis, knowing that it would not be disclosed without agreement.
 - It was essential for them to maintain the ability to advise Ministers confidentially on matters relating to the ongoing formulation and development of policy in an area which continued to be highly sensitive.



While recognising a public interest in having access to information on the subject, they believed that in relation to the documents withheld this was outweighed by these reasons for maintaining the exemptions.

61. Having considered the public interest arguments advanced by the Ministers, together with those provided by Mr Edwards for release, the Commissioner accepts that it is important for the Ministers to maintain a good relationship with the UK Government and the other administrations. He recognises that this facilitates the provision of information on matters, which although not wholly devolved to the Ministers is still of interest and relevance to the Ministers, and on which the Ministers provide comment. It is important that the devolved administrations can represent their interests freely to the UK Government, and equally that Whitehall is not inhibited in informing these administrations of relevant developments as they occur. The Commissioner also appreciates that this will from time to time involve the exchange of information and views of some sensitivity.
62. The Commissioner acknowledges that a significant proportion of the matters discussed were sensitive in nature and that the relevant discussions were ongoing and still developing at the time the request was dealt with, and therefore recognises that it may not be in the public interest to disclose such information pending conclusion of the discussions.
63. The Commissioner also recognises, however, that since the events of 9/11, Scotland and the UK (along with other countries) have become more aware of vulnerabilities in national security and incidents which may occur. He therefore accepts the argument put forward by Mr Edwards that there is a strong public interest in providing the public with information about measures, procedures, arrangements and discussions within government relating to the protection of the public from disasters or attacks. He accepts that in appropriate cases this should extend to exposing deficiencies and problems in such measures, procedures and arrangements, to enable them to be remedied, and that in a democratic society the public should not always have to accept unsupported assertions from government as the sole guarantee of its safety. The Commissioner also upholds the view that we reside in a society which is open and intelligent enough to both understand and expect that the governments of both Scotland and the UK should be discussing these matters and considering their options.
64. In considering and weighing up these arguments in relation to the information in Part 001 of the file which the Commissioner has found to be exempt under section 28 of FOISA, he accepts that some of these documents do contain information which was particularly sensitive and could if released have been used in a manner which was not in the interests of the public. The Commissioner is therefore of the view that, in respect of the information in documents 9a, 9b, 25, 35, 39, 42, and 50, the public interest in disclosure of the information in these documents is outweighed by the public interest in maintaining the exemption in section 28 of FOISA.



65. Having weighed up the public interest arguments the Commissioner has also concluded that the information contained in documents 12, 16, 23, 27, 30, 32, 41 and 46 in Part 001 of the file should not be released. The Commissioner has reached this conclusion having taken into account Mr Edwards' submissions on what he sees as being in the interests of the public: in the Commissioner's view, none of the information in these documents would add to any public debate on this subject area or otherwise fulfil a public interest. Therefore the Commissioner is of the view that the public interest in disclosing the information in these documents does not outweigh the public interest in maintaining the exemption in section 28 of FOISA.
66. In weighing up the public interest arguments in relation to documents 1 (other than paragraphs 1 and 2), 3 (other than paragraphs 1 and 2), 18, 51, 54 and 56 in Part 001 of the file the Commissioner accepts that certain of the information in these documents could, if released, have assisted in fulfilling the public interest as to whether the UK Government had taken appropriate steps in preparing the UK in the event of an emergency. However, as indicated above he also acknowledges that where the subject of the information is a matter involving ongoing discussion between the UK Government and the Ministers, there is inevitably a public interest in ensuring that these discussions can continue frankly, taking account of the interests of both administrations. Weighing this up, the Commissioner is of the view that the public interest in disclosing the information in these documents is outweighed by the public interest in maintaining the exemption in section 28 of FOISA.
67. Having considered the information contained in documents 29, 31, 36 and 48 in Part 001 of this file, together with the public interest arguments from the Ministers and Mr Edwards, as mentioned above the Commissioner accepts that there is a public interest in access to information which provides details of measures, discussions, procedures and arrangements put in place to protect UK citizens in the event of an emergency. He also accepts that information in these documents would go some way towards fulfilling this public interest. On balance, therefore, he finds that the public interest in release of certain of the information in documents 31 and 48 and all of the information in documents 29 and 36 would not be outweighed by the public interest in maintaining the exemption in section 28 of FOISA. As the Ministers have also applied the exemption in section 29(1)(a) of FOISA to this information he will go on to consider the application of that exemption to this information later in this decision notice.
68. The Commissioner has concluded that certain of the information in documents 3, 7 and 9 from Part 002 of this file should be released, as detailed in the Schedule of Documents attached to this decision. The Commissioner is of this view as release of this information will assist in fulfilling the public interest in the provision of information about measures, procedures, arrangements and discussions within government relating to the protection of the public from disasters and attacks, and he is not persuaded in the case of this information as to the strength of the countervailing arguments put forward by the Ministers. As the Ministers have not applied any other exemptions to the information in question the Commissioner requires its disclosure. ,



69. As the Commissioner has concluded that the information in documents 1 (other than paragraphs 1 and 2), 3 (other than paragraphs 1 and 2), 9a, 9b, 12, 16, 18, 23, 25, 27, 30, 32, 35, 39, 41, 42, 46, 50, 51, 54 and 56 in Part 001 of the file was properly withheld under section 28 of FOISA, as was certain of the information in documents 3, 7 and 9 in Part 002, he will not consider that information any further in this decision.
70. As the Commissioner has concluded that certain information in documents 31 and 48 and all of the information in documents 29 and 36 from Part 001 of the file was not properly withheld under section 28 of FOISA, he will go on to consider the other exemptions the Ministers have applied to these documents.
71. As the Commissioner has concluded that certain of the information in documents 3, 7 and 9 from Part 002 of this file would not be exempt under section 28 of FOISA, and as the Ministers have not applied any other exemptions to this information, the Commissioner requires the information to be released to Mr Edwards, as specified in the Schedule of Documents attached to this decision.

Section 29(1)(a) (Formulation or development of government policy)

72. The exemption in section 29(1)(a) of FOISA exempts information which relates to the formulation or development of government policy. As the Commissioner has set out elsewhere (for example, in *Decision 075/2006 Paul Hutcheon and the Scottish Executive*), he takes the view that “formulation” means the output from the early stages of the policy process where options are generated and sorted, risks are identified, consultation occurs and recommendations or submissions are put to a Minister. “Development” is sometimes used interchangeably with “formulation,” but may go beyond this stage. It may refer to the processes involved in improving on, altering or recording the effects of existing policy.
73. Given the use of the words “relates to” in the exemption, the scope of this exemption is potentially very wide. However, in considering the application of this exemption, public authorities must also take into account the requirements laid down in sections 29(2) and 29(3) of FOISA (set out in full in the Appendix).
74. In justifying their reliance on this exemption, the Ministers advanced the same arguments given when relying on section 28(1) of FOISA, to the effect that the line of communications between the UK Government and the Ministers should be kept open on matters, which although mainly reserved to Westminster and only in part devolved to the Ministers, are those on which the Ministers have a role in making decisions and providing comment. The Ministers have advised that the handling of complex and sensitive matters, such as those recorded in the withheld information, requires a clear and private space in which both UK and Scottish Ministers and their officials can operate.
75. The Ministers also submitted that the inability to communicate and exchange information with the UK Government and other devolved administrations would inhibit their ability to advise Scottish Ministers on the formulation and development of policy. They advised that their work and that of the other devolved administrations on the issues covered here was inextricably linked to the work of the UK Government.



76. The Ministers submitted that the documents withheld under this exemption covered internal discussion and advice to Scottish Government Ministers on a variety of policy matters. They also stated that the documents concerned the development of policy. During the meeting that the investigating officer had with the Ministers, they advised that discussions relating to the formulation and development of policy in this area can take place over a number of years before a final policy decision is reached. They confirmed that all of the information withheld under this exemption was still being used to inform current policy development in this area, which was ongoing
77. Having considered the documents for which the Ministers have relied on the exemption in section 29(1)(a) of FOISA, together with the submissions from the Ministers, the Commissioner is satisfied that the following documents of those remaining under consideration contain information which relates to formulation or development of government policy. In the case of Part 001 of the file, these are documents 1 (paragraphs 1 and 2), 2, 3 (paragraphs 1 and 2), 5, 7, 8, 14, 19, 20, 24, 28, 29, 31, 33, 34, 37, 38, 44, 45, 47, 48, 49, 58 and 65. In the case of Part 002, they are documents 12, 13 and 15 (email dated 21 March 2005 at 23:55hrs only).
78. Having considered the information and the relevant submissions, however, the Commissioner is not satisfied that the information in the following documents relates to the formulation or development of government policy. These are documents 4, 6, 15, 36, 59 and 60 in Part 001 of the file and documents 1, 2, 5, 6, 8, 10 and 15 (email dated 22 March 2005 at 15:31hrs only) in Part 002.
79. The Commissioner is of this view in the case of document 4 as the information in it relates to an exchange of emails regarding the content of a minute and a letter, which do not themselves form part of this document. This document does not relate to the formulation or development of a policy as it is not discussing ideas for a particular policy but rather simply highlighting methods that will be used to articulate work done in a particular area.
80. Document 6 in Part 001 of the file is simply articulating what has been done in a particular area: the document does not contain any information about the generation of ideas or options, nor is it seeking to consult on any options raised.
81. Document 15 in Part 001 is inviting the provision of information and advice, but it is concerned with the provision of a resource rather than the formulation or development of policy.
82. Document 36 appears to be checking the arrangements that were in place at the time that the email was prepared; this is not establishing anything new or otherwise contributing to the formulation or development of government policy.
83. Documents 59 and 60 make reference to attached documents relating to a discussion of policy, but do not themselves contain any information which relates to the formulation or development of policy.



84. It is the Commissioner's view that the information contained in documents 1, 2, 5 and 6 in Part 002 of the file refer to a possible discussion taking place in relation to matters outlined in a document attached to these emails. There is no evidence of ideas or options being generated here, this being simply an exchange of emails regarding matters addressed in an attached document. The Commissioner does not accept that this information relates to the formulation or development of policy.
85. The information in document 8 in Part 002 of the file records comments which have been given regarding the circulation of a briefing paper, none of which relate to the formulation or development of government policy.
86. It is the Commissioner's view that the information in documents 10 and 15 (email dated 22 March 2005 at 15:31hrs only) of Part 002 of this file relates to the fact that comments have been made on the content of a document (which does not form part of the information under consideration here), and the fact that comments are being sought from other parties. These documents do not record the comments, or any other information about the formulation or development of a policy, and so it is the Commissioner's view that the information in these documents does not engage the exemption in section 29(1)(a) of FOISA.
87. The Commissioner is therefore not satisfied that the Ministers were correct to rely on the exemption in section 29(1)(a) of FOISA in relation to the information in documents 4, 6, 15, 36, 59 and 60 in Part 001 of the file, or documents 1, 2, 5, 6, 8, 10 and 15 (email dated 22 March 2005 at 15:31hrs only) in Part 002. As this information has either been withheld under section 29(1)(a) only, or where it has been withheld under other provisions of FOISA the Commissioner has found these not to apply, the Commissioner requires its release.
88. As the Commissioner is satisfied that the Ministers were correct to rely on the exemption in section 29(1)(a) in relation to documents 1 (paragraphs 1 and 2), 2, 3 (paragraphs 1 and 2), 5, 7, 8, 14, 19, 20, 24, 28, 29, 31, 33, 34, 37, 38, 44, 45, 47, 48, 49, 58 and 65 in Part 001 of the file, and documents 12, 13 and 15 (email dated 21 March 2005 at 23:55hrs only) in Part 002, he must now go on to consider the application to this information of the public interest test in section 2(1)(b) of FOISA.
89. The Ministers have also relied on the exemption in section 29(1)(a) for redacting certain information (in addition to personal data) from 6 of the documents released to Mr Edwards. Having considered these documents, the Commissioner is satisfied that the information redacted from the following relates to the formulation or development of government policy:
- Email dated 26 October 2001, at 13:14hrs
 - Email dated 27 November 2001, at 11:52hrs
 - Email dated 10 December 2001
 - Email dated 10 December 2001, at 09:44hrs



90. While the Commissioner is satisfied that the information in the file list document titled does relate to the files held by the Ministers concerning particular policies, he does not accept that the mere reference to particular files and file codes relates to the formulation or development of policy. All the redacted information shows is that particular files existed concerning certain subject areas, providing no information as to the formulation or development of policy in this area. Therefore the Commissioner cannot uphold the Ministers reliance on section 29(1)(a) of FOISA in respect of this information. As no other exemptions have been claimed in relation to it, the Commissioner requires the Ministers to provide Mr Edwards with an unredacted copy of this document.
91. The Commissioner is also not satisfied that the information redacted from an email dated 9 January 2002 at 10:22hrs relates to the formulation or development of government policy. There is no information in this document which relates to generation of ideas or options or discussion of these, nor is any reference made to changes to a particular policy. The Commissioner is therefore not satisfied that the Ministers have applied the exemption in section 29(1)(a) correctly in respect of this email. As the Ministers have not applied any other exemption to the information in this email (except in relation to personal information about which Mr Edwards is not concerned), the Commissioner requires them to release a copy to Mr Edwards with only the personal information remaining redacted.
92. As the Commissioner is satisfied that the Ministers relied on the exemption in section 29(1)(a) correctly in respect of the emails listed in paragraph 89 above, he is now required to consider the application of the public interest test to that information also.

Public interest test

93. In considering the application of the public interest test, the Ministers provided the Commissioner with combined arguments to substantiate their view that the public interest in maintaining the exemptions in section 29(1)(a) and sections 30(b) and 30(c) of FOISA outweighed that of disclosure of the information. The Commissioner intends to consider these arguments initially in respect of the information he has found to be exempt under section 29(1)(a) of FOISA.
94. The arguments advanced by the Ministers are summarised as follows:
- There is a strong public interest in high quality policy making and implementation. In order for the Government to succeed in upholding that interest, Ministers and officials need to be able to consider all available options and debate these rigorously in order to expose all their merits and demerits and understand their implications.
 - The candour of Ministers and officials debating matters relating to policy making will be affected by their assessment of whether the content of their discussions will be disclosed in the near future, when it might undermine or constrain the Government's view on settled policy or policy under discussion or development.



- There is a strong public interest in maintaining the integrity of the process of giving free and frank advice in this sort of case. The knowledge of possible disclosure might inhibit the provision of advice in future and the candour and freedom with which papers are prepared, deliberated on and revised in future.
 - It is in the public interest for decision making to be based on the best advice available, with full consideration of all options.
 - There is a public interest in ensuring that Ministers and Officials can conduct rigorous and candid risk assessments of their policies and programmes, without premature disclosure which might close off discussion.
 - Premature disclosure of advice can distort public perceptions of it and thus affect its impartiality.
95. In considering the application of the public interest test in section 2(1)(b) of FOISA, the Commissioner has also considered the submissions from Mr Edwards as to why in his view the public interest lay in disclosure of this information. The Commissioner accepts that there is a public interest in allowing Ministers and Officials to fully discuss information relating to the formulation and development of policy. He also accepts that where the information under discussion is of a sensitive nature there would be a public interest in ensuring that Ministers and officials can discuss this in a manner which allows them to fully explore all of their options.
96. However, as the Commissioner has said already in this decision notice he accepts Mr Edwards' argument that there is a public interest in being shown what steps the Ministers and the UK Government are taking to protect the public against incidents which might occur.
97. Having considered the competing arguments with respect to the information in documents 2, 5, 38, 44 and 49 in Part 001 of this file, the Commissioner accepts that the information in these documents is sensitive and that there is a public interest in allowing Ministers and officials to discuss such information fully without concern that it would be disclosed prematurely. On balance, therefore, the Commissioner finds that the public interest in disclosing the information in documents 2, 5, 38, 44 and 49 in Part 001 of this file is outweighed by the public interest in maintaining the exemption in section 29(1)(a) of FOISA.
98. Considering the information contained in documents 19 and 20 in Part 001 of the file, it is clear to the Commissioner that this constitutes a draft document. The content of the final version is not clear, however, nor for that matter whether a final version was ever produced. The Commissioner upholds the argument from the Ministers that there is a public interest in allowing Ministers and officials to conduct rigorous assessments of their policies without premature disclosure. While there may be a public interest in disclosure of this information for the reasons discussed above, the Commissioner considers there to be (or at least to have been at the time the request was dealt with) a stronger public interest in allowing the relevant matters to be deliberated upon in private and avoiding the release of misleading information which could provide the wrong impression of the Ministers' and UK Government's position on the issue concerned. On balance, therefore, the Commissioner finds that the public interest in disclosing the information contained in documents 19 and 20 is outweighed by the public interest in maintaining the exemption in section 29(1)(a) of FOISA.



99. The Commissioner also accepts the arguments advanced by Mr Edwards that we reside in a society which is open and intelligent enough to expect that certain matters should be discussed by the Ministers and the UK Government. He also accepts that the public should be given information as to what steps, procedures and measures the Ministers and the Government have put in place to deal with these issues. However, having considered the information in documents 24, 33, 34, 37, 45, 58 and 65 in Part 001 of the file, the Commissioner can find nothing in this information which would add to the debate on matters of public interest in this area. On balance, having considered the countervailing public interest arguments advanced by the Ministers, the Commissioner finds that the public interest in disclosure of the information in documents 24, 33, 34, 37, 45, 58 and 65 is outweighed by that in maintaining the exemption in section 29(1)(a) of FOISA.
100. However, the Commissioner is of the view that release of the information in documents 7, 8, 14, 28, 29, 31 (paragraphs 1,2,3,4, 5 subject to redaction of the first two sentences, 7, 8,12 and 13 only), 47 and 48 (paragraphs 1,2,3,4,5 subject to redaction of the first two sentences, 7,8,12 and 13 only) in Part 001 of the file would assist in fulfilling the public interest in this area. The Commissioner takes this view as these documents provide information on the steps being taken by the Ministers and the UK Government to put in place measures, procedures and policies to prepare and protect the UK in the event of an emergency. On balance, having considered the content of the information and the arguments for maintaining the exemption, the Commissioner finds that (except in the case of the specified parts of documents 31 and 48) the public interest in disclosure of this information is not outweighed by the public interest in maintaining the exemption in section 29(1)(a) of FOISA. As the Ministers have applied other exemptions to documents 7, 8, 31 and 48 the Commissioner will consider these documents further in relation to these exemptions.
101. The Commissioner also finds that release of certain information in documents 1 (paragraphs 1 & 2 only) and 3 (paragraphs 1 & 2 only) of Part 001 of this file would inform public debate and assist in satisfying the public interest in this matter. On balance, having considered the content of the information and the arguments for maintaining the exemption, the Commissioner finds that the public interest in disclosing the information is not outweighed by that in maintaining the exemption..
102. In considering the application of the public interest test in relation to the information in documents 12 and 13 of Part 002 of this file, the Commissioner accepts that where Ministers and officials are debating matters relating to policy that they do need to be able to consider all the options that are available. He accepts that in doing so they must be able to debate these matters thoroughly. He partially accepts the argument put forward by the Ministers in relation to their view that the candour of Ministers and officials might be affected during policy making if they were aware that their discussions would be disclosed in the near future. Given that the documents in question were produced in March 2005, however, and FOISA has been in force since January 2005, it would be reasonable to conclude that Ministers and officials making comments or being party to discussion at that time would be mindful of FOISA. Where the information under investigation had been prepared before FOISA came into force then it might have been possible to attach greater weight to this aspect of the arguments advanced by the Ministers..



103. As indicated earlier in this decision, the Commissioner accepts the view put forward by Mr Edwards that there is a public interest in providing the public with information about measures, procedures, arrangements and discussions within government relating to the protection of the public from disasters or attacks. While the Commissioner accepts this view, having considered the information in documents 12 and 13, he is not satisfied that it would provide anything of substance to enhance public knowledge or encourage debate in this area.
104. On balance, therefore, the Commissioner is of the view that the public interest in disclosure of the information in documents 12 and 13 is outweighed by the public interest in maintaining the exemption in section 29(1)(a) of FOISA.
105. In the case of the email dated 21 March 2005 at 23:55hrs from document 15 in Part 002 of the file, the Commissioner considers that the public interest in releasing the information in it would outweigh that in maintaining the exemption. The Commissioner is of this view, as although he acknowledges the argument advanced by the Ministers, in relation to Ministers and officials being able to debate policy matters fully and expose all of their merits and demerits, he also accepts the arguments put forward by Mr Edwards in favour of disclosure, and is of the view that certain of the information in this document would assist in providing the public with details of the steps taken by the UK Government and the Ministers to address potential threats to the Country.
106. In relation to the emails listed at paragraph 89 above, the Commissioner accepts that were the information which has been redacted from the email dated 26 October 2001 at 13:14hrs to be released then this would not add anything to the debate on matters of public interest. He is not persuaded, therefore, that the public interest in disclosure can outweigh that in maintaining the exemption.
107. The information redacted from the email dated 27 November 2001 at 11:52hrs is the same information as considered under document 29 referenced above. Therefore for the same reasons as Commissioner has given for document 29 he is of the view that the public interest in disclosure of the information in this email would outweigh the public interest in maintaining the exemption in section 29(1)(a) of FOISA.
108. The information redacted from the email dated 10 December 2001 entitled 'SECC' is the same information as is contained in document 37 referenced above. Therefore, for the same reasons that as he has given for document 37 already the Commissioner accepts that the public interest in disclosing this document is outweighed by the public interest in maintaining the exemption in section 29(1)(a) of FOISA.
109. Having examined the information in the email dated 10 December 2001 at 09:44hrs it is clear to the Commissioner that the Ministers have recognised a public interest in disclosure. It is also clear that the information redacted from this document has in any event been released to Mr Edwards elsewhere in the same document. On balance, having considered the information redacted and the arguments advanced by the Ministers and by Mr Edwards, the Commissioner cannot accept that the public interest in maintaining the exemption outweighs that in disclosure.



110. The Commissioner's detailed conclusions in respect of section 29(1)(a) (and in respect of the other exemptions considered in this case) are set out in the Schedule of Documents attached to this decision.

Section 30 (Prejudice to effective conduct of public affairs)

Section 30(b)

111. In their submissions to the Commissioner, the Ministers sought to rely on the exemptions in section 30(b) of FOISA for 5 documents in Part 001 of the file.
112. As the Commissioner is satisfied that the information in documents 25, 27, 32, 54 and 56 is exempt under section 28 of FOISA, he will not consider the exemptions in section 30(b)(i) and 30(b)(ii) which the Ministers have also applied to these documents.

Section 30(c)

113. The Ministers have relied on the exemption in section 30(c) to withhold 11 documents in Part 001 of this file. The Ministers have not relied on the exemption in section 30(c) for any of the information they have withheld in Part 002 of this file.
114. As the Commissioner is satisfied that the information in documents 16, 18, 25, 27, 32, 54 and 56 was properly withheld under section 28 of FOISA, and that in documents 19 and 20 was properly withheld under section 29 of FOISA, he will not consider the exemption in section 30(c) in relation to these documents. Accordingly he is only required to consider the Ministers' application of the exemption in section 30(c) to documents 31 and 48 from Part 001 of this file.
115. The Ministers have provided the same submissions for their reliance on the exemption in section 30(c) of FOISA as they did for sections 30(b)(i) and 30(b)(ii) of FOISA.
116. The Ministers have submitted that they had relied on the exemptions under sections 30(b) and 30(c) of FOISA for this information as it related to internal discussion and advice to Scottish Government Ministers on a variety of policy matters discussed by the appropriate committee. The Ministers submitted that release of this information would have the effect of substantially inhibiting the free and frank provision of advice and exchange of views. The Ministers took this view, as they believed that the issues covered in this information were still relevant to the development of current policy. They added that disclosure would prejudice substantially the effective conduct of public affairs, as it was likely to inhibit substantially the free and frank provision of advice and exchange of views.



117. Having considered the information in documents 31 and 48 in Part 001 of the file, together with the submissions from the Ministers, the Commissioner accepts that this information does relate to the development of policy. It is also clear that the information discusses processes which are likely to take a number of years to complete. The Commissioner also accepts that although the information recorded here is factual, there is also certain information which is of some sensitivity. However, given the inclusion of the word “otherwise” in section 30(c), the Commissioner does not consider that the arguments put forward by the Ministers for withholding this information, which relate entirely to the exemptions in sections 30(b)(i) and (ii) (which they did not rely on for the information in these documents), to be valid for the purposes of this particular exemption.
118. The Commissioner therefore finds that documents 31 and 48 of Part 001 of the file are not exempt in terms of section 30(c) of FOISA. Consequently, he is not required to consider the application of the public interest test for the purposes of section 30(c) and therefore requires the disclosure of the information in these documents, insofar as he has not found it to have been properly withheld under sections 28 and 29(1)(a) of FOISA (see Schedule of Documents for further details).

Section 31(1) (National security and defence)

119. The Ministers have cited the exemption in section 31(1) of FOISA in relation to 8 documents withheld from Mr Edwards, all from Part 001 of this file. With the exception of documents 7 and 8 the Commissioner has found all of these to have been properly withheld under other provisions in FOISA. He will therefore only consider documents 7 and 8 here...
120. Section 31(1) of FOISA states that information is exempt from section 1(1) of FOISA, if the exemption from section 31(1) is required for the purposes of safeguarding national security.
121. The expression “national security” is not defined in FOISA. However, the Commissioner considers that the phrase covers matters such as defence of the realm; the prosecution of war; the disposition of the armed forces; nuclear weapons; security and intelligence services, and potential threats to the economic wellbeing of the UK; including terrorism, espionage and subversion.
122. However, it should be noted that section 31(1) of FOISA specifies that information is exempt if exemption is required *for the purposes of* safeguarding national security, which has a broader scope than simply information on these matters.
123. The Ministers have argued that disclosure of the information in documents 7 and 8 of this file could harm and compromise the safety of the state, in certain specified ways.
124. The Commissioner is not satisfied, however, that the information in documents 7 and 8 is exempt under section 31(1) of FOISA. He is of this view, as much of the information that is contained in these documents is factual, relating to the provision of advice or views on the outcome of a particular event, and he does not consider any of it to be of such sensitivity or consequence that its disclosure would (at the material time) have had the effect of compromising national security.



125. As the Commissioner is not satisfied that documents 7 and 8 in Part 001 of this file would come within the scope of section 31(1) of FOISA he is not required to consider the application of the public interest test in section 2(1)(b) of FOISA. However, the Ministers also argued that the exemption in section 26(a) of FOISA could apply to the information in documents 7 and 8, and therefore the Commissioner will go on to consider this.

Section 26(a) (Prohibition on disclosure)

126. For the Ministers to be able to rely on the exemption in section 26(a) of FOISA they would have to show that disclosure of the information in question was prohibited by or under an enactment.
127. In their submissions, the Ministers advised that if they were to release the information to which they had applied the exemption in section 31(1) they would commit an offence under section 79 of the Anti-Terrorism Crime and Security Act 2001.
128. Having considered section 79 of the Anti-Terrorism Crime and Security Act 2001, the Commissioner is not satisfied that section 79 of this Act (while clearly an enactment) constitutes a prohibition on disclosure under FOISA. Section 79 states that;
- 79 Prohibition of disclosures relating to nuclear security*
- (1) A person is guilty of an offence if he discloses any information or thing the disclosure of which might prejudice the security of a nuclear site or of any nuclear material –
- a) with the intention of prejudicing that security; or
 - b) being reckless as to whether the disclosure might prejudice that security.
129. The Commissioner is not satisfied that this section of the Anti-Terrorism Crime and Security Act does constitute a prohibition under FOISA. Certain circumstances would require to exist before disclosure would be prohibited: there is no general prohibition on disclosure. Having considered the information in question and the arguments advanced by the Ministers for it being withheld, the Commissioner is not persuaded in this particular case that the conditions which would require to be in place for the offence to be committed would in fact be in place as a consequence of disclosure of the information in response to Mr Edwards' request.
130. The Commissioner is therefore not satisfied that section 79 of the Anti-Terrorism Crime and Security Act 2001 would constitute a prohibition on disclosure under FOISA. As a result he cannot accept the Ministers reliance on the exemption in section 26(a) of FOISA. Not having found the information in documents 7 and 8 from Part 001 of the file to have been properly withheld under any of the provisions cited by the Ministers, he requires the release of that information.



Application of the EIRs

131. As noted above, the Commissioner considers some of the information withheld from Mr Edwards to be environmental information in terms of regulation 2(1) of the EIRs. Given that the Ministers have not cited section 39(2) of FOISA for this information (they were not asked whether they wished to do so during the investigation), the Commissioner will now go on to consider whether any of the information which he considers to be environmental information should have been made available to Mr Edwards under the EIRs.
132. In doing so, the Commissioner has considered the arguments put forward by the Ministers in relation to their reliance on section 3(2)(a)(ii) of FOISA and their submissions on the exemptions cited by them, and is satisfied in the circumstances that these arguments can readily be transferred to the EIRs without the need to seek further comments or submissions from the Ministers.

Regulation 2(2)(a) – environmental information not held

133. The Ministers submitted that some of the information withheld from Mr Edwards was not held by them in terms of section 3(2)(a)(ii) of FOISA. The Commissioner is satisfied that regulation 2(2)(a) of the EIRs has substantially the same effect and accepts that the environmental information contained in the following documents is not held by the Ministers for the purposes of the EIRs: documents 10, 11, 13, 17, 43, 53, 55, 57 and 63 from Part 001 and documents 4, 7a and 14 (which relates to 2 documents) from Part 002 of the file.
134. Under regulation 10(4)(a) of the EIRs, a Scottish public authority may refuse to make environmental information available to the extent that it does not hold the information when the applicant's request is received. As with all exceptions from the duty to make environmental information available under the EIRs, this is subject to the public interest test set out in regulation 10(1)(b). In this case, having accepted that all of the information was held in confidence at the material time, the Commissioner can identify no public interest in disclosure sufficiently compelling to outweigh the strong public interest in maintaining confidentiality.
135. Consequently, the Commissioner does not require the Ministers to make this information available to Mr Edwards. As with section 15 of FOISA (referred to above), the EIRs contain a duty under regulation 9(1) to provide advice and assistance – so far as it will be reasonable to expect the authority to do so – to applicants and prospective applicants. For the same reasons, as set out above in relation to section 3(2)(a)(ii) of FOISA, the Commissioner considers that the Ministers did not provide such assistance to Mr Edwards: to remedy this, he would require the same action he has specified above in the context of section 3(2)(a)(ii).

Regulation 10(4)(e) – internal communications

136. In terms of regulation 10(4)(e) of the EIRs, a Scottish public authority may refuse to make environmental information available to the extent that the request involves making available internal communications. In terms of regulation 10(2) of the EIRs, this exception must be interpreted in a restrictive way (regulation 10(2)(a)) and the public authority shall apply a presumption in favour of disclosure (regulation 10(2)(b)).



137. As noted above, the Ministers applied exemptions in section 29 and 30 of FOISA to information withheld from Mr Edwards. The Commissioner considers that the equivalent exception under the EIRs is that contained in regulation 10(4)(e) (and, from experience, the Commissioner is aware that this is the exception generally relied on by the Ministers in such circumstances). The Commissioner is satisfied that all of the environmental information contained in the following documents comprises internal communications: documents 2, 5, 7, 8, 14, 19, 20, 24, 31, 38, 44, 45, 47 and 48 of Part 001 of the file. As a result, he is satisfied that they are excepted under regulation 10(4)(e).
138. The Ministers applied the exemption in section 28 of FOISA to certain information withheld from Mr Edwards. There is no direct equivalent exception in the EIRs, but the Commissioner's own briefing on section 28 acknowledges that the exception in regulation 10(4)(e) of the EIRs may be applicable where the withheld information constitutes internally produced information. The Commissioner is satisfied that as the information in documents 18, 23, 25, 27, 31, 35, 36, 39, 41, 42, 48, 54 and 56 all falls into this category and contains internally produced information, this is excepted under regulation 10(4)(e).
139. Having considered the information contained in document 6 in Part 002 of the file, in respect of which the Ministers relied on the exemptions in sections 28 and 29 of FOISA, the Commissioner is satisfied that this comprises internal communications for the purposes of regulation 10(4)(e).
140. However, the exception in regulation 10(4)(e) of the EIRs is subject to the public interest test required by regulation 10(1) of the EIRs. This states that a Scottish public authority may refuse a request to make environmental information available if there is an exception to disclosure under paragraph 10(4) or (5) and, in all the circumstances of the case, the public interest in making the information available is outweighed by that in maintaining the exception.
141. In coming to a decision on where the public interest lies, the Commissioner has again considered the comments and submissions made by both the Ministers and by Mr Edwards.
142. For the reasons set out when considering the public interest test in relation to FOISA above, the Commissioner finds that the public interest in making the information in the following documents available is outweighed by that in maintaining the exception in regulation 10(4)(e): documents 2, 5, 18, 19, 20, 23, 24, 25, 27, 35, 38, 39, 41, 42, 44, 45, 54 and 56 of Part 001 of the file.
143. For the reasons set out when considering the public interest test in relation to FOISA above, the Commissioner finds that the public interest in making available certain of the information in documents 31 and 48 of Part 001 of this file is not outweighed by the public interest in maintaining the exception in regulation 10(4)(e) of the EIRs (while the public interest in maintaining the exception does outweigh that in making the information available in respect of the remainder).



144. For the reasons set out when considering the public interest test in relation to FOISA above, the Commissioner finds that the public interest in making the information in documents 7, 8, 14, 36 and 47 available is not outweighed by that in maintaining the exception in regulation 10(4)(e).
145. Having considered the public interest arguments advanced by both the Ministers and Mr Edwards in this case, the Commissioner is satisfied that the public interest in disclosure of document 6 in Part 002 is not outweighed by the public interest in maintaining the exception in this case. The Commissioner is of this view as he considers that the information contained within the document will fulfil the public interest identified by Mr Edwards and is not likely to harm discussions between the Ministers on the matter if it were to be released.

Regulation 10(5)(f) – Interests of the person who provided the information where that person did not supply it in circumstances such that it could, apart from these Regulations, be made available; and has not consented to its disclosure.

146. In terms of regulation 10(5)(f) of the EIRs, a Scottish public authority may refuse to make environmental information available to the extent that its disclosure would, or would be likely to prejudice substantially the interests of the person who provided the information where that person (i) was not under, and could not have been under, any legal obligation to supply the information; (ii) did not supply it in circumstances such that it could, apart from the EIRs, be made available; and (iii) has not consented to its disclosure. In terms of regulation 10(2) of the EIRs, this exception must be interpreted in a restrictive way (regulation 10(2)(a)) and the public authority shall apply a presumption in favour of disclosure (regulation 10(2)(b)). It is, of course, subject to the public interest test in regulation 10(1)(b).
147. As noted above, the Ministers applied the exemption in section 28(1) of FOISA to document 51. As the information was not produced within the Scottish Administration, the Commissioner has been unable to consider this under the exception in regulation 10(4)(e) of the EIRs. He has considered whether this information would be excepted under regulation 10(5)(f).
148. The Commissioner's briefing on regulation 10(5)(f) states that certain points need to be addressed in considering whether this exemption applies. These are:
- Was the information provided by a third party?
 - Was the third party under a legal obligation to provide the information?
 - Could the provider be required by law to provide it?
 - Would release of the information cause substantial harm to the interests of the information provider?
 - Is the information otherwise publicly available?
 - Has the information provider consented to disclosure?



149. Having considered the information in document 51 which he considers to be environmental information, the Commissioner is satisfied that each of the tests set out above would be met, and therefore that disclosure of the environmental information in this document would be excepted under regulation 10(5)(f) of the EIRs.
150. As mentioned already, the exception in regulation 10(5)(f) of the EIRs is subject to the public interest test required by regulation 10(1)(a) of the EIRs.
151. In coming to a decision on where the public interest lies in relation to this document, the Commissioner has again considered the comments and submissions made by both the Ministers and Mr Edwards.
152. For the reasons set out above when considering the public interest test in relation to FOISA, the Commissioner is satisfied that the public interest in making the information in document 51 of Part 001 of the file available is outweighed by that in maintaining the exception in regulation 10(5)(f).

DECISION

Freedom of Information (Scotland) Act 2002

The Commissioner finds that the Scottish Ministers (the Ministers) partially dealt with Mr Edwards' request for information in accordance with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA), in notifying Mr Edwards that certain of the information he had requested was not held by them in terms of section 3(2)(a)(ii) of FOISA and by withholding other information under various exemptions in Part 2 of FOISA.

However, the Commissioner also finds that that not all of the information withheld from Mr Edwards was properly withheld by the Ministers under the various exemptions claimed (as specified in the Schedule of Documents attached to this decision), and that in failing to disclose this information the Ministers failed to comply with Part 1 of FOISA, and in particular with section 1(1).

The Commissioner also finds that, in failing to provide advice and assistance to Mr Edwards on making a request under the Freedom of Information Act 2000 for the information they did not hold in terms of section 3(2)(a)(ii) of FOISA, the Ministers failed to comply with Part 1 of FOISA, and in particular with section 15(1).



Environmental Information (Scotland) Regulations 2004

The Commissioner finds that the Ministers failed to deal with Mr Edwards' request in accordance with the EIRs, by failing to identify and consider the information specified in paragraph 27 of this decision as environmental information as defined in regulation 2(1) of the EIRs. He also finds that the Ministers were entitled to withhold certain of this information (as specified in the Schedule of Documents attached to this decision) under exceptions in the EIRs.

The Commissioner also finds, however, that the remainder of the environmental information specified in paragraph 27 (as more particularly described in the attached Schedule of Documents) could not be properly withheld from Mr Edwards under exceptions in the EIRs, and that in failing to make that information available to Mr Edwards the Ministers failed to comply with the EIRs, and in particular with regulation 5(1).

The Commissioner also finds that, in failing to provide advice and assistance to Mr Edwards on making a request under the Environmental Information Regulations 2004 for the information they did not hold in terms of regulation 2(2)(a) of the EIRs, the Ministers failed to comply with Part 1 of FOISA, and in particular with regulation 9(1).

Outcome

The Commissioner therefore requires the Ministers to disclose to Mr Edwards the documents specified for release in the Schedule of Documents attached to this decision (to the extent specified in that Schedule) by 13 May 2009.

The Commissioner also requires the Ministers to provide Mr Edwards with reasonable advice and assistance by way of naming the UK Government department(s) which provided them with the information the Commissioner has accepted as not held in terms of section 3(2)(a)(ii) of FOISA (as specified in the attached Schedule of Documents), along with advice and assistance to identify the relevant information in such a way that the department(s) in question might locate it. Again, this must be done by 13 May 2009.

Decision 036/2009
Rob Edwards
and the Scottish Ministers



Appeal

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

Kevin Dunion
Scottish Information Commissioner
30 March 2009



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.

...

- (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 –

- (a) the provision does not confer absolute exemption; and
- (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

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

...

- (b) section 26;

...

3 Scottish public authorities

- (2) For the purposes of this Act but subject to subsection (4), information is held by an authority if it is held-

- (a) by the authority otherwise than-

....



- (ii) in confidence, having been supplied by a Minister of the Crown or by a department of the Government of the United Kingdom; or

15 Duty to provide advice and assistance

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

....

26 Prohibitions on disclosure

Information is exempt information if its disclosure by a Scottish public authority (otherwise than under this Act)-

- (a) is prohibited by or under an enactment;

...

28 Relations within the United Kingdom

- (1) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice substantially relations between any administration in the United Kingdom and any other such administration.

- (2) In subsection (1), "administration in the United Kingdom" means-

- (a) the Government of the United Kingdom;
- (b) the Scottish Administration;
- (c) the Executive Committee of the Northern Ireland Assembly; or
- (d) the National Assembly for Wales.

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;

...

- (2) Once a decision as to policy has been taken, any statistical information used to provide an informed background to the taking of the decision is not to be regarded, for the purposes of-



- (a) paragraph (a) of subsection (1), as relating to the formulation or development of the policy in question; or
-
- (3) In determining any question under section 2(1)(b) as respects information which is exempt information by virtue of subsection (1)(a), the Scottish Administration must have regard to the public interest in the disclosure of factual information which has been used, or is intended to be used, to provide an informed background to the taking of a decision.
- (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;
-

30 Prejudice to effective conduct of public affairs

Information is exempt information if its disclosure under this Act-

- (b) would, or would be likely to, inhibit substantially-
 - (i) the free and frank provision of advice; or
 - (ii) the free and frank exchange of views for the purposes of deliberation; or
- (c) would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs.

31 National security and defence

- (1) Information is exempt information if exemption from section 1(1) is required for the purpose of safeguarding national security.



The 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);

(2) For the purpose of these Regulations, environmental information is held by a Scottish public authority if it is-

- (a) in its possession and it has been produced or received by that authority; or

...

and, in either case, it has not been supplied by a Minister of the Crown or department of the Government of the United Kingdom and held in confidence.



...

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)-

...

(b) is subject to regulations 6 to 12.

9 Duty to provide advice and assistance

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

...

10 Exceptions from duty to make environmental information available—

(1) A Scottish public authority may refuse a request to make environmental information available if-

(a) there is an exception to disclosure under paragraphs (4) or (5); and

(b) in all the circumstances, the public interest in making the information available is outweighed by that in maintaining the exception.

(2) In considering the application of the exceptions referred to in paragraphs (4) and (5), a Scottish public authority shall-

(a) interpret those paragraphs in a restrictive way; and

(b) apply a presumption in favour of disclosure.

(4) A Scottish public authority may refuse to make environmental information available to the extent that-

(a) it does not hold that information when an applicant's request is received;

...

(e) the request involves making available internal communications.



- (5) A Scottish public authority may refuse to make environmental information available to the extent that its disclosure would, or would be likely to, prejudice substantially-
- (f) the interests of the person who provided the information where that person-
- (i) was not under, and could not have been put under, any legal obligation to supply the information;
 - (ii) did not supply it in circumstances such that it could, apart from these Regulations, be made available; and
 - (iii) has not consented to its disclosure; or

...



Schedule of documents

Consideration under FOISA

Doc No	Exemption (s) cited by the Executive	Exemption(s) upheld	Public interest in favour of disclosure	Release or withhold	Details of release (where applicable)
Part 001					
1	s.28 s.29	Yes (not including paragraphs 1 and 2) Yes	No Yes (Partial)	 Release	 Release paragraphs 1 and 2 only.
2	s.29	Yes	No	Withhold	
3	s.28 s.29	Yes (not including paragraphs 1 and 2) Yes	No Yes (Partial)	 Release	 Release paragraphs 1 and 2 only.
4	s.28 s.29	No No		Release	Release in full.
5	s.29	Yes	No	Withhold	
6	s.29	No		Release	Release in full.
7	s.29 s.31 s.26	Yes No No	Yes	Release	Release in full.



Doc No	Exemption (s) cited by the Executive	Exemption(s) upheld	Public interest in favour of disclosure	Release or withhold	Details of release (where applicable)
8	s.29 s.31 s.26	Yes No No	Yes	Release	Release in full.
9a	s.3(2)(a)(ii) ¹ s.28 s.29	No Yes n/c ²	No	Withhold	
9b	s.28 s.29	Yes n/c	No	Withhold	
10	s.3(2)(a)(ii) s.29 s.31 s.26	Yes n/c n/c n/c		Withhold	
11	s.3(2)(a)(ii) s.29 s.31 s.26	Yes n/c n/c n/c		Withhold	
12	s.28 s.29	Yes n/c	No	Withhold	
13	s.3(2)(a)(ii) s.28	Yes n/c		Withhold	

¹ S.3(2)(a)(ii) is not an exemption, but it has been referred to as an exemption in the Schedule for ease of reference

² "n/c" means "not considered"



Doc No	Exemption (s) cited by the Executive	Exemption(s) upheld	Public interest in favour of disclosure	Release or withhold	Details of release (where applicable)
14	s.29	Yes	Yes	Release	Release in full.
15	s.29	No		Release	Release in full.
16	s.28 s.29 s.30 (c)	Yes n/c n/c	No	Withhold	
17	s.3(2)(a)(ii) s.28 s.29	Yes n/c n/c		Withhold	
18	s.28 s.29 s.30(c)	Yes n/c n/c	No	Withhold	
19	s.29 s.30(c)	Yes n/c	No	Withhold	
20	s.29 s.30 (c)	Yes n/c	No	Withhold	
21	s.29 s.30 (c)	The Executive is no longer relying on any exemptions in respect of this document			This document should be released to Mr Edwards in full



Doc No	Exemption (s) cited by the Executive	Exemption(s) upheld	Public interest in favour of disclosure	Release or withhold	Details of release (where applicable)
22	Executive no longer relying on any exemptions in respect of this document				This information has been released to Mr Edwards in an email dated 21 November 2001 at 10:56hrs between Donald McGillivray and Toby Willison titled 'Emergency Planning'.
23	s.28 s.29(1)(a)	Yes n/c	No	Withhold	
24	s.28 s.29(1)(a)	No Yes	No	Withhold	
25	s.28 s.29 s.30(b) s.30 (c) s.31 s.26	Yes n/c n/c n/c n/c n/c	No	Withhold	
26	Document not considered as Mr Edwards indicated that he is not interested in this information				
27	s.28	Yes	No	Withhold	



Doc No	Exemption (s) cited by the Executive	Exemption(s) upheld	Public interest in favour of disclosure	Release or withhold	Details of release (where applicable)
	s.29(1)(a) s.30(b) s.30 (c) s.31 s.26	n/c n/c n/c n/c n/c			
28	s.28 s.29(1)(a)	No Yes	Yes	Release	Release in full.
29	s.28 s.29(1)(a)	Yes Yes	Yes Yes	Release	Release in full.
30	s.28 s.29(1)(a)	Yes n/c	No	Withhold	
31	s.28 s.29(1)(a) s.30(c)	Yes Yes No	Yes (Partial) Yes (Partial) n/a	Partial release	Partial release (paras 1, 2, 3, 4, 5 (subject to redaction of first two sentences), 7, 8, 12 and 13 only).
32	s.28 s.29(1)(a) s.30 (b) s.30(c)	Yes n/c n/c n/c	No	Withhold	
33	s.29(1)(a)	Yes	No	Withhold	



Doc No	Exemption (s) cited by the Executive	Exemption(s) upheld	Public interest in favour of disclosure	Release or withhold	Details of release (where applicable)
34	s.28 s.29(1)(a)	No Yes	No	Withhold	
35	s.28 s.29(1)(a)	Yes n/c	No	Withhold	
36	s.28 s.29(1)(a)	Yes No	Yes	Release	Release in full.
37	s.28 s.29(1)(a)	No Yes	No	Withhold	
38	s.29(1)(a)	Yes	No	Withhold	
39	s.28 s.29(1)(a)	Yes n/c	No	Withhold	
40	Information not considered as Mr Edwards indicated that he is not interested in this information				
41	s.28 s.29(1)(a)	Yes n/c	No	Withhold	
42	s.28 s.29(1)(a)	Yes n/c	No	Withhold	



Doc No	Exemption (s) cited by the Executive	Exemption(s) upheld	Public interest in favour of disclosure	Release or withhold	Details of release (where applicable)
43	s.3(2)(a)(ii) s.28 s.29(1)(a)	Yes n/c n/c		Withhold	
44	s.29(1)(a) s.31 s.26	Yes n/c n/c	No	Withhold	
45	s.29(1)(a)	Yes	No	Withhold	
46	s.28 s.29(1)(a)	Yes n/c	No	Withhold	
47	s.29(1)(a)	Yes	Yes	Release	Release in full.
48	s.28 s.29(1)(a) s.30(c)	Yes Yes No	Yes (partial) Yes (partial) n/a ³	Partial release	Partial release (paras 1, 2, 3, 4, 5 (subject to redaction of first two sentences), 7, 8,12 and 13 only)
49	s.29(1)(a)	Yes	No	Withhold	
50	s.28 s.29(1)(a)	Yes n/c	No	Withhold	
51	s.28 s.29(1)(a)	Yes n/c	No	Withhold	
52	s.3(2)(a)(ii)	Yes		Withhold	

³ "n/a" means "not applicable"



Doc No	Exemption (s) cited by the Executive	Exemption(s) upheld	Public interest in favour of disclosure	Release or withhold	Details of release (where applicable)
53	s.3(2)(a)(ii) s.28 s.29(1)(a)	Yes n/c n/c		Withhold	
54	s.28 s.29(1)(a) s.30(b) s.30(c)	Yes n/c n/c n/c	No	Withhold	
55	s.3(2)(a)(ii) s.28 s.29(1)(a)	Yes n/c n/c		Withhold	
56	s.28 s.29(1)(a) s.30(b) s.30(c)	Yes n/c n/c n/c	No	Withhold	
57	s.3(2)(a)(ii) s.28 s.29(1)(a)	Yes n/c n/c		Withhold	
58	s.29(1)(a)	Yes	No	Withhold	
59	s.28 s.29(1)(a)	No No		Release	
60	s.3(2)(a)(ii)	No		Release	Release in full.



Doc No	Exemption (s) cited by the Executive	Exemption(s) upheld	Public interest in favour of disclosure	Release or withhold	Details of release (where applicable)
	s.28	No			
	s.29(1)(a)	No			
61	s.3(2)(a)(ii)	Yes		Withhold	
	s.28	n/c			
	s.29(1)(a)	n/c			
62	s.3(2)(a)(ii)	Yes		Withhold	
	s.28	n/c			
	s.29(1)(a)	n/c			
63	s.3(2)(a)(ii)	Yes		Withhold	
	s.28	n/c			
	s.29(1)(a)	n/c			
64	This information was not considered as Mr Edwards indicated that he was not interested in it.				
65	s.29(1)(a)	Yes	No	Withhold	
Part 002					
1	s.28	No		Release	Release in full
	s.29(1)(a)	No			



Doc No	Exemption (s) cited by the Executive	Exemption(s) upheld	Public interest in favour of disclosure	Release or withhold	Details of release (where applicable)
2	s.28 s.29(1)(a)	No No		Release	Release in full
3	s.3(2)(a)(ii) s.28	No Yes	Yes (Partial)	Partial release	Redact first line of email and last sentence in email from 'This' to '...the Government Offices'.
4	s.3(2)(a)(ii) s.28 s.29(1)(a)	Yes n/c n/c		Withhold	
5	s.28 s.29(1)(a)	No No		Release	Release in full
6	s.28 s.29(1)(a)	No No		Release	Release in full
7	s.3(2)(a)(ii) s.28	No Yes	Yes (Partial)	Partial release	Redact first line of email and last sentence in email from 'This' to '...the Government Offices'
7a	s.3(2)(a)(ii)	Yes		Withhold	
8	s.28 s.29(1)(a)	No No		Release	Release in full
9	s.3(2)(a)(ii) s.28	No Yes	Yes (Partial)	Partial release	Redact first line of email and last sentence in email from 'This' to '...the Government Offices'



Doc No	Exemption (s) cited by the Executive	Exemption(s) upheld	Public interest in favour of disclosure	Release or withhold	Details of release (where applicable)
10	s.28 s.29(1)(a)	No No		Release	Release in full
11	s.3(2)(a)(ii) s.28	No No		Release	Redact email dated 21/3/05 at 23:55hrs. Redact all information in the first paragraph and sentence starting 'Part' to '... as necessary later in the year' in the second paragraph.
12	s.29(1)(a)	Yes	No	Withhold	
13	s.29(1)(a)	Yes (partial)	No	Partial release	Withhold email dated 22/3/05 at 17:06hrs. Release email dated 22/3/05 at 15:31hrs. Release certain information in email dated 21/3/05 at 23:55hrs. Redact all of the information in the first paragraph and the sentence beginning 'Part' and ending '...as necessary later in the year' in paragraph 2 of email dated 21/3/05 at 23:55hrs.
14	s.3(2)(a)(ii) s.28 s.29(1)(a)	Yes n/c n/c		Withhold	
15	s.3(2)(a)(ii) s.28 s.29(1)(a)	No No Yes (Partial)	Yes (Partial)	Partial release	Release all of email dated 22/3/05 at 15:31hrs. Redact email dated 21/3/05 at 23:55hrs. Redact all information in the first paragraph and sentence starting 'Part' to '... as necessary later in the year' in



Doc No	Exemption (s) cited by the Executive	Exemption(s) upheld	Public interest in favour of disclosure	Release or withhold	Details of release (where applicable)
					the second paragraph.

The Commissioner requires the Ministers to release an unredacted copy of the file list from Part 001 of the file.

The Commissioner requires the Ministers to release a copy of the email dated 9 January 2002 at 10:22hrs from Part 001 of the file, with only personal data remaining redacted.

The Commissioner requires the Ministers to provide Mr Edwards with an unredacted copy of an email dated 10 December 2001 at 09:44hrs from Part 001 of this file.

The Commissioner requires the Scottish Government to release the email dated 13/11/01 at 08:22hrs.

Consideration under the EIRs

Doc No	Exception(s)	Exception(s) upheld	Public interest in favour of disclosure?	Release or withhold
2	Reg 10(4)(e)	Yes	No	Withhold
5	Reg 10(4)(e)	Yes	No	Withhold
7	Reg 10(4)(e)	Yes	Yes	Release in full
8	Reg 10(4)(e)	Yes	Yes	Release in full
10	Reg 10(4)(a) ⁴	Yes	No	Withhold
11	Reg 10(4)(a)	Yes	No	Withhold
13	Reg 10(4)(a)	Yes	No	Withhold



Doc No	Exception(s)	Exception(s) upheld	Public interest in favour of disclosure?	Release or withhold
14	Reg 10(4)(e)	Yes	Yes	Release in full
17	Reg 10(4)(a)	Yes	No	Withhold
18	Reg 10(4)(e)	Yes	No	Withhold
19	Reg 10(4)(e)	Yes	No	Withhold
20	Reg 10(4)(e)	Yes	No	Withhold
23	Reg 10(4)(e)	Yes	No	Withhold
24	Reg 10(4)(e)	Yes	No	Withhold
25	Reg 10(4)(e)	Yes	No	Withhold
27	Reg 10(4)(e)	Yes	No	Withhold
31	Reg 10(4)(e)	Yes	Yes	Partial release (paras 1, 2, 3, 4, 5 (subject to redaction of first two sentences), 7, 8, 12 and 13 only)
35	Reg 10(4)(e)	Yes	No	Withhold
36	Reg 10(4)(e)	Yes	Yes	Release in full
38	Reg 10(4)(e)	Yes	No	Withhold
39	Reg 10(4)(e)	Yes	No	Withhold
41	Reg 10(4)(e)	Yes	No	Withhold
42	Reg 10(4)(e)	Yes	No	Withhold
43	Reg 10(4)(a)	Yes	No	Withhold
44	Reg 10(4)(e)	Yes	No	Withhold
45	Reg 10(4)(e)	Yes	No	Withhold



Doc No	Exception(s)	Exception(s) upheld	Public interest in favour of disclosure?	Release or withhold
47	Reg 10((4)(e)	Yes	Yes	Release in full
48	Reg 10(4)(e)	Yes	Yes (partial)	Partial release (paras 1, 2, 3, 4, 5 (subject to redaction of first two sentences), 7, 8, 12 and 13 only)
51	Reg 10(5)(f)	Yes	No	Withhold
53	Reg 10(4)(a)	Yes	No	Withhold
54	Reg 10(4)(e)	Yes	No	Withhold
55	Reg 10(4)(a)	Yes	No	Withhold
56	Reg 10(4)(e)	Yes	No	Withhold
57	Reg 10(4)(a)	Yes	No	Withhold
63	Reg 10(4)(a)	Yes	No	Withhold
4	Reg 10(4)(a)	Yes	No	Withhold
6	Reg 10(4)(e)	Yes	Yes	Release in full
7a	Reg 10(4)(a)	Yes	No	Withhold
14	Reg 10(4)(a)	Yes	No	Withhold