



Scottish Information
Commissioner

**Decision 124/2007 Mark Ruskell and the Scottish
Executive**

Proposed ship-to-ship transfer of oil in the Firth of Forth

**Applicant: Mr Mark Ruskell
Authority: Scottish Executive
Case No: 200503170
Decision Date: 31 July 2007**

**Kevin Dunion
Scottish Information Commissioner**

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Decision 124/2007 Mr Mark Ruskell and the Scottish Executive

Request for information about proposed ship-to-ship transfer of oil in the Firth of Forth – information withheld by the Executive – decision partially upheld by the Scottish Information Commissioner

Relevant statutory Provisions and other Sources

Freedom of Information (Scotland) Act 2002 (FOISA): sections 1(1) (General entitlement); section 2(1) (Effect of exemptions); 28 (Relations within the United Kingdom); 30(b) (Prejudice to effective conduct of public affairs) and 36(1) (Confidentiality)

The full text of each of these provisions is reproduced in Appendix 1 to this decision. Appendices 1 and 2 (Appendix 2 is referred to below) form part of this decision.

Facts

Mr Ruskell asked the Scottish Executive (the Executive) for documentation relating to an application from Melbourne Marine Services Ltd of Sunderland to Forth Ports Authority in respect of a proposal for ship-to-ship transfer of oil, and also for information relating to any meetings between the Scottish Ministers and the Forth Ports Authority and/or Melbourne Marine Services Ltd where ship-to-ship oil transfer proposals were discussed.

The Executive released information to Mr Ruskell in response to his request, but also refused to supply other information on the basis that it was exempt under the Freedom of Information (Scotland) Act 2002 (FOISA). Following an investigation, the Commissioner found that the Executive had failed to comply with Part 1 of FOISA in withholding some of the information requested by Mr Ruskell and ordered its release.



Background

1. On 29 July 2005, Mr Ruskell asked the Executive for copies of:
 - all correspondence items, reports and documents which have the subject of, or refer in detail to the current proposal for ship-to-ship transfer of oil, which is the subject of an application from Melbourne Marine Services Ltd to Forth Ports Authority (Forth Ports) (the first request); and
 - information relating to dates of any meetings between Ministers and Forth Ports and/or Melbourne Marine Services Ltd, where ship-to-ship oil transfer proposals were a subject of discussion, details of who was present, what was discussed and any minutes of such meetings (the second request).
2. The Executive replied on 25 August 2005 and provided Mr Ruskell with copies of a number of documents and also with CD-ROMs of the draft and final versions of the oil spill contingency plan. At the same time, the Executive advised Mr Ruskell that it was withholding some information from him under sections 25 (Information otherwise accessible), 28(1) (Relations within the United Kingdom) and 30(b)(i) and (ii) (Prejudice to effective conduct of public affairs) of FOISA. The Executive also advised Mr Ruskell that there had been no meetings between the Ministers and Forth Ports and/or Melbourne Marine Services Ltd on this issue, commenting that it would not have been appropriate for the Ministers to become involved given that the proposal relates to reserved matters. The Executive, however, released extracts from a routine meeting between Forth Ports and the Ports and the Harbours Branch of the Enterprise, Transport and Lifelong Learning Department, when the matter was briefly mentioned.
3. Mr Ruskell was dissatisfied with this response and, on 7 October 2005, asked the Executive to carry out a review of its decision to withhold information from him. Mr Ruskell disagreed that the exemptions in sections 28(1), 30(b)(i) and (ii) applied to the information and argued that, in any event, the information should be released in the public interest. Mr Ruskell did not comment on the seminar papers which had been withheld under section 25 of FOISA on the basis that they were otherwise accessible to him. Mr Ruskell had been present at the seminar and the Executive understood that he already had a set of these papers. Consequently, I am not required to address the use of the section 25 exemption in this decision.



4. The Executive subsequently carried out a review and, on 7 November 2005, wrote to Mr Ruskell to advise him of the outcome. As a result of the review, the Executive released information contained in a further 11 documents to Mr Ruskell. However, the Executive upheld its earlier decision not to release the remaining information on the basis of the exemptions contained in sections 28(1) and 30(b)(i) and (ii) of FOISA. It also withheld the names and addresses of members of the public from two documents on the basis that the information was personal data and therefore exempt under section 38(1)(b) of FOISA.
5. Mr Ruskell remained dissatisfied with the response from the Executive and applied to me for a decision on 21 November 2005. As with his request for review, Mr Ruskell considered that the exemptions in section 28(1) and 30(b)(i) and (ii) had not been applied appropriately by the Executive. Mr Ruskell made no reference to the fact that the Executive had redacted names and addresses from two documents on the basis of the exemption in section 38(1)(b). As a result, I will not consider whether the Executive was correct to withhold the names and addresses in this decision.
6. The case was allocated to an investigating officer and the application validated by establishing that Mr Ruskell had made a valid information request to a Scottish public authority and had made an application to me only after asking the public authority to review its response to his request.

The Investigation

7. The officer formally notified the Executive of Mr Ruskell's application on 7 December 2005 in terms of section 49(3)(a) of FOISA and provided it with an opportunity to comment on the application. The officer also asked the Executive for certain information including the information which had been withheld from Mr Ruskell and for detailed submissions on its reasoning for withholding information from him. The Executive responded on 30 January 2006, providing copies of withheld correspondence and its submissions. The Executive also helpfully provided some background to the case.
8. The Executive explained that Melbourne Marine Services Ltd is seeking permission to transfer oil between ships in the Firth of Forth. As a reserved matter, the Department for Transport ("the DfT") and its Maritime and Coastguard Agency ("the MCA") have operational responsibility for regulating this. The Executive was first consulted about these proposals in early 2005 as part of a consultation initiated by Aquatera Ltd, environmental consultants working on behalf of Melbourne Marine Services Ltd.



9. The Executive explained that this was in line with normal practice for considering oil spill contingency plans. The MCA must consent to such a plan before Forth Ports can allow ship-to-ship transfers to take place within its harbour authority area. Before consent is given, the content of the draft plan will be agreed by a number of statutory consultees. Given that the Executive has devolved responsibility for the environment in Scotland, it has commented on the proposals as a statutory consultee.
10. The Executive commented that it had no valid grounds to object to the proposal, given that ship-to-ship transfer operations have been undertaken globally over many years with very few spills resulting. However, Scottish Natural Heritage and a number of authorities, including Fife Council, had expressed objections to the proposal. This led to the DfT announcing that a public consultation would be carried out by the MCA into the environmental implications for the proposed ship-to-ship transfers. (The MCA consultation subsequently commenced on 16 February 2006 and closed 11 May 2006.)
11. In July 2006, the MCA directed that certain changes be made to the oil spill contingency plan. Information about the consultation and the outcome can be found on the MCA's website at: http://www.mcga.gov.uk/c4mca/mcga-guidance-regulation/mcga-consultations/mcga-consultations-archive/archived-consultations_2006/mcga-consultations-sts_forth/mcga-consultations-sts_outcome.htm.
12. According to this website, the MCA has approved (25 August 2006) the amended oil spill contingency plan subject to further amendments.
13. The Executive was approached by my office in March 2007 and asked whether, given the passage of time and the fact that matters had now moved on, the information which it had withheld could be disclosed to Mr Ruskell. Following consideration, the Executive contacted my Office to state that it did not wish to alter its position.

Submissions from the Executive

14. I will now consider the submissions made by the Executive in relation to its use of exemptions in FOISA, starting with the exemptions contained in sections 30(b)(i) and (ii). The Executive made initial submissions in its letter of 30 January 2006 and further, more detailed, general submissions on section 30(b)(i) and (ii) by letter of 2 May 2007.
15. The Executive argued that disclosure of much of the information withheld from Mr Ruskell would, or would be likely to, inhibit substantially the free and frank provision of advice or the free and frank exchange of views for the purposes of deliberation in terms of section 30(b)(i) and (ii) of FOISA respectively.



16. The Executive noted that where possible it had redacted specific parts of the documents to enable the release of as much information as possible. The information which it had not released includes internal exchanges discussing the drafting of a document (with the final version usually being released); comments on relations between involved parties; summaries of the UK's position; recommendations as to the Executive's approach; advice to the Minister on developments and briefing notes setting out sensitive issues.
17. The exemptions in section 30 are subject to the public interest test required by section 2(1)(b) of FOISA. The Executive relied on the same public interest arguments for withholding information under both sections 30 and 28. I refer to these below in paragraph 21.
18. As noted above, in addition to relying on the exemptions in section 30(b)(i) and (ii), the Executive withheld two documents under section 28(1) of FOISA. In terms of section 28(1), information is exempt if its disclosure would, or would be likely to, prejudice substantially relations between any "administration in the United Kingdom" and any other such administration. In terms of section 28(2), both the Government of the United Kingdom and the Scottish Administration come under the definition of "administration in the United Kingdom."
19. The Executive commented that the two documents which had been withheld under section 28(1) comprise frank exchanges between Executive and UK government officials and that such communications are a vital component in the relationship between the administrations, particularly where they are discussing reserved matters such as this, which also touch on devolved areas of responsibility and local concerns. The Executive commented that the devolution settlement makes it clear that such lines of communication are an essential component in its success.
20. The Executive also stated that where possible much of the information in such exchanges had been released to Mr Ruskell, but there are some comments of particular sensitivity and it considers that if the information in two documents in question were to be released, relations would be prejudiced in two aspects; firstly, that the UK government would object to the release and secondly, that there would be inhibition in future exchanges between the two administrations.



21. The exemption in section 28(1) is also subject to the public interest test required by section 2(1)(b). As noted above, the Executive relied on the same public interest arguments for section 28(1) and for section 30(b)(i) and (ii). In considering the public interest, the Executive commented that it had released the majority of the information it held to Mr Ruskell. Having considered where the public interest lay in respect of the documents which had been withheld, the Executive took the view that the overriding public interest does not lie in disclosure. While the Executive had taken due regard of the public's interest in the issue of ship-to-ship oil transfer in the Firth of Forth, the issue was one which had still to be resolved and there was a real risk that further disclosure of information would prejudice the positions of the parties involved. The Executive considered that release of the withheld information would add little to the public understanding or debate of the issue, whilst damaging either the free exchange of views or advice or relations within the UK.
22. Although the Executive had not relied on the exemption in section 36(1) in either its initial response to Mr Ruskell or in its review, the Executive, in its submissions to me argued that this additional exemption applied to one of the documents which it had already withheld on the basis that it was exempt under sections 30(b)(i) and (ii). Section 36(1) exempts information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings. In this case, the document summarised legal advice.
23. The exemption in section 36(1) is also subject to the public interest test. Here, the Executive argued, paraphrasing one of my earlier decisions, that the public interest in withholding legal advice is high and that only in particularly compelling cases would release be considered.

Commissioner's Analysis and Findings

24. Mr Ruskell information requests are set out in paragraph 1 above.
25. I accept that the Executive has provided Mr Ruskell with all the information it holds relating to his second request. I shall therefore only consider his first request.



26. As noted in paragraph 13 above, my Office approached the Executive and asked it to consider whether, given the passage of time and the fact that matters has now moved on, whether it would now release some of the information withheld from Mr Ruskell. The Executive did consider the matter, but stated that it did not wish to alter its position. I should make it clear, however, that I have not taken the passage of time (or, indeed, the fact that matters have moved on) into consideration in my decision, but have considered whether the Executive complied with FOISA as at the date of the authority's notice under section 21(5) of FOISA. In this I refer to the Lord President's opinion in the *Scottish Ministers v. the Scottish Information Commissioner (David Elstone and Martin Williams's Applications)* 2007 S.L.T. 274 (at 283)

“It is correct that any issue of alleged failure by a public authority to comply with its statutory obligations falls to be determined as at the date of the authority's notice under section 21(5) of the Act. “

FOISA or EIRs?

27. When Mr Ruskell made his original information request, he asked for the information under both FOISA and the Environmental Information (Scotland) Regulations 2004 (the EIRs). As will be clear from the response made by the Executive and from the submissions made to me, the Executive dealt with the request under FOISA. On being asked why the information request was not considered under the EIRs, the Executive commented that it had considered which regime the information fell most suitably under and decided that, as the information comprises, in the main, consideration of the Executive's position in respect of a reserved policy issue, rather than consideration of the environmental impact of the proposal, FOISA was the more applicable.
28. Having considered the withheld material, I accept the decision of the Executive to deal with the request under FOISA rather than under the EIRs. I would also note that I can see no detriment to Mr Ruskell by considering his request under FOISA rather than the EIRs, nor has Mr Ruskell made mention of any reason why he considered that his request should be dealt with under the EIRs.

Scope of request

29. The wording of Mr Ruskell's information request is set out above. In considering the information which has been withheld from Mr Ruskell, I have decided that three of the emails which make up document 26 are outwith the scope of Mr Ruskell's request (see Appendix 2 for further details). As such, they do not required to be disclosed and I will not consider them further.



Section 28 - Relations within the United Kingdom

30. The Executive considered parts of two documents (documents 26 and 54) to be exempt under section 28(1) of FOISA on the grounds that disclosure would, or would be likely to, prejudice substantially relations between the Scottish Administration and the UK Government. (The Executive also considered these parts of the documents to be exempt under sections 30(b)(i) and (ii) and I will consider those exemptions later.)
31. These documents are exchanges between Executive and UK Government officials. The Executive's submissions in respect of its reliance on section 28(1) are set out above.

Document 26 – email exchange

32. Document 26 has already been partially released to Mr Ruskell by the Executive. It is made up of five emails, only two of which (both dated 24 May 2005) I consider fall within the scope of Mr Ruskell's request.
33. I have considered both the content and context of the email of 24 May 2005 (sent at 12:24) and do not accept that disclosure of this email would, or would be likely to, prejudice substantially relations between the Executive and the government of the United Kingdom. The email is factual – and the Executive has been unable to provide me with any arguments as to why the specific information contained in this email should not be released. I note, too, that the majority of the response to the email has already been released to Mr Ruskell and that at least some of the contents of this email can be worked out from the response.
34. The email of 24 May 2005 (sent at 13:03) responds to the earlier email. The majority of this particular email has already been released to Mr Ruskell. The version which has been released to Mr Ruskell contains the words, "Our line on this – which is the press line, and thus available for public consumption – is as follows..." and proceeds to list five bullet points. Part of the fifth bullet point has been redacted. Inasmuch as the comment comes within the description of information described as being available for public consumption, I do not see how disclosure of this part of the email would, or would be likely to, prejudice substantially relations between the Executive and the government of the United Kingdom or why the UK Government would oppose this information being released (one of the arguments put forward by the Executive). Even if a mistake had been made and the information contained in this bullet point were not in fact "available for public consumption", having considered the content and context of the information, I do not consider that it is exempt in terms of section 28(1).



35. I take the same view as regards the remainder of the email. It contains factual information and advice and I do not see how the content of this information can be said to meet the requirements of section 28. I am therefore of the view that document 26 is not exempt in terms of section 28(1) of FOISA.

Document 54 – Email exchange

36. Document 54 is an exchange of email on 11 July 2005 between the Executive and the MCA about a newspaper article and a proposed meeting. The email sent at 15:56 has been redacted in part but the response sent at 17:00 (with a copy of the article in question) has been released in full to Mr Ruskell.
37. I do not accept that disclosure of the redacted sections of the email sent at 15:56 would, or would be likely to, prejudice substantially relations between the Executive and the government of the United Kingdom and therefore do not uphold the use of the exemption. Whilst the email does contain candid comments, these comments do not refer to either Administration and I do not consider them to be such that they could be said to prejudice substantially relations between the Executive and the government of the United Kingdom.
38. The exemption in section 28(1) is subject to the public interest test required by section 2(1)(b) of FOISA. However, since I am satisfied that the information withheld in documents 26 and 54 is not exempt under section 28(1) of FOISA, I am not required to consider whether the public interest test lies in the disclosure of the information or the maintenance of this exemption.

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

39. As noted above, the Executive withheld information under sections 30(b)(i) and (ii) of FOISA. Although these are two separate exemptions (with two distinct tests), the Executive has applied both of the exemptions together and has, as can be seen from its submissions (detailed above), used the same arguments for relying on the two exemptions. As noted above, the Executive also supplied to my office on 2 May 2007 further submissions on the application of section 30(b)(i) and (ii) of FOISA to all cases in which it had applied these exemptions. The Executive's revised position on section 30(b)(i) and (ii) is set out fully in a previous decision 089/2007 (Mr James Cannell and the Scottish Executive) and, whilst I have given full consideration to these submissions, I do not propose to set them out in detail here.
40. The Executive stated that it had redacted specific parts of the documents to enable the release of as much as information as it felt possible. Consequently, the Executive partially released the following documents:

Documents 14, 23, 26, 27, 38, 44, 48, 54 and 56,



and applied sections 30(b)(i) and (ii) of FOISA to the redacted material.

- 41 The Executive applied sections 30(b)(i) and (ii) of FOISA to the following documents in their entirety:

Documents 30, 37, 39, 41 and 42.

The information withheld in documents 26 and 54 was also withheld in terms of section 28(1), as discussed above. Some of the information in document 23 was withheld in terms of section 36(1) and I will discuss this below.

42. Section 30(b) of FOISA states that information is exempt if its disclosure under FOISA would, or would be likely to, inhibit substantially the free and frank provision of advice (section 30(b)(i)) or the free and frank exchange of views for the purposes of deliberation (section 30(b)(ii)). As I have said in a previous decision – Decision 003/2007 Mr Allan McLeod and the Northern Joint Police Board – in applying these exemptions the chief consideration should not be whether the information constitutes advice or opinion, but whether the release of the information would, or would be likely to, have the effect set out in the statute – i.e. the substantial inhibition of the free and frank provision of advice or of the free and frank exchange of views for the purposes of deliberation.
43. As I said in another case – Decision 151/2006 Mr Reiner Luyken and the Scottish Executive – in assessing the inhibiting effect disclosure might have, the authority should consider:
- a) the subject matter of the advice or opinion,
 - b) the content of the advice and opinion itself,
 - c) the manner in which the advice or opinion is expressed, and
 - d) whether the timing of release would have any bearing (releasing advice or opinion whilst a decision was being considered, and for which further views were still being sought, might be more substantially inhibiting than once a decision has been taken).

This approach was subsequently upheld by the Court of Session in *Scottish Ministers v Scottish Information Commissioner* (23 January 2007).

44. I found that some of the documents – or redacted documents – withheld from Mr Ruskell contain free and frank advice or a free and frank exchange of views for the purposes of deliberation. I accept that in these instances it is more likely that the exemptions in 30(b)(i) and (ii) may apply to the information withheld. However, it is not enough for a public authority simply to assert that disclosure of such information will substantially inhibit officials from participating fully in such exchanges in future.



45. Yet in this case the Executive has made no attempt to identify the manner, or the circumstances, in which substantial inhibition would or would be likely to occur as a result of disclosure. Indeed it argues that there is no requirement to do so. It submitted that this particular issue has been a complex one on a number of levels given the involvement of a number of organizations and both reserved and devolved government such as the Scottish Environment Protection Agency (SEPA), the DfT and the MCA. As such, according to the Executive, it is particularly important that bodies feel able to communicate without inhibition, on areas touching their particular interests and responsibilities. The Executive said it was not possible to pinpoint exactly which future provision of advice or deliberations would be affected, but that there are a multitude of such exchanges every day.
46. What the Executive is arguing is that this “uninhibited arena” would be damaged by release. Once again the Executive is seeking to exempt information which belongs to a type or class of information – in this case information which is exchanged for the purposes of advice or deliberation. What matters so far as the Executive is concerned is not the substance or content of the information but whether it was exchanged in the expectation that participation occurred in an uninhibited arena and that this extends to exchanges between Scottish Executive officials, between officials and Ministers between Scottish Executive officials and counterparts in the UK government or between the Executive and officials in a Non Departmental Public Body. As I have made clear many times before, this is not an acceptable approach. In Decision 089/2007 Mr James Cannell and Historic Scotland, whilst I acknowledged there may be difficulty in predicting future harm with any degree of certainty, the absence of certainty does not permit the assumption that substantial inhibition would or would be likely to occur. I noted that it is now more than two years since the introduction of Part 1 of FOISA and I have yet to be presented with concrete examples of where harm (substantial or otherwise) has in fact been caused by the release of information under Part 1, whether following one of my decisions or in other circumstances. I expect, then, the public authority to be able to justify the use of these exemptions by setting out the circumstances in which substantial inhibition is likely to occur, such as who will be affected and why.
47. I do not accept that simply because information is prepared, received or commented on by public officials or Ministers that it is *a priori* exempt information. Neither can I accept the automatic presumption that harm will be caused by the release of information relating to the release of this type of information.
48. Certain documents make mention of an aspect of the ship-to-ship proposal about which, at the time of Mr Ruskell’s request, information was publicly available and in these instances, especially where the view or advice is not candid, or on a sensitive matter, I do not accept that either section 30(b)(i) or



- (ii) applies. In those cases, I have ordered release of the documents, e.g. parts of document 37 and all of document 48.
49. Much of the information which has been withheld comprises advice which is factual, or which I do not consider can reasonably be described as sensitive (for example, within Documents 14, 23, 26, 27, 30, 37, 41, 48). For example, in document 27 the Background Note to the reply to the respective Scottish Parliamentary Question (SPQ) is described as being confined to factual matters, yet there is redaction from this Background Note.
 50. In that document, as in other documents, the documents provide factual information and I do not accept that disclosure of such factual information has the suppressive effect contended for by the Executive.
 51. Additionally, some documents provide a view or advice which I believe it would be expected that would be given, sought or mentioned in the context of ship-to-ship operations (for example, within documents 14 and 48) and also document 41 (where the view relates to largely factual matters, albeit selected by the writer from an event - the Fife Council seminar). Other examples include documents 30 and 37. I do not think that release of such a view or advice could be said to have a suppressive effect.
 52. Other documents (for example, document 42) indicate whether the advice is required or helpful: I do not accept that the disclosure of such information will engage the conditions for the section 30(b) exemption. Some documents include emails conveying various drafts of a final letter with various drafts (for example, document 44).
 53. Certain documents contain advice or views which can be discerned, or found in other released documents. For example, on review the Executive released document 43 (described as various exchanges between SE officials and Scottish Parliament Information Centre on answer to Scottish Parliamentary Question SPQ S2W-17223). From my reading of the material which the Executive supplied, document 43 contains information which is redacted from withheld documents (for example documents 27 and 38). I find it difficult to see in this instance how an exemption can be applied to material which can be found in other released documents. Document 48 contains some redacted information which can be found in documentation released to, and communications with, Mr Ruskell. Other examples are documents 26 and 38.
 54. However, I have found that in some cases I agree with the arguments put forward by the Executive and therefore that the documents do contain certain information which is exempt under either section 30(b)(i) and/or (ii). I would refer Mr Ruskell and the Executive to Appendix 2 for details of the documents which I have decided fall within the terms of section 30(b)(i) and/ or (ii).



Application of the public interest test

55. Section 30(b) is subject to the public interest test contained in section 2(1)(b) of FOISA. Where I have found that section 30(b)(i) and/or (ii) applies, I must go on to consider whether, in all the circumstances of the case, the public interest in maintaining the exemptions outweighs the public interest in disclosing the information.
56. In this case I consider that the public interest in the disclosure of the information is mainly focused on the following areas:
- the substantive matter of the proposed ship-to-ship transfer which has clearly given rise to concern within sectors of society in Scotland including elected representatives, local authorities, environmental organisations
 - the nature of communication between administrations, and within the Executive, on matters such as the ship-to-ship transfer of oil, which cover both reserved and devolved issues and, in essence, the public interest in how devolved government works in particular instances and
 - the general interest in making information available to the public and the general need for transparency and accountability in decision making. In particular, there is a public interest in knowing the advice given by and the views of those involved within the Executive, one of the statutory consultees in such a cross-border issue.
57. The public interest factors in favour of maintaining the exemptions include:
- the public interest in effective government, i.e. ensuring that officials can give clear, candid and full advice and views for the purposes of deliberation, and that there are open channels of communication within the Scottish administration, and with the UK government, where there are issues which are devolved or reserved;
 - Ministers and officials being able to discuss matters of substance freely and openly;
 - the sensitivity of the subject matter and
 - the timing of the request – Mr Ruskell made his information request in July 2005, when the matter was very much under discussion. Indeed, most of the information which has been withheld from Mr Ruskell dates from May, June and July 2005.
58. On balance, where I have found information to be exempt under section 30(b)(i) and/or (ii), I have also found that the balance of the public interest lies in favour of maintaining the use of the exemptions. This is because the information at issue would not add significantly to the matters which favour



public interest in disclosure, but release would harm the public interest matters favouring non disclosure

Section 36(1) – Confidentiality of communications

59. Section 36(1) of FOISA states that information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings is exempt information. As noted above, this exemption is subject to the public interest test required by section 2(1)(b) of FOISA.
60. One type of communication covered by this exemption is communications between legal adviser and client. For the exemption to apply to this particular type of communication, certain conditions must be fulfilled. For example, the information being withheld must relate to communications with a legal adviser; the legal adviser must be acting in his/her professional capacity and the communications must occur in the context of his/her professional relationship with his/her client. This is commonly known as “legal professional privilege” and the exemption can only be relied upon if that privilege has not been waived.
61. The Executive redacted parts of document 23 on the grounds of section 36(1). The information withheld from Ruskell includes legal advice obtained by SEPA on the application of the Pollution Prevention and Control (Scotland) Regulations 2000 to ship-to-ship operations (Mr Ruskell has been told by the Executive that this is the subject of the legal advice). The legal advice is contained in an email from SEPA to Aquatera Ltd which has been forwarded to the Executive with a request that it is kept confidential.
62. A plea of confidentiality is most commonly claimed in respect of communications between a lawyer and client with the justification for this being that there should be a safeguard to ensure that clients can be candid with their legal advisers.
63. I note that the implications of the redacted information can be interpreted from the unredacted parts of document 23. Additionally, SEPA’s formal response to the OSCP contains a consideration of the implications of the 2000 Regulations for the proposed ship-to-ship transfer and this response is publicly available (released document 33).
64. The Executive stated in its review letter of 7 November 2006 to Mr Ruskell that the legal advice in an email exchange (Document 23) had been superseded by more recent legal advice. The Executive summarised this new legal advice, i.e. that the proposed ship-to-ship transfer did not fall within the 2000 Regulations and did not fall to be regulated by SEPA.
65. It is clear from the emails contained in document 23 that the summary of the legal advice was disclosed by SEPA to two separate bodies, i.e. Aquatera Ltd. and the Executive.



66. As a result, I am not satisfied this is information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings. If the privilege had existed, I consider that it has been waived as a result of the advice being disclosed to two separate bodies. I therefore do not accept that the redacted part of Document 23 is covered by the exemption contained in section 36(1) of FOISA.
67. Having decided that document 23 does not fall within the terms of section 36(1), I do not need to consider the public interest.

Decision

I find that the Scottish Executive (the Executive) partially failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) by withholding some information (or by subsequently maintaining an exemption in relation to information) requested by Mr Ruskell.

In withholding information which was not exempt, the Executive failed to deal with Mr Ruskell's request in accordance with section 1(1) of FOISA.

I require the Executive to provide Mr Ruskell with a copy of the information to be disclosed, as specified in Appendix 2, within 45 days of receipt of this decision notice.

Appeal

Should either the Executive or Mr Ruskell 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 notice.

Kevin Dunion
Scottish Information Commissioner
31 July 2007



APPENDIX 1

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.

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.

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.



30 Prejudice to effective conduct of public affairs

Information is exempt information if its disclosure under this Act-

- (a) ...
- (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

36 Confidentiality

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



APPENDIX 2

Doc No.	Document title	Exemptions cited by the Executive /section	Exemptions upheld/section	Public interest in favour of disclosure	Release or withhold	Details of release (where applicable)
14	Exchanges on draft reply (19 April 2005 to 10 May 2005)	30(b)(i) 30(b)(ii)	Partial No	No n/a	Partial release	Release email of 19 April 2005 [10:15]. Release email of 19 April 2005 [12:41 with redaction of second sentence of first paragraph (“I think” to “Act”) and redaction of second observation: “As noted above” to “at present”]. Release email of 19 April 2005 [14:34] with redaction of second sentence. Release email of 22 and 25 April 2005 and emails of 10 May 2005. Withhold advice notes to Nicol Stephen
23	Exchange 16 February 2005 to 19 May 2005	30(b)(i) 30(b)(ii) 36(1)	No No No	n/a n/a n/a	Release	Release in full
26	Email exchange 19 May 2005 to 24 May 2005	28 30(b)(i) 30(b)(ii)	No No No	N/a N/a N/a	Partial Release	Withhold emails of 14 and 19 April 2005 as outwith scope of request. Release remainder of document.
27	Drafts, background notes and exchanges on SPQs	30(b)(i) 30(b)(ii)	Partial No	Partial N/a	Partial release	Withhold emails of 25 May 2005 [[19:20], 26 May 2005 [11:18] 26 May 2005 [12:20] and



						amended draft responses. Release remainder of document and background note.
30	Drafts and email exchange to SPQ S2O-07045	30(b)(i) 30(b)(ii)	No No	N/a N/a	Partial release	Withhold second paragraph of mail of 2 June 2005 [10:43] as is outwith the scope of Mr Ruskell's request. Release remainder of document.
37	Exchanges (9 June 2005) about Fife Council seminar	30(b)(i) 30(b)(ii)	No Partial	N/a No	Partial release	Redact second paragraph and third paragraph (except final sentence of this paragraph) of email of 09 June 2005 [15:14] ("I understand" to "arises"). Release remainder of document in full.
38	Submission (9 June 2005) 2005 on Fife Council seminar	30(b)(i) 30(b)(ii)	Partial No	No n/a	Partial release	Release email of 09 June 2005 (16:27] with redaction of personal data in final line; Redaction of point 7 of submission, except last two sentences. Release remainder of document.
39	Reply from Ministerial office to submission	30(b)(i) 30(b)(ii)	No No	n/a n/a	Release	Release in full with redaction of final line of email 09 June 2005 [16:27]
41	Submission (14 June 2005) to Minister reporting Fife Council seminar	30(b)(i) 30(b)(ii)	No Partially	N/a No	Partial release	Redaction of last sentence of point 5 ("Crucially" to "questions"). Release remainder of document.
42	Reply from Deputy Minister's office 15 June 2005	30(b)(i) 30(b)(ii)	No No	N/a N/a	Release	Release in full



44	Exchanges with Minister of Transport's office in reply to letter	30(b)(i) 30(b)(ii)	Partially No	No n/a	Partial release	Release email exchanges with redaction of final sentence in email 24 June 2005 [11:52] Withhold drafts.
48.	Latest BriX Note prior to request date (29 July 2007).	30(b)(i) 30(b)(ii)	No No	N/a N/a	Partial release	Release Notes in full i.e. BriX note with last modified dates of 24/03/2005, 18/04/05, 19/05/2005 and 04/07/05
54	Email exchange (Executive and MCA)	28 30(b)(i) 30(b)(ii)	No No Partial	N/a N/a Partial	Partial release	Withhold second sentence of email 11 July 2005 [15:56/7] Release remainder.
56.	Internal Executive email about MCA meeting on 25 July 2005	30(b)(i) 30(b)(ii)	No Yes	N/a No	Partial release	Withhold second last and last sentence (from "As you" to "about you") Release remainder of document.