

Decision Notice



Decision 136/2008 Sunwick Farm Limited and the Scottish Ministers

Documentation relating to Agricultural Subsidy Review

Reference No: 200800596
Decision Date: 13 October 2008

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Kevin Dunion
Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews KY16 9DS
Tel: 01334 464610



Summary

Sunwick Farm Limited (Sunwick) requested from the Scottish Ministers (the Ministers) documentation relating to a Stage 1 Internal Review pursuant to the EU Agricultural Subsidies Appeals Procedure. The Ministers responded by providing some information, stating that they did not hold other information and arguing that certain of the information they held was exempt under section 30(b)(ii) of FOISA. Following a review, in which the Ministers upheld their original decision without amendment, Sunwick remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the Ministers had partially failed to deal with Sunwick's request for information in accordance with Part 1 of FOISA. He was satisfied that the Ministers were correct in their determination that certain information was not held, and also in applying section 36(1) to document 4, but found that they had been incorrect in their application of section 30(b)(ii) to the information in one document (as its release would not, and would not be likely to, substantially prejudice the free and frank exchange of views). He required the release of this document to the applicant.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and 1(6) (General entitlement); 2(1)(b) (Effect of exemptions); 17(1) (Notice that information is not held); 30(b)(ii) (Prejudice to effective conduct of public affairs) and 36(1) (Confidentiality).

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

Background

1. On 18 January 2008, Maclay Murray and Spens LLP (MMS) wrote to the Ministers on behalf of Sunwick, requesting the following information:
 - (a) The terms of appointment, terms of engagement, or remit of [certain named individuals] as members of a Panel appointed in 2007 to hear and determine the Stage 1 Internal Review at the instance of Sunwick pursuant to the EU Agricultural Subsidies Appeals Procedure (the Stage 1 Review).



- (b) The communications with, and instructions to, [the named individuals] from any person (within or outwith the Scottish Government), in the period from 1 April 2007 to date, relating to or connected with the Stage 1 Review.
- (c) The communications or discussions between [the named individuals], in the period from 1 May 2007 to date, relating to or in connection with their terms of appointment, terms of engagement, remit, powers, jurisdiction or capacity, as members of a Panel appointed in 2007 to hear and determine the Stage 1 Review.
- (d) The communications or discussions between [the named individuals], in the period from 1 May 2007 to date, relating to or in connection with the Stage 1 Review, in particular (without prejudice to the foregoing generality, the merits of the Stage 1 Review application and the disposal thereof)

MMS stated that in this context, “information” included (without limitation) “information recorded in any form (whether in correspondence, emails, memos, reports, notes of meetings or telephone discussions, extracts from notebooks, and all data in written (including handwritten) or electronic form)”.

2. The Ministers responded on 8 February 2008. In response to request (a), the Ministers explained how the named individuals were selected for the Stage 1 Review. In response to request (b), the Ministers provided Sunwick with certain documentation and stated that this was all the relevant information they held. In response to request (c), the Ministers informed Sunwick that they did not hold any relevant information. In response to request (d), the Ministers withheld any information falling within the scope of the request, stating that it was exempt under section 30(b)(ii) of FOISA.
3. On 12 February 2008, MMS wrote to the Ministers on behalf of Sunwick and requested a review of their decision. In particular, Sunwick felt that the information provided appeared inadequate and incomplete and that the application of section 30(b)(ii) of FOISA was incorrect. They asked the Ministers to reconsider their responses to requests (a), (b) and (d).
4. The Ministers notified Sunwick of the outcome of their review on 4 March 2008. In relation to requests (a) and (b), the Ministers provided further explanation to supplement their original response but also reiterated that no further relevant information was held. In response to request (d), the Ministers provided further clarification as to the information held and upheld their reliance on section 30(b)(ii) of FOISA.
5. On 21 April 2008, MMS wrote to the Commissioner’s Office on behalf of Sunwick, stating that their client was dissatisfied with the outcome of the Ministers’ review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
6. The application was validated by establishing that Sunwick had made requests for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its responses to those requests.



Investigation

7. On 6 May 2008, the Ministers were notified in writing that an application had been received from Sunwick and asked to provide the Commissioner's Office with any information withheld from the applicant. The Ministers responded with the information requested and the case was then allocated to an investigating officer.
8. The investigating officer subsequently contacted the Ministers, giving them an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking them to respond to specific questions. In particular, the Ministers were asked to justify their reliance on any provisions of FOISA they considered applicable to the information requested.
9. The Ministers supplied the investigating officer with copies of the four documents withheld from Sunwick. In their response, the Ministers submitted that they no longer considered documents 2 or the covering email of document 3 to fall within the scope of any of the requests. In addition, they stated that they also wished to apply section 36(1) of FOISA to document 4.
10. Within its application to the Commissioner, Sunwick highlighted that it did not seek the disclosure of the information contained within the Appeals File as circulated to each Panel Member and copied to Sunwick in advance of the Stage 1 Review Hearing.

Commissioner's analysis and findings

11. In coming to a decision on this matter, the Commissioner has considered all the withheld information and the submissions that have been presented by both Sunwick and the Ministers and is satisfied that no matter of relevance has been overlooked.
12. In its request for review and its application to the Commissioner, Sunwick raised concerns in relation to the Ministers' responses to requests (a), (b) and (d) only. The investigation (and this decision) is therefore limited to these requests.

Background

13. In their response to the Commissioner's Office, the Ministers and Sunwick provided some background information on the context of this application.
14. Sunwick claimed payment of an EU subsidy available to it under Council regulation (EC) No. 1782/2003. The calculation and payment of the subsidy is administered by the Ministers. Sunwick was dissatisfied with the Ministers calculation of the amount of subsidy payable to it and commenced (and was pursuing at the time of application to the Commissioner) a statutory review or "appeal" against the calculation under the Agricultural Subsidies (Appeals) (Scotland) Regulations 2004 (the Regulations).



15. The Regulations prescribe a three stage “review” process. Stages 1 and 2 take the form of hearings convened before Panels, composed of officials nominated by, and from within, the Scottish Government. The Panels have the power under the Regulations to “confirm” the original decision, or to “amend or alter the decision in any respect which they consider appropriate” or to “revoke the decision in its entirety and substitute a new decision”.
16. In terms of procedure, there are two types of Stage 1 (internal review stage) agricultural subsidies appeal – oral and written. In the latter, the applicant writes in with their reasoning for the appeal and a Panel is convened to look at the case, discuss it and reach a decision. This is then written up and sent out to the applicant. With an oral appeal, the process is the same with the exception that the applicant is invited to present their case verbally. In such cases an applicant can be supported by whomever they wish. As it is neither a court of law, nor a legal process as such, a lawyer is not required. However, in this instance, the Ministers explained that the applicant brought legal representation and, for that reason, officers from the Scottish Government Legal Directorate (SGLD) also attended. Additionally, due to the legal involvement, it was felt prudent to ensure that the appeal was recorded accurately, so a professional recorder was hired. It was also decided to use this facility to record the discussion between SGLD and Panel members. The Ministers advised that such a meeting did not usually form part of the appeal process.
17. In this instance, the Stage 1 Review Hearing took place before a Panel in 2007 and sustained the Ministers’ original calculation and decision. Sunwick informed this Office that at the time of its application to the Commissioner it was pursuing a Stage 2 Review Hearing.

Request (a) – terms of appointment, terms of engagement, or remit of the members of the Panel appointed to hear and determine the Stage 1 Review

18. In response to this request, the Ministers advised that the Panel members were selected for each appeal separately, on the basis that they had a significant amount of knowledge in the relevant area for the appeal and so that there was a representative from both the scheme policy area and professional and technical area on each Panel. Sunwick was also advised by the Ministers that all staff within Rural Payments and Inspections Directorate (RPID) understood that they might be selected to take part in an Appeals Panel as part of their job, once they had developed their expertise to a certain level. Once selected, the Ministers advised, there were no terms of appointment: it was simply one of the duties expected of the more experienced staff as part of their day-to-day work. The remit of the Panel members was also said to be part of their day-to-duties: each Panel member would receive a file containing all the information relevant to a particular case and could request additional information as required. The Ministers advised that they had provided all relevant information they held in response to Sunwick’s initial request.



19. In its submission to the Commissioner's Office, Sunwick stated that it considered it virtually inconceivable that each of the Panel Members was appointed without receiving some form of instruction or guidance or explanation as to the scope of work and remit expected of them. In particular Sunwick noted that a document supplied as a result of its request contained reference to "Guidelines on the Procedures of the Internal Review", which were said to form part of the "Appeals Internal Guidance Note for Policy and Area Office Staff" accessible in the Appeals Secretariat Public Folder. Sunwick noted that although it considered this document to fall within the scope of request (a), the document had not been provided. It stated that it had since made another request specifically for this document.
20. In response to the concerns raised by Sunwick and questions posed by the investigating officer, the Ministers advised that a formal search for the information requested had not been undertaken. The Ministers stated that from the personal experience of staff and through discussion with the Appeals Secretariat Section Head, absolute confirmation was given that no terms of appointment, remit or engagement had ever been provided for Panel Members. They reiterated that Panel Members were selected from available officials with relevant experience and that potential membership of a panel was simply another part of their normal professional duties.
21. In relation to Sunwick's query regarding the internal guidance note, the Ministers argued that the booklet in question provided guidance for the applicants rather than Panel Members and therefore fell outwith the scope of the original request. This booklet, the Ministers advised, contained details of how to apply for an appeal, what stages there were and what happened at each stage. The Ministers submitted that this was not what was requested therefore the booklet would not have been considered relevant when responding to the request. They advised that in any event a copy of this booklet had been supplied to the applicants in response to a separate request.
22. However, the Commissioner noted that the copy email supplied in response to Sunwick's original request alluded to an "Internal Guidance Note **for Policy and Area Office Staff**". This is clearly a different document than that described by the Ministers as external guidance to applicants and the investigating officer therefore requested clarification on this point.
23. The Ministers confirmed that there were indeed two separate documents, but that the document alluded to in the email did not constitute guidance for panel members per se (it being general for policy and area office staff). They acknowledged that this was based on a narrow interpretation of the request, but reiterated that in any event this document was released subsequently as a result of another request.
24. Although the Commissioner considers that on a reasonable interpretation of the request this document should have been provided in response to Sunwick's original request, as it has since been provided to Sunwick he will not consider this point further in this decision. In the circumstances, he is satisfied that no further relevant information is held by the Ministers, in addition to that supplied to Sunwick already.



Request (b) – Communications with, and instructions to the Panel Members in the period from 1 April 2007 to 18 January 2008, relating to or connected with the Stage 1 Review

25. In their original response to this request, the Ministers supplied Sunwick with a number of documents.
26. However, Sunwick had concerns that the only information disclosed was information regarding the administrative organisation of the Stage 1 Review Hearing itself. Sunwick considered it highly likely that communications were made to the Panel Members from within (and possibly outwith) the Scottish Government on the merits of the Stage 1 Review in order to maintain a consistent governmental policy line.
27. In their response to this office, the Ministers stated that they had conducted a full search for all relevant information issued to Panel Members. The various searches had involved a trawl through individuals' emails and calendars as well as through networked folders and the Scottish Government wide electronic document filing system (eRDM). Keywords used in the searches had included "Sunwick", Panel Members' surnames and the appeal reference number. The actual appeal file had also been searched.
28. The Commissioner has considered carefully the searches undertaken by the Ministers and the concerns raised by Sunwick. He has also noted the content of the withheld information, insofar as relevant, and is satisfied in the circumstances that the Ministers have identified all the information which would fall within the scope of this request. The Commissioner is therefore satisfied that the Ministers responded appropriately to request (b).

Request (d) – Communications or discussions between Panel Members, in the period from May 2007 to 18 January 2008, relating to or in connection with the Stage 1 Review, in particular the merits of the Stage 1 Review application and the disposal thereof

29. In response to this request the Ministers originally withheld 4 documents. It was argued by the Ministers that the information withheld was exempt under section 30(b)(ii) of FOISA and also, in respect of document 4, section 36(1). On further consideration, the Ministers also submitted that they did not regard document 2 or the covering email and telephone note forming part of document 3 as falling within the scope of Sunwick's request.
30. Document 2 consists of amendments to the draft report on the Stage 1 Review Hearing, made by a representative of the SGLD who attended the Hearing but did not form part of the Panel. Document 3 is an initial draft of this report, together with a covering email from the Appeals Secretariat to a representative of the SGLD and a related telephone note. The Commissioner has considered these documents carefully alongside the terms of Sunwick's original request and is satisfied that neither document 2 nor (any of) document 3 reflects discussions or communications between any of the named panel members in relation to the Stage 1 Review. He is further satisfied that they do not fall within the scope of any of Sunwick's other requests either. The Commissioner is therefore satisfied that these documents fall outwith the scope of Sunwick's requests and therefore do not require to be considered further in this decision notice.



Document 4 – section 36(1)

31. Document 4, which the Ministers argued was exempt under section 36(1) of FOISA, is the transcript of a private session discussion involving the Panel Members and representatives of the SGLD. The Ministers submitted that the transcript contained the legal advice of the SGLD officials and that consequently a claim to confidentiality of communications could be maintained in relation to it in legal proceedings.
32. The Ministers submitted that it was clear that the officials from SGLD had been invited to be present at the discussion in their legal capacity and that the advice given was in terms of a professional relationship with the Panel Members as well as with the Ministers. Of the three SGLD officials present, two were there in support of the Appeals Panel while the third was present on behalf of the Ministers in anticipation that the appeal would progress further.
33. Given the capacities in which the SGLD representatives had been present, the Ministers submitted that the information fell under section 36(1) both because it related to advice provided to a client and because the discussion had taken place *post litem motam* i.e. in contemplation of litigation, in that the appeal might continue and could progress at a later stage to the Land Court and possibly the Court of Session.
34. The exemption in section 36(1) of FOISA exempts from disclosure information in respect of which a claim of confidentiality of communications could be maintained in legal proceedings. Among the types of communication which fall into this category are those which are subject to legal professional privilege, one aspect of which is legal advice privilege. Legal advice privilege covers communications between lawyer and client in which legal advice is sought or given
35. For legal advice privilege to apply, certain conditions must be fulfilled. The communication must be with a professional legal advisor, such as a solicitor (including an in-house one). The legal adviser must be acting in their professional capacity as such and the communication must occur in the context of their professional relationship with their client. The information must be confidential between lawyer and client: privilege does not extend to matters known to the legal adviser through sources other than the client or to matters in respect of which there is no reason for secrecy.
36. In the circumstances, given that the primary purpose of the private session discussion appears to have been to obtain legal advice on the conduct of the Hearing, and given that legal advice was actually sought by and given to Panel Members in the course of that discussion, the Commissioner is satisfied having considered the content of the transcript that the information in it is subject to legal advice privilege and therefore exempt under section 36(1) of FOISA. While less convinced, given the context of the discussion, that it took place in contemplation of litigation, the Commissioner is not required to consider this further aspect of the Ministers' submissions in any detail.



37. The exemption in section 36(1) is a qualified exemption, which means that its application is subject to the public interest test set out in section 2(1)(b) of FOISA. Therefore, having decided that the information in document 4 is exempt under this exemption, he must go on to consider whether, in all circumstances of the case, the public interest in disclosing the information is outweighed by the public interest in maintaining the exemption.

Public interest test

38. As the Commissioner has noted in a number of previous decisions, the courts have long recognised the strong public interest in maintaining the right to confidentiality of communications between legal adviser and client on administration of justice grounds. Many of the arguments in favour of maintaining confidentiality of communications were discussed in a House of Lords case, *Three Rivers District Council and others v Governor and Company of the Bank of England (2004) UKHL 48*, and the Commissioner will apply the same reasoning to communications attracting legal professional privilege generally. Consequently, while he will consider each case on an individual basis, he is likely to order the release of such communications in highly compelling cases only.
39. With respect to document 4, the Ministers submitted that any public interest in seeing this information was outweighed by the public interest in ensuring that legal advisers and their clients – in this instance Appeal Panel members – could discuss relevant issues and give and receive legal advice in confidence. The Ministers argued that release of such information was likely to erode the trust which necessarily exists between a client and legal adviser.
40. The Ministers suggested that not only was it an essential point of principle that legal advisers and clients could speak freely and openly, but in practice advice would be less likely to be given fully and frankly in future if it were felt that records of such discussions might be released. Consequently, the Ministers considered it would be harmful to the public interest if solicitors and clients could not discuss relevant issues and given and receive legal advice in confidence. The Ministers maintained that decisions were informed by legal advice and that there was a risk that disclosure would both unreasonably expose legal positions to challenge and diminish the range and quality of the advice, which would in turn damage the quality of the decision making.
41. Sunwick, within its application to the Commissioner, contended that in the balance of the public interest favoured disclosure. It argued that it was clearly in the public interest that the decision-making processes for these Stage 1 and 2 Review Panels were susceptible to open and transparent scrutiny, given that the Panels in question purported to be independent and impartial and exerted considerable power and authority over farmers who might be eligible for EU agricultural subsidies. Sunwick submitted that such transparency would ensure, as far as possible, that the Panels were properly directing themselves, not taking into account irrelevant factors (or omitting to take account of relevant ones), and were not being unduly influenced by any third party or dictated policy.



42. In considering the public interest test in relation to document 4, the Commissioner accepts that there is a general public interest in making information available to the public and a general need for transparency and accountability in decision making. There may also be a more specific public interest in transparency and accountability in individual cases, but the public interest in disclosure must always be balanced against any detriment to the public interest as a consequence of disclosure.
43. It is clear from the information provided by both parties that the internal review in question was undertaken in a unique set of circumstances, which it appears the Ministers had never encountered before. It was for this reason that the closed session discussion was recorded. The Commissioner recognises the public interest in ensuring that any process such as this has been conducted properly and has not been unduly influenced by or on behalf of either party. In this particular case, he recognises that understandable concerns may have been raised by the presence in the closed session discussion of the solicitor representing the Ministers. However, having considered the information in document 4 he cannot identify anything in it which would support a conclusion that the public interest in disclosure was not outweighed by the public interest in maintaining the exemption. In reaching this conclusion the Commissioner has taken into account the timing of the request, which was made while the overall appeals process was still ongoing.
44. The Commissioner therefore considers that the Ministers were correct in their application of section 36(1) to document 4 as the public interest in favour of disclosure is outweighed by that in favour of maintaining the exemption. Having reached this conclusion, the Commissioner is not required to consider the application of section 30(b)(ii) of FOISA to this document and will consider only document 1 in the context of this latter exemption.

Document 1 – section 30(b)(ii)

45. Generally speaking, the exemptions in section 30(b) of FOISA allow for information to be withheld if its disclosure would, or would be likely to, inhibit substantially the commissioning or imparting of advice, or the requesting or offering of opinions or views. Section 30(b)(ii) states that information is exempt information if its disclosure under FOISA would, or would be likely to, inhibit substantially the free and frank exchange of views for the purposes of deliberation. This exemption is subject to the public interest test in section 2(1)(b) of FOISA.
46. In *Decision 166/2006 Mr Martin Williams of The Herald and the Scottish Executive*, the Commissioner discussed, in detail, his views on the issues that should be considered in deciding whether the exemptions in section 30(b)(i) and (ii) can apply. The Commissioner will not repeat his comments in full in this decision notice, but they can be summarised as follows: information must be treated on a case-by-case basis; release of information in one case need not imply release in another case; the nature of the information in question must be considered, rather than considering "advice" or "exchange of views" as categories of information; if the information withheld does not in itself constitute advice or an exchange of views, the argument for exemption under section 30(b) may be weaker; the standard to be met in applying the tests in 30(b) is high.



47. The Commissioner's consideration of the Ministers' application of the exemptions under section 30(b) has also been informed by the judgment of the Court of Session *Scottish Ministers v Scottish Information Commissioner (re Alexander's Application) 2007 S.L.T. 274*. The Court's conclusions made clear that the actual content of the information must be considered in determining whether disclosure would be likely to have a substantially inhibitive effect, rather than proceeding on an assumption that disclosure of certain types of information, such as advice to Ministers, would always lead to future substantial inhibition for the purposes of these exemptions.
48. The Ministers have also previously provided general submissions on the arguments relied upon in justifying their position in relation to the section 30(b) exemptions.
49. The Commissioner has addressed these additional, general submissions already in paragraphs 23 to 31 of *Decision 089/2007 Mr James Cannell and Historic Scotland*. These general arguments are not specific to the information under consideration in this case and the Commissioner does not think it necessary to discuss them further here, other than to say that where relevant they have been taken into account fully, together with the case-specific arguments submitted by the Ministers, in reaching his decision on the applicability of the exemptions in section 30(b) of FOISA to the information under consideration here. In particular, it should be clear that the Commissioner cannot as a rule accept an automatic presumption that harm will be caused by the release of information simply because it falls into a particular category
50. In their correspondence with the Commissioner, the Ministers supplied a new version of their general arguments in relation to section 30(b) of FOISA. The Commissioner has fully considered these submissions and addressed them in paragraphs 43-64 in *Decision 105/2008 Mr Rob Edwards and the Scottish Ministers*. In summary the new arguments raised by the Ministers are as follows:
- Conflation of the harm test and the public interest test
 - Additional arguments on the difficulties in predicting future inhibition
 - Parliamentary discussion and class based approach
 - Conflation of sections 29 and 30
 - Court of Session rulings
 - Information Tribunal decisions.
- As the Commissioner has fully addressed these points in *Decision 105/2008 Mr Rob Edwards and the Scottish Ministers*, he will not repeat his consideration of them here, other than to say that he has taken these into account where relevant in reaching his conclusions in this case.
51. The Ministers submitted that document 1 comprised a draft report on the Stage 1 Review Hearing, with tracked changes provided by a Panel Member.



52. The Ministers explained that the final report was written up by the Appeals Secretariat member of staff who attended the Hearing and included the decision to taken with the reasons for that decision. This was then issued to each Panel Member to make sure it had been recorded correctly and to make any presentational amendments, such as with grammar, spelling, rephrasing etc. Each Panel Member would return their changes, which would then be included in the final document issued to the applicant. The Ministers submitted that document 1 was therefore a draft version of the final document which the applicant would have received.
53. During the course the investigation the investigating officer confirmed with the Ministers that no other drafts of this document, amended by the other panel members, were held. Taking account of the searches described at paragraph 27 above, together with the content of the final version of the report, the Commissioner is satisfied that this is the only such version of the draft report held by the Ministers.
54. The Ministers contended that there would be substantial inhibition to the free and frank exchange of views for the purposes of deliberation were documents such as amended drafts to be routinely made public. Further, they considered it crucial that officials could operate in a private space environment, in this instance one designed to ensure that a record of an appeal hearing was accurate and correctly recorded the discussion and decision. The Ministers argued that were individual drafts made public, revealing the comments of particular Panel Members, those Panel Members would be likely to become far more circumspect in their amendments and to discuss changes orally instead of in writing. The Ministers went on to argue that Panel Members would not wish to expose any differences of view or understanding as this could undermine or discredit their final decision. In the Ministers' view, this would undoubtedly be to the detriment of the appeal process itself and more widely would bring it into public disrepute.
55. The Ministers also submitted that were amended drafts etc to be routinely released, there would be the likelihood of longer term substantial inhibition to the process of how information would be recorded and modified. They submitted that while officials would no doubt continue to engage in debate and discussion and endeavour to maintain accurate records, practice as to how discussions were managed and reports produced was still likely to change. In particular, in terms of written amendments such as in this appeal, the Ministers considered it likely that these would be reduced to a minimum in order to prevent controversy and the potential for a public post mortem of the decision, almost inevitably focussing more on internal disagreements of various officials rather than the final decision.



56. In a wider context, the Ministers suggested that if officials understood there was a likelihood that their individual comments etc would be made public, possibly against their initial expectations, they would be far less willing to participate in such appeals and to play as full a role as might be expected and required. The Ministers also suggested that if the comments of individual officials were to be made public, it was to be expected that there would be an increased possibility of officials coming under pressure to adopt particular lines of argument. This pressure, the Ministers suggested, could potentially come from external parties promoting their own agenda or due to officials wishing it be seen to take a certain position (perhaps at variance with their private views) knowing their comments would be disclosed. These various factors, the Ministers argued, would be to the substantial inhibition of the appeals process and such procedures in general, and hence to the effective conduct of public affairs.
57. Sunwick, on the other hand, submitted that it was of vital importance for it to know whether or not the Stage 1 Review Panels established by the Scottish Government were (a) discharging their review functions, fairly, properly and impartially and/or (b) susceptible to any undue influence from within or outwith the Scottish Government.
58. Sunwick submitted that section 30(b)(ii) could not apply to the information requested, as no “substantial” prejudice or “substantial” inhibition could be demonstrated by the Ministers. On the contrary, Sunwick argued that the effective conduct of public affairs in the context of such a decision-making Panel was positively enhanced by the introduction of transparency to the reasoning and decision-making process. Sunwick also argued that the public interest in ensuring that the statutory review processes were seen to be operating properly, correctly and reasonably (and in particular independently and impartially) outweighed any vested interest of the Ministers in withholding disclosure of the requested information.
59. Having carefully considered the content of this draft document having particular regard to the changes made thereto by the Panel Member (which are the focus of the Ministers’ submissions), it appears to the Commissioner that the amendments in question reflect minor or stylistic changes to the text rather than anything of substance. While the Commissioner has in other circumstances accepted that information which was subject to review and revision should not be disclosed, given the likely adverse effect on officials’ future consideration, he does not accept in this instance that the innocuous changes contained in this document, if disclosed, would (or would be likely to) inhibit substantially the free and frank exchange of views for the purpose of deliberation, in any of the ways suggested by the Ministers. The Commissioner therefore concludes that the Ministers were incorrect in their application of section 30(b)(ii) to document 1.

DECISION

The Commissioner finds that the Scottish Ministers partially complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Sunwick Farm Limited (Sunwick).

Decision 136/2008
Sunwick Farm Limited
and the Scottish Ministers



The Commissioner finds that by giving notice in terms of section 17(1) that they did not hold certain information, and in withholding document 4 under section 36(1) of FOISA, the Ministers complied with Part 1.

However, by incorrectly applying section 30(b)(ii) of FOISA to document 1, the Ministers failed to comply with Part 1 (and in particular section 1(1)).

The Commissioner therefore requires the Ministers to supply Sunwick with a copy of document 1, by 27 November 2008.

Appeal

Should either Sunwick Farm Limited 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 after the date of intimation of this decision notice.

Margaret Keyse
Head of Investigations
13 October 2008



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 –

...

- (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

17 Notice that information is not held

- (1) Where-

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

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

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

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

...



30 Prejudice to effective conduct of public affairs

Information is exempt information if its disclosure under this Act-

...

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

...

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

...

36 Confidentiality

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

...