



Scottish Information  
Commissioner

**Decision 202/2007 Sunwick Farms Ltd and the  
Scottish Ministers**

*Request for information relating to payments made under the  
National Reserve for those in the Beef Special Premium Scheme*

**Applicant: Sunwick Farms Ltd  
Authority: Scottish Ministers  
Case No: 200700096  
Decision Date: 30 October 2007**

**Kevin Dunion  
Scottish Information Commissioner**

Kinburn Castle  
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## Decision 202/2007 Sunwick Farms Ltd and the Scottish Ministers

***Request for all information relating to the Scottish Government's proposed method of calculation of entitlement under the National Reserve for those in the Beef Special Premium Scheme investor category- failure to respond to request and request for review - information not held***

### Relevant Statutory Provisions and Other Sources

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) (General entitlement); 10(1) (Time for compliance); 20(1)-(3) (Requirement for review of refusal etc.) and 21(1) (Review by Scottish public authority)

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

### Facts

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Maclay Murray and Spens LLP, acting on behalf of Sunwick Farms Ltd (Sunwick Farms) requested information relating to the proposed method of calculation of entitlement under the National Reserve for those in the Beef Special Premium Scheme (BSPS) investor category from the Scottish Ministers (the Ministers). After extensive delays, the Ministers responded by providing the applicant with some information. Sunwick Farms was not satisfied with this response and asked the Ministers to review their decision. The Ministers carried out a review and, as a result, notified Sunwick Farms that they had supplied all the information which fell within the scope of its request. Sunwick Farms 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 Farms' request for information in accordance with Part 1 of FOISA.



## Background

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1. On 6 April 2006, Sunwick Farms wrote to the Ministers requesting:  
*“...all information (which term includes, without limitation, for the purposes of this letter, documents, extracts from notebooks, estimates, reports, memos, e-mails and data in written (including handwritten) or electronic form), which relates in any way to SEERAD’s [i.e. the Scottish Executive Environment and Rural Affairs Department, as it was then known] proposed method of calculation of entitlement under the National Reserve for those in the Beef Special Premium Scheme investor category.”*
2. On 7 April 2006, the Ministers wrote to Sunwick Farms acknowledging its request for information. This was subsequently followed by a letter dated 4 May 2006 from the Ministers acknowledging that its response had been delayed and explaining that collection of the information was taking longer than originally anticipated and that a response would be provided as soon as possible.
3. On 26 June 2006, Sunwick Farms, having not received a response, wrote to the Ministers requesting a review of its deemed refusal to respond.
4. On 27 July 2006, Sunwick Farms wrote to my Office, stating that it was dissatisfied that the Ministers had failed to respond to its request and request for review and applying to me for a decision in terms of section 47(1) of FOISA.
5. Following an Information Notice, issued under section 50 of FOISA by my Office, the Ministers, on 9 August 2006, supplied Sunwick Farms with information relating to its initial request. The official who wrote the letter stated that he appreciated that the delay had had serious ramifications for which he accepted responsibility and he asked the Sunwick Farms to accept his solemn apology.
6. On 16 August 2006, Sunwick Farms wrote to the Ministers stating that it was dissatisfied with this response. Sunwick Farms expressed various reasons as to why it considered the Ministers’ response to be inadequate.
7. On 11 October 2006, Sunwick Farms wrote to my Office, stating that it was dissatisfied that it had received no response to its request for review within the statutory timeframe.



8. On 15 January 2007, following a further Information Notice issued by my Office, the Ministers responded to Sunwick Farms' request for review, stating that it had treated its letter of 16 August 2006 as a new request and that further searches had not identified any information additional to that supplied on 9 August 2006.
9. On 18 January 2007, Sunwick Farms applied to my Office, stating that it was dissatisfied with the Ministers' response and the manner in which the Ministers had dealt with its request.
10. The application was validated by establishing that Sunwick Farms had made a request for information to a Scottish public authority and had applied to me for a decision only after asking the authority to review its response to that request.
11. On 25 January 2007, the Ministers were notified in writing that an application had been received from Sunwick Farms and was asked to provide my Office with specified items of information required for the purposes of the investigation. The Ministers responded with the information requested and the case was then allocated to an investigating officer.

## The Investigation

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12. The initial application to my Office made by Sunwick Farms was on the basis that the Ministers failed to comply with the technical requirements of FOISA. Following a second application in relation to the failure to comply with the technical requirements of FOISA, Sunwick Farms made a third application with respect to the substance of the Ministers' response to their request. My investigation, therefore, considered both the technical and substantive issues surrounding this case.
13. During the course of this investigation, Sunwick Farms provided my Office with evidence which suggested that the Ministers held information which, in their opinion, fell within the scope of their request, but had not been provided in response to their initial request or their request for review. This information had been obtained by Sunwick Farms in response to a Court Order and as a result of a similar information request made under the Freedom of Information Act 2000 to the UK Government's Department for Environment, Food and Rural Affairs (Defra).
14. The Ministers were then provided with the opportunity to comment on these additional submissions made by Sunwick Farms.



## The Commissioner's Analysis and Findings

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15. In coming to a decision on this matter, I have considered all of the information and the submissions that have been presented to me by both Sunwick Farms and the Ministers and I am satisfied that no matter of relevance has been overlooked.
16. There are two central issues which Sunwick Farms has asked me to address in relation to this case – the manner in which the Ministers dealt with Sunwick Farms' information request and whether the Ministers hold any further information which falls within the scope of the request.
17. I will consider the Ministers' handling of this request in the first instance.

### Handling of request-sections 10, 20 and 21 of FOISA

18. Section 10(1) of FOISA gives Scottish public authorities a maximum of 20 working days from receipt of an information request to comply with the request for information.
19. Sunwick Farms submitted its original request on 6 April 2006. Although acknowledging this request, the Ministers failed to provide a response within the requisite timescales, stating that the collection of information was taking longer than originally anticipated.
20. Sunwick Farms then submitted a request for review on 26 June 2006 on the basis that the Ministers had failed to respond.
21. Section 21(1) of FOISA gives authorities a maximum of 20 working days from receipt of the requirement to comply with a requirement for review.
22. In this instance, the Ministers failed to respond within 20 working days and Sunwick Farms applied to my Office on 27 July 2006. I am satisfied that Ministers failed to adhere to the requisite timescales set down in sections 10(1) and 21(1) of FOISA.



23. On 10 August 2006, in response to an Information Notice issued by my Office, the Ministers stated that the request was not dealt with on time due to an administrative oversight which led to the applicant's fax message being filed in error. However, the Ministers submitted that all staff were made aware of the importance of requests made under FOISA and how they should be dealt with to ensure that this type of mistake is avoided in future. The Ministers also highlighted that Sunwick Farms had been provided with a response on 9 August 2006.
24. In its response, dated 9 August 2006, the Ministers supplied Sunwick Farms with information which fell within the scope of its initial request of 6 April 2006 and, as noted above, provided an apology for not responding within the allotted time.
25. On 16 August 2006, Sunwick Farms wrote to the Ministers requesting a review of its initial decision and stating that the information received on 9 August 2006 was inadequate and detailed its reasons for reaching this conclusion. This letter was also copied to my Office.
26. On 11 October 2006, Sunwick Farms applied to my Office, stating that the Ministers had failed to respond within 20 working days to its request for review.
27. Following a second Information Notice issued by my Office, the Ministers submitted that Sunwick Farms' letter of 16 August 2006 had not been identified as a request for review and they felt that the letter reflected three entirely new requests.
28. Having reviewed the content of the letter of 16 August 2006, I am satisfied that it meets the requirements of section 20(3) of FOISA. This letter clearly identifies the request for information to which the requirement for review relates; highlights that it considered the initial response to be inadequate and sets out the various reasons as to why it considers this to be the case. Although the request for review was addressed to the party who provided the initial response, the Ministers' initial response on 9 August 2006 omitted details as to how to request a review, presumably on the basis that the Ministers did not consider that information about how to seek a review was necessary, given that they considered that they were supplying all of the information they held which fell within the scope of the information request. In the circumstances, therefore, I am satisfied that the letter of 16 August 2006 reflects a valid request for review of the initial response to Sunwick Farms' request of 6 April 2006.



29. On 30 November 2006, in response to a second Information Notice issued by my Office, the Ministers submitted that they were currently working with the team responsible to establish whether they held any other relevant information which had not already been provided to Sunwick Farms and assured my Office that a response would be provided as soon as possible. The Ministers apologised unreservedly for the excessive delays in responding to the applicant.
30. In their submissions to my Office, the Ministers explained that the particular department involved misunderstood its obligations under FOISA. The Ministers explained that this department, in relation to the issues raised by Sunwick Farms in its request for review, were trying to obtain information which the Ministers did not actually hold. The delays in obtaining that information meant that no response had been provided. The Ministers submitted that the team dealing with the request had since been informed that information which the Ministers do not hold is considered outwith the scope of the request.
31. On 15 January 2007, the Ministers responded to Sunwick Farms' request for review highlighting that they considered its letter of 16 August 2006 as a new request for information. In addition, the Ministers argued that they did not hold any further information in addition to the information provided on 9 August 2006.
32. As stated earlier, I am satisfied that Sunwick Farms' letter of 16 August 2006 represents a valid request for review. In light of this, it is clear to me that the Ministers have failed to comply with section 21(1) of FOISA in that they did not respond to Sunwick Farms' request for review within the relevant period of 20 working days specified in FOISA. In fact, the Ministers took almost 90 working days to respond to Sunwick Farms' initial request, and over 4 months to respond to their request for review, which is clearly well outside the 20 day timescales set out in sections 10(1) and 21(1) and which is, in my view, unacceptable. Additionally, in both instances, the Ministers only responded to Sunwick Farms after I had issued them with an Information Notice.
33. In conclusion, I find that the Ministers breached Part 1 of FOISA in failing to respond within the 20 working day period prescribed by sections 10(1) and 21(1) of FOISA.

### **Substance of request**

34. Now that I have considered the handling of this request, I shall now consider the substantive aspect of Sunwick Farms' application to my Office. In its letter dated 18 January 2007, Sunwick Farms submitted that it considered it highly unlikely that there were no documents in existence relating to the policy formulation process which informed SEERAD's decision to adopt its current method of calculation for the National Reserve.



35. Sunwick Farms highlighted the following areas in which it considered the response of 9 August 2006 inadequate:
- No information had been provided on the policy formulation process which must have been undertaken by SEERAD to determine the exercise of its discretion under Article 21 of Regulation 795/2004. Sunwick Farms felt that it was inconceivable that no documents, e-mails, meeting notes or other information exist which discuss the formulation of SEERAD's policy in relation to the National Reserve.
  - No information had been provided in relation to discussions between SEERAD, Defra and other devolved administrations in relation to setting the policy for the National Reserve. Sunwick Farms highlighted correspondence which alluded to the fact that such discussions did take place and a common approach was agreed.
  - Sunwick Farms referred to information leaflet 11 "National Reserve 2005" which sets out SEERAD's policy on calculating entitlements under the National Reserve. Sunwick Farms questioned that no information had been provided in relation to its drafting or formulation.
36. In their submissions to my Office, the Ministers stated that they held no further information to that supplied on 9 August 2006 which fell within the scope of Sunwick Farms' request. The Ministers submitted that, in addition to checking their own files, the CAP Reform Implementation Team also sought any relevant information from SEERAD colleagues. This was done by searching files held by Agriculture and Food Division (responsible for CAP policy in general and Single Farm Payment Scheme in particular). The CAP Reform Implementation Team also searched documents held electronically under the Executive's Electronic Records and Document Management system (e-RDM). The team used standard corporate searches based on the following key words: National Reserve, Beef Special Premium Scheme, BPS and Scaleback. The Ministers submitted that no further information, falling within the scope of the request, including those areas raised in Sunwick Farms' request for review, was identified during the course of these searches.
37. In providing context to this request for information, the Ministers explained that relations with the European Union are reserved to the UK parliament, with Defra having overall policy responsibility for the formulation of UK policy on European Union initiatives (in this context the SFPS National Reserve). The Ministers highlighted to my Office that due to the relationship between Defra and SEERAD, it is possible that other papers relevant to Sunwick Farms' request may be held by Defra.





38. Further to its earlier submissions, Sunwick Farms submitted by e-mail on 25 April 2007, that as a result of a Court Order they had received a number of documents which were not supplied as a result of their earlier request under FOISA. Sunwick Farms submitted that this Specification of Documents was framed largely the same terms as their original request made under FOISA. Sunwick Farms supplied my Office with a copy of this specification.
39. Subsequently, on 6 June 2007, Sunwick Farms supplied further documents relevant to this case. The documents supplied were received by Sunwick Farms from Defra as a result of a freedom of information request made under the Freedom of Information Act 2000. Sunwick Farms submit that this request was made in parallel to that made to SEERAD and was framed in similar terms.
40. Sunwick Farms highlighted that the emails recovered from Defra do not appear in the documents obtained from the Ministers. Sunwick Farms argued that although distribution lists had been blanked out, the content of the emails clearly suggests that someone from SEERAD was on the distribution list. Sunwick Farms submitted that the emails supplied illustrate that Defra was seeking opinions from all the devolved administrations within the UK on how to calculate awards from the National Reserve under the investor category. As this would have required input from SEERAD, Sunwick Farms submit that it is highly likely that SEERAD was on the email distribution list. Consequently, Sunwick Farms felt that the information provided as a result of their request and their Court Order had not been comprehensive.
41. The Ministers were provided with the opportunity to comment on the issues raised by the applicant.
42. On 28 June 2007, the Ministers confirmed that SEERAD had been involved in discussions with Defra and other devolved administrations about the calculation of entitlement under the National Reserve and the Single Farm Payment Scheme (including the BPS).
43. The Ministers submitted that these discussions involved many people interacting at policy and operational levels, both within the Scottish Government and in discussion with opposite numbers in other administrations. The Ministers explained that these interactions were fast-paced as the time for discussion was short. The European Commission Regulation on which the National Reserve was largely based was not published until April 2004 and the UK had to decide on the models for implementation by 1 August 2004. Because the need for agreement on the details of how the reserve would operate, the discussion was by telephone, e-mail and meetings. Given the pace and volume of such exchanges, the Ministers submitted that there was a possibility that an e-mail is inadvertently deleted or the note of a meeting is not written up.



44. The Ministers further explained that whilst the European regulations allowed for regional implementation of the Single Farm Payment Scheme (SFPS) i.e. different approaches in each administration, the National Reserve operates at a member state level. Funding for the National Reserve, in its first year, came from a variety of sources but principally a deduction from the reference amounts of the SFPS allocated to all producers. As the National Reserve exists for the UK as a whole, there was a collective obligation on all administrations to fund it, which means that a shortfall of National Reserve funding in one UK region can be balanced by any surplus in another. This arrangement meant that the same percentage deduction was applied across the UK but the percentage could not be determined until all Departments had completed the processing of their National Reserve applications to a satisfactory degree.
45. The Ministers further explained that the four UK administrations, including SEERAD, were committed to including applications to a National Reserve as part of their SFPS claim processes that were scheduled to close on 16 May 2005. Accordingly, from April 2004, the administrations would have been involved at both a policy and implementation level in determining the eligibility criteria for each of the eight categories of the Reserve, the common business rules for handling applications and estimating the funding requirements. These wide-ranging discussions would have included the bearing of the support schemes (including BPS) on National Reserve applications and would have been conducted by normal business conduits i.e. telephone, e-mails, and meetings. The Ministers submitted that the department concerned operated standard office practices i.e. recording discussions through post-event note, filing e-mails, minutes etc using paper files until the advent of their e-RDM. The Ministers explained, for the reasons outlined above, that there was no guarantee that every document had been kept, filed or filed appropriately.
46. The Ministers referred me to the details of the searches it had undertaken contained within their letter of 6 February 2007 in response to Sunwick Farms' original request and request for review. The Ministers submitted that these searches would have identified papers relating to discussions with Defra and the other devolved administrations.
47. The Ministers undertook a further search but had not identified any material beyond what had already been supplied. The further search involved revisiting existing paper files and asking the individual officers who might have been involved at both a policy and implementation level to identify any other official files or unfilled papers. This search also included a repeat of the search of the e-DRM system but on this occasion using 'wildcards' on variations of 'National Reserve', 'Beef Special Premium Scheme', 'BSPS', 'Scaleback' and 'SFPA Investor'.



48. The Ministers also submitted that the Specification of Documents submitted as a result of the Court Order and the scope of the request made under FOISA was different. Furthermore, given that the scope of the requests were not identical, the Ministers submitted that it is reasonable that the documents supplied will not be the same in each case.
49. The Ministers acknowledged that the pressure of work is not an excuse for failure to keep complete records, resulting in information not being available. The Ministers submitted that they have taken care to inform and train staff about their obligations under FOISA, for example there is comprehensive guidance on their intranet which is regularly updated. Against this background, the Ministers asserted that it is unlikely that anyone would have deliberately destroyed or concealed information to thwart this or any other request. Ultimately, the Ministers submitted that any discrepancy between the information provided by SEERAD was due to human error.
50. Having reviewed the wording of the Specification of Documents in relation to the Court Order supplied by Sunwick Farms and having compared this with that of their original request, I am satisfied that it would capture information outwith the scope of the original request made under FOISA.
51. In conclusion, I am satisfied, having considered the searches undertaken by the Ministers and their explanations as to why some of the information is not held, that Sunwick Farms have been supplied with all the information held by the Ministers that falls within the scope of its original request of 6 April 2006.

## Decision

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I find 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 Farms.

I find that the Ministers supplied Sunwick Farms with all the information that fell within the scope of their original request. In this respect I find that the Ministers complied with Part 1.

However, in failing to respond to Sunwick Farms within the 20 working day period allowed for responding to the initial request and request for review, the Ministers failed to comply with sections 10(1) and 21(1) of FOISA.



The delays in dealing with the request and request for review are very concerning. The Ministers took almost 90 working days to issue their initial response and over 4 months to respond to Sunwick Farms' request for review. Clearly this is unacceptable. However, the Ministers have stated that they have taken steps to ensure that all staff in the particular team involved are aware of the importance of requests under FOISA and how they should be dealt with to ensure that this type of mistake is avoided in the future. I therefore do not require the Ministers to take any action in response to the failures highlighted above.

## **Appeal**

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Should either Sunwick Farms or the 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.

**Kevin Dunion**  
**Scottish Information Commissioner**  
**30 October 2007**



## Appendix

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### 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.

##### 10 Time for compliance

- (1) Subject to subsections (2) and (3), a Scottish public authority receiving a request which requires it to comply with section 1(1) must comply promptly; and in any event by not later than the twentieth working day after-
  - (a) in a case other than that mentioned in paragraph (b), the receipt by the authority of the request; or
  - (b) in a case where section 1(3) applies, the receipt by it of the further information.

[...]

##### 20 Requirement for review of refusal etc.

- (1) An applicant who is dissatisfied with the way in which a Scottish public authority has dealt with a request for information made under this Part of this Act may require the authority to review its actions and decisions in relation to that request.
- (2) A requirement under subsection (1) is referred to in this Act as a "requirement for review".
- (3) A requirement for review must-



- (a) be in writing or in another form which, by reason of its having some permanency, is capable of being used for subsequent reference (as, for example, a recording made on audio or video tape);
- (b) state the name of the applicant and an address for correspondence; and
- (c) specify-
  - (i) the request for information to which the requirement for review relates; and
  - (ii) the matter which gives rise to the applicant's dissatisfaction mentioned in subsection (1).

[...]

## **21 Review by Scottish public authority**

- (1) Subject to subsection (2), a Scottish public authority receiving a requirement for review must (unless that requirement is withdrawn or is as mentioned in subsection (8)) comply promptly; and in any event by not later than the twentieth working day after receipt by it of the requirement.

[...]