



Scottish Information
Commissioner

**Decision 014/2008 Mr John McIntosh and
Transport Scotland**

Aberdeen Western Peripheral Route

**Applicant: Mr John McIntosh
Authority: Transport Scotland
Case No: 200601423
Decision Date: 28 January 2008**

**Kevin Dunion
Scottish Information Commissioner**

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Decision 014/2008 – Mr John McIntosh and Transport Scotland

Request for information regarding the Aberdeen Western Peripheral Route – information was released and four documents were withheld. Further information was subsequently published during the investigation - The Commissioner took the view that the documents under consideration contained environmental information. The Commissioner found that exemptions under FOISA and exceptions under the EIRs applied to these documents, but the public interest in maintaining these was outweighed by the public interest in disclosure of the information – he required that the two remaining documents should be released.

Relevant Statutory Provisions and other Sources

Freedom of Information (Scotland) Act 2002 sections 1(1); 2(1) (Effect of exemptions); 29(1)(a) and (b), (4) (definitions of “government policy” and “Ministerial communications”) and (5) (Formulation Scottish Administration policy etc.); 30(b)(ii) (Prejudice to effective conduct of public affairs) and 39(2) (Health, safety and the environment)

Environmental Information (Scotland) Regulations 2004 (EIRs) regulations 2 (Interpretation) (definition of “environmental information”); 5(1) and (2) (Duty to make available environmental information on request) and 10(1), (2) and (4)(e) (Exceptions from duty to make environmental information available)

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

Decision 218/2007 Professor A D Hawkins and Transport Scotland (the Hawkins Decision)
(<http://www.itspublicknowledge.info/applicationsanddecisions/Decisions/2007/200600654.asp>)



Facts

Mr McIntosh requested from the Scottish Ministers (the Ministers) a range of information and documentation relating to the decision of the route for the Aberdeen Western Peripheral Route (AWPR) announced in December 2005. Transport Scotland (an agency of the Ministers) released some information. Mr McIntosh requested a review, indicating that some parts of his request had not been addressed.

Following its review, Transport Scotland confirmed that it was withholding the remaining information under section 30(b)(i) and (ii) of the Freedom of Information (Scotland) Act 2002 (FOISA). Mr McIntosh then submitted an application for a decision by the Scottish Information Commissioner.

During the investigation, the Ministers claimed additionally that the exemptions in sections 29(1)(a) and 29(1)(b) of FOISA applied to the information withheld from Mr McIntosh. (The exception under regulation 10(4)(e) of the Environmental Information (Scotland) Regulations 2004 (the EIRs) was also relied on by the Ministers towards the end of the investigation.) However, some of the information originally withheld was made publicly available during the investigation.

Following an investigation, the Commissioner found that by withholding the remaining documents sought by Mr McIntosh, Transport Scotland had failed to deal with Mr McIntosh's request for information in line with Part 1 of FOISA.

Furthermore, he was of the view that the information contained within the documents was environmental information and, therefore, that Transport Scotland had failed to deal with the request in line with the EIRs and, in particular, regulation 5 of the EIRs.

He required disclosure of the two documents withheld.

Background

1. This decision considers a request for information regarding the Aberdeen Western Peripheral Route (AWPR). The case I consider here overlaps significantly both in terms of the information under consideration and the issues to be addressed with that considered in my *Decision 218/2007 Professor A D Hawkins and Transport Scotland* (the Hawkins Decision). The Hawkins Decision sets out my thinking fully on the various legal questions raised by these cases, and I will refer to it at various points in what follows.



2. As I explained in the Hawkins decision, the AWPR is a new road that is being developed with the aim of improving travel in and around Aberdeen and the north-east of Scotland. It is scheduled for completion in 2011 and will provide a link between towns to the north, south and west of Aberdeen. On 1 December 2005, the Transport Minister announced the chosen route for the AWPR. This was a combination of two route options that had been under consideration (the Milltimber Brae option and the Peterculter/Stonehaven option).
3. Mr McIntosh emailed the Ministers on 17 January 2006. He referred to the Transport Minister's announcement of 1 December 2005 and requested a range of information regarding the appraisal of options for the route of the AWPR and the information considered by the Minister and his advisers when deciding to take forward the new preferred option.
4. Transport Scotland responded to this request on 23 January 2006. Its response included a number of documents and further information.
5. Mr McIntosh emailed Transport Scotland on 12 February 2006 as he did not consider that Transport Scotland had provided a full response to his request. In particular, he provided clarification of the part of his request that is under consideration in this decision, and which had not been addressed in Transport Scotland's response. He explained that this was intended to seek the specific written documentation, properly dated, which was provided to the Minister for Transport or his advisors that justified the withdrawal from the appraisal process all routes other than the Milltimber Brae Route, and resulted in the inclusion of the Stonehaven to Maryculter spur.
6. Mr McIntosh subsequently wrote to formally request a review of Transport Scotland's response on 1 March 2006. This sought dates of certain appraisal reports that had been disclosed, and requested a response to the part of his request described in paragraph 5 above.
7. On 24 March 2006, Transport Scotland responded to Mr McIntosh's request for review. This confirmed the dates of the appraisal reports queried by Mr McIntosh. Transport Scotland accepted the part of the request clarified (see paragraph 5) had not been addressed in the response of 23 January 2006, and apologised for this oversight. It went on to explain that the relevant information was being withheld under sections 30(b)(i) and (ii) of FOISA. The reviewer went on to direct Mr McIntosh to various publicly available reports that were referred to in documents that were provided to the Minister.
8. Mr McIntosh wrote to my Office on 27 August 2006, stating that he was dissatisfied with the outcome of Transport Scotland's review and applying to me for a decision on this matter.



9. The application was validated by establishing that Mr McIntosh 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 his request.

The Investigation

10. As noted above, Transport Scotland is an agency of the Ministers and, in line with agreed procedures, the Ministers were notified in writing on 5 September 2006 that an application had been received from Mr McIntosh and were invited to comment on the matters raised by him and on the application as a whole in terms of section 49(3)(a) of FOISA. The Ministers were also asked to provide my Office with specified items of information required for the purposes of the investigation. The Ministers responded on 12 October 2006 with the information requested and the case was then allocated to an investigating officer.
11. The Ministers' submissions confirmed that Transport Scotland had withheld four documents from Mr McIntosh.
12. The Ministers confirmed that they now considered the information withheld to be exempt from disclosure under the exemptions in sections 29(1)(a), 29(1)(b), 30(b)(i) and 30(b)(ii) of FOISA.
13. Further general arguments on the application of section 30(b) of FOISA (of relevance to this case and others) were provided to my Office by the Ministers with a letter of 2 May 2007.
14. On 9 August 2007, the investigating officer alerted the Ministers to the fact that, having considered the documents withheld in this case, I had reached an initial view that these contained environmental information. The Ministers were asked to comment on this matter and provide submissions on whether they would also consider the information to fall under the scope of any of the exceptions contained in the EIRs, if I were to judge that the information withheld from Mr McIntosh was environmental information.
15. The Ministers responded on 16 August 2007. They submitted that Transport Scotland had acted correctly in considering the request under the terms of FOSIA rather than the EIRs. Having reached this conclusion, the Ministers declined to consider the request under the terms of the EIRs at that stage.



16. I met with the Ministers on 17 October 2007 to discuss my approach to cases such as these in more detail. The Ministers subsequently wrote to me on 5 November 2007 to say that they still considered my approach to be incorrect, but that if I continued to disagree with their view and decided to consider the application from Mr McIntosh under the EIRs, then they would wish to apply the exception at regulation 10(4)(e) of the EIRs to the documents in question, given that they are all internal communications.
17. I will consider the Ministers' submissions in more detail within my analysis and findings below.
18. In January 2008, some of the information under consideration in this case was subsequently made publicly available after the Hawkins Decision concluded that it had been wrongly withheld.

The Commissioner's Analysis and Findings

Documents falling within the scope of the request

19. As stated above, Transport Scotland withheld four documents (which I will describe, in line with the numbering used by the Ministers, as Documents 3, 4, 5 and 6) from Mr McIntosh.
20. However, I will only consider Documents 4 and 6 in what follows below. Document 5 is entirely replicated in Document 6 and so will not be considered separately. Also, Document 3 was considered in detail in the Hawkins Decision (in which it was described as Document 2) and it has subsequently been made publicly available¹. As this document is no longer being withheld from Mr McIntosh, and with his agreement, I will not consider it further in this decision.
21. Documents 4 and 6 are both series of emails between Ministers (and officials acting on their behalf) regarding the choice of route for the AWPR. The email exchange that was described as Document 3 in the Hawkins Decision, and which has also since been made publicly available, is duplicated either partly or fully in each of these exchanges. However, Documents 4 and 6 in this case also include further exchanges between Ministers that were not considered in the Hawkins decision. In summary:

¹ Available online here:
http://www.awpr.co.uk/news_full.asp?id=610&curpage=&search=clear§ion=news.



- Document 4 contains an exchange of emails between the Minister for Transport and the Minister for Finance and Public Sector Reform.
 - Document 6 contains an exchange of emails between the Minister for Transport and the First Minister.
22. In coming to a decision in this matter, I have considered all of the information and the submissions that have been presented to me by both the Ministers and Mr McIntosh and I am satisfied that no matter of relevance has been overlooked.

EIRs or FOISA?

23. Environmental information is defined in regulation 2 of the EIRs (the definition is reproduced in full in the Appendix to this decision). Where information falls within the scope of this definition, a person has a right to access it under the EIRs, subject to various restrictions and exceptions contained in the EIRs.
24. Documents 4 and 6 contain communications between Ministers and officials with regard to the choice of route for the AWPR. This decision was one that would have significant environmental implications as a consequence of the large scale road building on the route concerned and subsequent traffic levels. This would include traffic emissions levels affecting the air quality in the areas through which the route passed, as well as emissions contributing to climate change and would also lead to changes to the natural and built environment in these areas.
25. As the information under consideration in this case relates to a decision that would have significant environmental implications, I reached an initial view that it was environmental information. The investigating officer relayed this initial view to the Ministers in an email dated 9 August 2007. She asked for their comments on this point, and as to whether it would have been appropriate to consider Mr McIntosh's request under the terms of the EIRs. The Ministers were also asked to confirm whether they would consider the documents withheld to fall under the scope of any of the exceptions from disclosure contained within the EIRs.
26. The Ministers' response to this email, dated 16 August 2007, prompted the detailed consideration of the relationship between FOISA and the EIRs that is set out in the Hawkins Decision.



27. In short, the Ministers disagreed with my view that the information within Documents 4 - 6 should be considered to be environmental information. They accepted that some content within Document 3 was environmental information. However, they submitted that in cases where a mixture of environmental and non-environmental information is being considered, an authority is entitled to consider this environmental information along with non-environmental information under the terms of FOISA. They submitted that the judgement made by an authority when deciding which law to apply could only be questioned by me where the decision led to some detriment to the applicant. They also suggested that if I disagreed about which law should be applied in responding to an information request, I could say so in my decision, and at that point it would be open to the applicant to make a new request for the same information under the appropriate law.
28. In their subsequent submissions, the Ministers have maintained that Transport Scotland was entitled to consider Mr McIntosh's request only under the terms of FOISA. They have not chosen to rely upon the exemption in section 39(2) in this case. However, at a late stage in the investigation, the Ministers did confirm that they would consider the information withheld to be excepted from disclosure under the terms of regulation 10(4)(e) (which applies to internal communications) if the case had been considered under the terms of the EIRs.
29. I will not repeat my full discussion of the relationship between FOISA and EIRs in this decision. I would note, however, that the reasoning set out in the Hawkins Decision is assumed also to apply here. Broadly, my general position on the interaction between the two regimes is as follows:
- The definition of what constitutes environmental information should not be viewed narrowly.
 - There are two separate statutory frameworks for access to environmental information and an authority is required to consider any request for environmental information under both FOISA and the EIRs.
 - Any request for environmental information therefore **must** be dealt with under the EIRs.
 - In responding to a request for environmental information under FOISA, an authority may claim the exemption in section 39(2).
 - If the authority does not choose to claim the section 39(2) exemption, it must deal with the request fully under FOISA, by providing the information, withholding it under another exemption in Part 2, or claiming that it is not obliged to comply with the request by virtue of another provision in Part 1 (or a combination of these).



- I am entitled (and indeed obliged), where I consider a request for environmental information has not been dealt with under the EIRs, to consider how it should have been dealt with under that regime.
30. The implication of the Hawkins Decision for my consideration of Mr McIntosh's request is therefore that I must first determine whether the information withheld is environmental information. If it is, I must go on to consider Transport Scotland's handling of the request both in terms of the EIRs and FOISA.

Do documents 4 and 6 contain environmental information?

31. When a request for information is received by a public authority, it may not be at all clear whether it entails consideration of information which, in whole or in part, is environmental. That may only become evident when considering the nature and contents of the specific information found to fall within the scope of the request.
32. In this case, I must first consider whether Documents 4 and 6 contain environmental information. In doing so, I have reviewed the contents of these documents, having regard to the definition of environmental information contained within regulation 2 of the EIRs and the Ministers' submissions.
33. The emails under consideration in this case contain discussion primarily concerned with the costs and financing of the AWPR route options. These communications all relate directly to the decision on the route for the AWPR and cost factors which influenced this decision.
34. As noted above, in my view, the definition of what constitutes environmental information should not be viewed narrowly. I regard both Documents 4 and 6 as containing information on measures, including activities, policy and plans (which in turn would require legislation) which would be likely to affect the elements and factors referred to in part (a) and (b) of the definition of environmental information. I have noted the Ministers' submission that these documents relate to the discussions around the cost of the AWPR project, but I take the view that since this major road building project was one with significant environmental implications (for the landscape, air quality, built structures etc of the surrounding area), the information about the costs and financing of this project should also be considered environmental information.
35. I am therefore unable to agree with the Ministers that Documents 4 and 6 do not contain not environmental information. I conclude that the information contained within Documents 4 and 6 falls within the definition of environmental information.



36. Having concluded that the information under consideration in this case is environmental information, and given that the Ministers have not chosen to apply the exemption in section 39(2) of FOISA to it, I must now go on to consider how the Ministers dealt with (or should have dealt with) Mr McIntosh's request under both FOISA and the EIRs.

Consideration of Mr McIntosh's request under the terms of FOISA

37. As noted above, the Ministers did not apply the exemption under section 39(2) of FOISA when considering Mr McIntosh's request. Instead, they refused to supply the information that continues to be withheld under the terms of the exemptions contained in sections 30(b)(ii), 29(1)(a) and 29(1)(b) of FOISA. I will consider these exemptions in turn below.

Section 30(b)(ii) of FOISA – Prejudice to effective conduct of public affairs

38. The Ministers have argued that the exemption in section 30(b)(ii) of FOISA applies to Documents 4 and 6. This section provides 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 is a qualified exemption, and so is subject to the public interest test required by section 2(1)(b).
39. The Ministers' submissions to my Office observed that these documents are exchanges between Ministers about the options for the route of the AWPR. They submitted that disclosure of these would be likely to inhibit the free and frank exchange of views. They considered that exchanges of this nature would be jeopardised if this correspondence was released whilst the issues are still relevant to the development of current policy.
40. In reaching this decision, I have also taken into consideration the arguments about the application of this exemption put forward by the Ministers in their letter of 2 May 2007 and discussed in detail (albeit in relation to the exemption in section 30(b)(i)) in my decision *089/2007 Mr James Cannell and the Scottish Executive*.



41. The main consideration in determining whether this exemption applies is not so much whether the information constitutes an exchange of views— although obviously that will be relevant in many cases – but rather whether the release of the information would, or would be likely to, have the substantially inhibiting effect required for the exemption to apply. In this connection, I look for authorities demonstrating a real risk or likelihood that actual harm will occur at some time in the near (certainly the foreseeable) future, not simply that harm is a remote possibility. Also, the harm in question should take the form of substantial inhibition from expressing advice in as free and frank a manner as would be the case if disclosure could not be expected to follow. The word "substantial" is important here: the degree to which a person will or is likely to be inhibited in expressing themselves has to be of some real and demonstrable significance.
42. I have also repeatedly noted in my decisions that it cannot necessarily follow from my requiring release of one particular piece of information in particular circumstances that information of that general variety will require to be disclosed routinely in the future. In considering this exemption, I must always look at the actual information in the context of a particular case.
43. In this case, the documents withheld comprise a discussion between the Ministers on the chosen route option for the AWPR and the costs associated with the route options. The discussion in these emails centres on fact finding and clarification of why the specific route was chosen.
44. I have noted the content of these documents and the nature of the discussion therein. It is my view that discussions between Ministers of the type revealed in these documents are a central part of their role which would be expected to take place before any major decision of this type. In this case, when Mr McIntosh made his information request, the decision concerned has been made and announced. Having considered the content of these discussions, I do not accept that disclosure would be likely to inhibit similar such discussions in future.
45. As noted, my conclusions in this case should not be construed as suggesting that all similar discussions between Ministers should be disclosed in future. Any assessment in a particular case should take into consideration matters including the timing of an information request, along with the content of the discussion.
46. The Ministers' submissions on the application of the exemption in section 30(b)(ii) of FOISA in this case have all been made in relatively general terms, suggesting that disclosure of exchanges of the type requested by Mr McIntosh would always have such an inhibitive effect. Having assessed the content of these documents, I can see no basis for concluding that disclosure of this information would have a substantially inhibitive effect on exchanges of views in future deliberations.



47. Given that I do not accept that disclosure of the exchange of views will always have a substantially inhibitive effect, and having considered the contents of the documents withheld from Mr McIntosh, I am not persuaded that the Ministers have demonstrated that the disclosure of these particular items would be likely to inhibit substantially the free and frank exchange of views for the purposes of deliberation.
48. Therefore, I have concluded that the Ministers' application of the exemption under section 30(b)(ii) of FOISA was not justified in this instance. Since I am satisfied that this information is not exempt under section 30(b)(ii) of FOISA, I am not required to consider the public interest test in relation to the use of this exemption.

Section 29(1)(a) – formulation and development of government policy

49. In terms of section 29(1)(a) of FOISA, information held by the Scottish Administration is exempt information if it relates to the formulation or development of government policy. Section 29(1)(a) of FOISA is a qualified exemption, which means that even if the exemption applies, the application of this exemption is subject to the public interest test required by section 2(1)(b) of FOISA.
50. For information to fall under the section 29(1)(a) exemption in FOISA, it must relate to government policy, i.e. to the development of options and priorities for Scottish Ministers, who will subsequently determine which options should be translated into political action and when.
51. The Ministers submitted to my Office that both of the documents under consideration related to the formulation of Scottish Government policy in relation to the AWPR.
52. I am satisfied that the Scottish Ministers' decision on the route of the AWPR was a policy decision, which in turn forms part of their overall policy with respect to the development of the AWPR. Having examined the contents of Documents 4 and 6, I am satisfied that the information contained in each relates directly to the formulation of the Scottish Government's policy on the route and on the overall development of the AWPR.
53. Therefore, I agree with the Ministers that Documents 4 and 6 are both exempt from disclosure under section 29(1)(a) of FOISA.
54. As noted above, the section 29(1)(a) exemption of FOISA is a qualified exemption which means that since the exemption applies, it is subject to the public interest test. However, before considering the public interest, I will first go on to consider the other exemption under section 29(1) of FOISA relied upon by the Ministers to withhold these documents.



Section 29(1)(b) – Ministerial communications

55. The Ministers have also claimed that Documents 4 and 6 are exempt from disclosure under section 29(1)(b) of FOISA.
56. Section 29(1)(b) of FOISA provides that information held by the Scottish Administration is exempt if it relates to Ministerial communications. The definition of “Ministerial communication” is contained within sections 29(4) and (5) of FOISA, which are reproduced in the Appendix to this decision.
57. For information to fall under this exemption there must be a communication between Ministers. I accept that this exemption is not limited to direct written communications between Ministers, such as a letter or e-mail from one Minister to another, but could also cover records of discussions between Ministers.
58. Documents 4 and 6 contain a series of emails. These were all exchanged between Ministers or officials who were acting on Ministers’ behalf.
59. Consequently, I am satisfied that the exemption in section 29(1)(b) applies to Documents 4 and 6 in their entirety. This exemption is also a qualified exemption, and so I will now turn to consider the public interest test required by section 2(1)(b) of FOISA.

Public Interest Test

60. Each of the exemptions I have found to be correctly applied in this case (i.e. section 29(1)(a) and (1)(b)) is subject to the public interest test laid out in section 2(1)(b) of FOISA. In this instance, I will consider the public interest as it relates to these two exemptions together.
61. Section 2(1)(b) of FOISA is worded in such a way as to assume that disclosure would be in the public interest rather than in withholding it. I must consider whether, in all the circumstances of the case, the public interest in disclosing the information is outweighed by that in maintaining the exemption. Unless I find that it is, I must order release of the information. It is for the authority to show why, on public interest grounds, the information should not be released. To proceed otherwise would leave us in a position where innocuous and non-sensitive information relating to policy formulation or ministerial communications would rarely be released because no resounding public interest argument could be found to justify disclosure.



62. The Ministers submitted *inter alia* that there is a strong public interest in high quality policy making and implementation, and for the Government to succeed in upholding that public interest, Ministers and officials need to be able to consider all available options and debate them rigorously, to expose all their merits and demerits and to understand their possible implications. They claimed that their candour in doing so will be affected by their assessment of whether the content of their discussions will be disclosed in the near future. The Ministers also suggested that inappropriate disclosure may also distort the public perception of advice provided by officials, and the prospect of disclosure may also affect the impartiality of advice provided.
63. The Ministers also submitted that the public interest lies in ensuring that Minister and officials can conduct rigorous and candid risk assessments of their policies and programmes, including considerations of pros and cons. They stated that they must be able to do this without there being premature disclosure which might close off the development of better options, and without the fear that the exploration of potential solutions would be subdued or inhibited.
64. Mr McIntosh has submitted that the information withheld should be made available on public interest grounds as disclosure would, in his view:
- enhance the scrutiny of the decision-making process in selecting the route option in a project involving significant public expenditure and
 - provide an understanding of why the more expensive and longer route with increased environmental impact was chosen.
65. I have considered all of the submissions made by the Ministers and Mr McIntosh in relation to this case, along with the contents of the documents concerned.
66. I acknowledge that there will be occasions where it will be in the public interest to maintain these exemptions rather than disclose information relating to policy making processes or ministerial communications. However, I do not accept that this should automatically be accepted in each case. Each case, and the content and context of the information concerned, must still be considered on its own merits.
67. In this case, I have found that the public interest in maintaining each of the exemptions in sections 29(1)(a) and (1)(b) is outweighed by the significant public interest that can be identified in the disclosure of the information.
68. The Scottish Ministers' Code of Practice on the Discharge of Functions by Public Authorities under the Freedom of Information (Scotland) Act 2002 (the Section 60 Code) lists factors which may inform a decision about the public interest. These include:



- a) the general public interest that information is accessible, i.e. whether disclosure would enhance scrutiny of the decision-making process and thereby improve accountability and participation;
 - b) whether disclosure would contribute to debate on a matter of public interest;
 - c) whether disclosure would be contributing to ensuring effective oversight of public funds.
69. In this case, I have found that each of a) – c) above can be considered factors weighing in favour of release. I have noted that the decision regarding the route for the AWPR was a controversial decision that will have major impact on the communities concerned; which will involve significant public expenditure; and which has been the subject of considerable public debate and concern. I also take the view that the withheld information will aid understanding of the reasons for the decision and factors that determined the choice of route.
70. In reaching this conclusion, I have noted that the decision about the route of the AWPR had been made at the time of Mr McIntosh's information request. Therefore, I am not satisfied that the specific policy concerning the route would be prejudiced by disclosure of the information requested.
71. Given the significant public interest in disclosure of the information concerned, I am not persuaded that the competing public interests in protecting wider policy making processes (either with respect to the AWPR or other policy areas), or the protection of ministerial communications is sufficiently weighty to outweigh the public interest in disclosure in this case.
72. I am therefore satisfied that the public interest in the disclosure of Documents 4 and 6 outweighs the public interest in maintaining the exemptions in section 29(1)(a) and (1)(b) of FOISA in this instance and that Transport Scotland failed to comply with section 1(1) of FOISA by withholding these documents in response to Mr McIntosh's request for information.

Consideration of Mr McIntosh's request under the EIRs

73. I now turn to consider Transport Scotland's handling of Mr McIntosh's request from the point of view of the EIRs. As noted above, I have concluded that all the information withheld in this case is environmental information.



74. I would note that had I accepted the view set out by the Ministers, that only part of the information withheld was environmental, I would still have considered that Transport Scotland was wrong not to consider that part of the information under the EIRs.
75. As noted above, during the course of my investigation, I advised the Ministers of my view that the information under consideration was environmental information, and offered them the opportunity to make submissions as to whether any of the exceptions within the EIRs would apply if this information were considered under those regulations.
76. The Ministers initially declined to make any submissions as to whether, had they dealt with the request under the EIRs, they would have found the information to be excepted from disclosure under the EIRs, instead arguing that I should issue a decision finding simply that Transport Scotland had failed to consider Mr McIntosh's request under the appropriate law.
77. The Ministers therefore initially made no case to me to suggest that the information withheld from Mr McIntosh under the terms of FOISA should also be withheld under the EIRs. Following further discussion with my Office, the Ministers stated that if I continued to disagree with their views and decided to consider Mr McIntosh's application under the EIRs, then, without prejudice to their views, they would wish to apply the exception at regulation 10(4)(e) of the EIRs.
78. Regulation 10(4)(e) provides an exception from disclosure where the request involves making available internal communications. Both of Documents 4 and 6 are internal communications that were exchanged within the Scottish Government, and so both items clearly fail within the scope of this exception.
79. The exception in regulation 10(4)(e) is subject to the public interest test contained in regulation 10(1) of the EIRs. In considering this test, I have had regard to the submissions made by both the Ministers and Mr McIntosh in relation to the public interest test required by FOISA.
80. For the same reasons as my decision on the public interest under FOISA (see paragraphs 66-71 above), I find that in all the circumstances of this case the public interest in making the information withheld from Mr McIntosh available outweighs the public interest in maintaining the exception under regulation 10(4)(e) of the EIRs.
81. I therefore conclude that the Transport Scotland also acted in breach of regulation 5 of the EIRs by withholding Documents 4 and 6 from Mr McIntosh.



Decision

In this decision, I have considered a request for information that I have judged to be environmental information as defined within regulation 2 of the Environmental Information Scotland Regulations 2004 (EIRs). As set out above, authorities are obliged to consider such requests in accordance with the requirements of both the EIRs and the Freedom of Information (Scotland) Act 2002 (FOISA). My decision therefore has considered whether Transport Scotland has acted in accordance with each of these laws.

FOISA

I find that Transport Scotland did not deal with Mr McIntosh's request for information in accordance with Part 1 of FOISA.

I have found that Transport Scotland misapplied the exemption in section 30(b)(ii) of FOISA to Documents 4 and 6. I have found that the exemptions in sections 29(1)(a) and (b) of FOISA applies to both of these documents. However, I have concluded that the public interest in maintaining these exemptions is outweighed by the public interest in the disclosure of the information concerned. Consequently, Transport Scotland failed to comply with section 1(1) of FOISA when it withheld these documents from Mr McIntosh.

The EIRs

I also find that Transport Scotland failed to comply with the requirements of the EIRs.

I find the exception in regulation 10(4)(e) of the EIRs applies to Documents 4 and 6. However, I found that the public interest in disclosure of this information outweighed the public interest in the maintenance of this exception. Therefore, by failing to provide the information withheld from Mr McIntosh, I therefore find that Transport Scotland failed to comply with the requirements of regulation 5 of the EIRs.

Steps to be taken

I require Transport Scotland to provide copies of Documents 4 and 6 to Mr McIntosh within 45 days after the date of intimation of this decision notice.



Appeal

Should either Transport Scotland or Mr McIntosh wish to appeal against this decision, there is a right to 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
28 January 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.

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.

...

29 Formulation of Scottish Administration policy etc.

- (1) Information held by the Scottish Administration is exempt information if it relates to-
- (a) the formulation or development of government policy;
 - (b) Ministerial communications;

...

- (4) In this section-

"government policy" means-

- (a) the policy of the Scottish Administration; and
- (b) in relation to information created before 1st July 1999, the policy of the Government of the United Kingdom;

...

"Ministerial communications" means any communications between Ministers and includes, in particular, communications relating to proceedings of the Scottish Cabinet (or of any committee of that Cabinet); and

....

- (5) In the definitions of "Ministerial communications" and "Ministerial private office" in subsection (4), "Minister" means a member of the Scottish Executive or a junior Scottish Minister.

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

...



39 Health, safety and the environment

- ...
- (2) Information is exempt information if a Scottish public authority-
- (a) is obliged by regulations under section 62 to make it available to the public in accordance with the regulations; or
 - (b) would be so obliged but for any exemption contained in the regulations.
- ...

Environmental Information (Scotland) Regulations 2004

2 Interpretation

- (1) In these Regulations –

- ...
- "environmental information" has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on -
- (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
 - (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in paragraph (a);
 - (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in paragraphs (a) and (b) as well as measures or activities designed to protect those elements;
 - (d) reports on the implementation of environmental legislation;
 - (e) costs benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in paragraph (c); and
 - (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in paragraph (a) or, through those elements, by any of the matters referred to in paragraphs (b) and (c);
- ...



5 Duty to make available environmental information on request

- (1) Subject to paragraph (2), a Scottish public authority that holds environmental information shall make it available when requested to do so by any applicant.
 - (2) The duty under paragraph (1)-
 - (a) shall be complied with as soon as possible and in any event no later than 20 working days after the date of receipt of the request; and
 - (b) is subject to regulations 6 to 12.
- ...

10 Exceptions from duty to make environmental information available

- (1) A Scottish public authority may refuse a request to make environmental information available if-
 - (a) there is an exception to disclosure under paragraphs (4) or (5); and
 - (b) in all the circumstances, the public interest in making the information available is outweighed by that in maintaining the exception.
 - (2) In considering the application of the exceptions referred to in paragraphs (4) and (5), a Scottish public authority shall –
 - (a) interpret those paragraphs in a restrictive way; and
 - (b) apply a presumption in favour of disclosure.
- ...
- (4) A Scottish public authority may refuse to make environmental information available to the extent that
 - ...
 - (e) the request involves making available internal communications.
- ...