



Scottish Information
Commissioner

**Decision 042/2005 – Mr Rob Edwards of the Sunday Herald and
the Scottish Executive**

*Request for information about all EU infraction proceedings in which the
Scottish Executive is currently involved*

**Applicant: Mr Rob Edwards, Sunday Herald
Authority: The Scottish Executive
Case No: 200501215 and 200501768
Decision Date: 25 October 2005**

**Kevin Dunion
Scottish Information Commissioner**

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Decision 042/2005 – Mr Rob Edwards and the Scottish Executive

Request for status and substance of all EU infraction proceedings in which the Scottish Executive is currently involved – whether information outwith the scope of FOISA – section 3(2).

Facts

Mr Edwards asked the Scottish Executive (the Executive) to supply a list of all current EU infraction proceedings in which the Executive is involved, including information on the status of each case, the EU legislation to which it relates, and information on the substance of the alleged breach and the Executive's response. The Executive has made public a list of all current EU infraction proceedings which gives details of the status of the case and the EU legislation to which it relates. However, information on the substance of the alleged breach in each case has not been provided, on the grounds that, under Section 3(2) of the Freedom of Information (Scotland) Act 2002 (FOISA), this information is not held for the purposes of the Act.

Mr Edwards made a second request for information relating to the infraction proceedings which were the subject of his first request. Again, this request was refused on the grounds that the information is not held for the purposes of the Act under Section 3(2).

As the two requests are so closely related and as the reasons given for refusing to supply the information are identical in each case, this decision notice will cover both requests made by Mr Edwards.

Outcome

The Commissioner upheld the decision of the Executive to refuse to consider releasing information provided in confidence by departments of the UK government, under section 3(2)(a)(ii) of FOISA.

The Commissioner found that some of the information requested by Mr Edwards should have been considered for release under section 1(1) of FOISA.



Appeal

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

Background

1. On 18 January 2005 Mr Edwards made a request by email to the Executive, asking for a list of all the current EU infraction proceedings in which the Executive was involved. He asked for details of which EU law had allegedly been breached in each case, and what stage the proceedings were at. He also asked for information about the substance of the alleged breach, and the Executive's response.
2. Mr Edwards received a reply (dated 23 February 2005) from the Finance and Central Services Department, Europe Division of the Scottish Executive, attaching a list of all the current EU infraction proceedings showing the status of each case and the European legislation to which it related. This list is now available on the Executive's website.
3. Mr Edwards was not supplied with information on the substance of each alleged breach, on the grounds that Section 3(2) applies to this information and therefore it cannot be considered for the purposes of FOISA.
4. I note that the Executive failed to respond to Mr Edwards' request within the 20 working day period required by FOISA. The Executive acknowledged this in their letter of 23 February, and apologised.
5. On 24 February 2005 Mr Edwards sent an email to the Executive asking for a review of the decision to withhold information relating to the substance of each infraction case.
6. On 24 March 2005 the Executive sent him a letter confirming that, after review, the original decision had been upheld.
7. Mr Edwards then applied to me for a decision (email dated 29 March 2005).



8. In the meantime, Mr Edwards had submitted a second request to the Executive on 24 March 2005. In his email he asked for copies of the Article 226 letters, the Article 226 Reasoned Opinions, and the Article 226 letter referred to in the Executive's response to his previous request for information on European Commission infraction proceedings.
9. He received a reply from the Executive dated 22 April 2005, which informed him that, as with his previous request, the information is not held by the Scottish Executive in terms of FOISA, having been provided in confidence by a department of the Government of the UK and therefore excluded from the scope of the FOISA by virtue of section 3(2)(a)(ii). He was advised to direct his request to the relevant UK Government Department under the Freedom of Information Act 2000.
10. Mr Edwards then asked the Executive to review this decision in an email request sent on the same day (22 April 2005).
11. The reply from the Executive, dated 18 May 2005, upheld the original response to his request.
12. Mr Edwards applied to me for a decision in an email dated 18 May 2005. In his application he referred to an email obtained from the Scottish Executive through a subject access request under the Data Protection Act. The email discussed the fact that Mr Edwards had been supplied with a leaked copy of an Article 226 letter relating to an EU infraction case, and stated that "Rob could have had access...with an FOI request". Mr Edwards believes this implies that an Article 226 letter would be released in response to an FOI request, and pointed out that the Executive have refused to provide him with access to such letters.

Investigation

13. Mr Edwards' appeals were validated by establishing that he had made his requests to a Scottish public authority (i.e. the Executive), and had appealed to me only after requesting the authority to review its response to his requests.
14. A letter was sent to the Executive on 18 April 2005, informing the Scottish Executive that an appeal had been received and that an investigation into the matter had begun.



15. An email was also sent to the Executive on 18 May 2005, informing them that a second, related appeal had been received from Mr Edwards and proposing that this case should be conjoined with the first. The Executive replied on 3 June 2005, confirming that they were content with this approach.
16. In order to investigate both cases, the Executive were asked
- a) On what basis was the decision taken that the information supplied by the UK Government Departments should be held in confidence?
 - b) What proof could be supplied to show that the information is to be regarded in confidence? For instance, do the documents carry stamps or markings to this effect, or are there file notes indicating the confidential status of the documents?
17. The Executive's reply to question (a) was as follows:
- The information requested by Mr Edwards is held in confidence since it relates to legal proceedings between the European Commission and the United Kingdom Government, under Article 226 or 228 of the Treaty Establishing the European Community.
 - Paragraph 11 of the Memorandum of Understanding (MoU) between the UK Government and Scottish Ministers (December 2001, Cm 5240) subjects the information to safeguards in order to avoid prejudicing the Executive's and the UK's interests.
 - The Scottish Executive is under a duty of confidence to respect the legal requirements of confidentiality, and is obliged to treat information it receives in accordance with the restrictions specified as to its usage.
 - Paragraph B4.3 of the Concordat on Co-ordination of European Union policy issues states that the arrangements for the exchange of information between the UK and the Scottish Executive "will rely for their effectiveness on mutual respect for the confidentiality of information exchanged" and that "complete confidentiality is often essential in formulating a UK negotiating position in the EU and developing tactical responses".
18. The Executive's reply to question (b) was as follows:
- Scottish Executive and Cabinet Office guidance states that all infraction correspondence is confidential; this is verified with UK Departments on a case-by-case basis where necessary.
 - All such consideration of infraction proceedings and related issues are by their nature confidential between the Executive and the UK Government
 - Within the Executive all such documents are held in files with a "restricted" marking. This is in accordance with the MoU and European Concordat provisions noted in paragraph 17 above.



The Commissioner's Analysis and Findings

19. The investigation focused on the question of whether section 3(2)(a)(ii) applies to the information requested. The Executive was required to show evidence to support the claim that the information is not held by the Executive for the purposes of FOISA, having been supplied by a department of the Government of the United Kingdom and held in confidence.
20. My briefing on section 28 of FOISA notes that the basis for section 3(2)(a)(ii) is the Scotland Act 1998, which states that the Scottish Parliament has competence to legislate on Freedom of Information in relation to information held by the Scottish Parliament, any part of the Scottish Administration, the Parliamentary Corporation and any Scottish public authority with mixed functions or no reserved functions with the exception of information supplied by a Minister of the Crown or government department and held in confidence.
21. The Executive has explained that all infraction cases raised against the UK are first notified to the UK Permanent Representation in Brussels, which in turn sends a request for more information to the Cabinet Office European Secretariat, which then writes to the lead Whitehall Department, copying in the Devolved Administrations. If the case solely concerns a devolved matter in Scotland, the Cabinet Office European Secretariat asks the Scottish Executive to prepare a response in close liaison with the relevant Whitehall Department. In all cases the information held by the Executive is passed to it from a department of the UK Government.

Is the information held in confidence?

22. My briefing on section 28 of FOISA discusses some of the issues to be considered in cases where the information requested has been supplied by the UK Government and is held in confidence. In this case I accept that the Executive has provided sufficient evidence (described in paragraphs 17 and 18) to support its view that information about EU infractions involving the Scottish Executive is held in confidence.
23. However, in his request of 18 January 2005, Mr Edwards also asked for the Executive's response regarding the alleged EU infractions. The Executive did not address this in its reply to Mr Edwards or in the review of his request. When the investigating officer raised this matter, the Executive explained that it had interpreted this to be a request for the formal response to the allegations of infractions, not the internal deliberations on the cases and communications with the UK Government. It therefore considered that the draft replies did not come within the scope of his request.



24. The investigating officer asked Mr Edwards to clarify what information he had hoped to obtain from this part of his request. Mr Edwards confirmed that he had not intended this request to relate specifically to the formal response submitted to the EU; rather, he wanted to see any information that would show the Executive's responses to all the infraction cases, including both formal and draft responses, if available.
25. When asked to comment, the Executive maintained that the wording of Mr Edwards' request ("list of all EU infraction cases... and the Executive's response") clearly requests the formal response issued to the EU, which is not held by the Executive. At this stage of the investigation the Executive refused to consider whether any information provided as a draft response to departments of the UK government should be provided to Mr Edwards.

Conclusion

26. I do not accept the Executive's interpretation of Mr Edwards' request. I require the Executive to consider releasing any draft response sent to departments of the UK government under the provisions of FOISA or the Environmental Information (Scotland) Regulations 2004 (EIRs). As this information was not provided to the Executive by a department of the Government of the United Kingdom, section 3(2)(a)(ii) of FOISA does not apply to this information.
27. I uphold the Executive's view that information provided by departments of the UK government relating to alleged EU infractions is held in confidence by the Executive. Under section 3(2)(a)(ii) it is therefore not held by the Executive for the purposes of FOISA. This should not prevent Mr Edwards from requesting the information from the relevant UK government departments under the Freedom of Information Act 2000.

Decision

I find that the Executive has not fully dealt with Mr Edwards' request for information in accordance with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA), as detailed in paragraphs 19 - 27 above.

I uphold the decision of the Executive to refuse to consider releasing information provided and held in confidence by departments of the UK government, under section 3(2)(a)(ii) of FOISA.



However, I find that the Executive has failed to comply with section 1(1) of FOISA in refusing to consider Mr Edwards' request for information regarding the Executive's response to the EU infractions. As such, I require the Executive to do the following within two months of receipt of this decision notice:

- (a) inform Mr Edwards whether it holds information regarding the Scottish Executive response submitted to UK government departments on the subject of the alleged EU infractions and, if it does, to release the information, or
- (b) provide Mr Edwards with a refusal notice in accordance with section 16 of FOISA.

Kevin Dunion
Scottish Information Commissioner
25 October 2005