



Scottish Information
Commissioner

**Decision 187/2006 – Dr JR Cuthbert and Mrs M Cuthbert and
the Scottish Executive**

**Request for information on the subject of the financing of the Water Industry in
Scotland**

**Applicant: Dr JR Cuthbert and Mrs M Cuthbert
Authority: Scottish Executive
Case No: 200501863
Decision Date: 12 October 2006**

**Kevin Dunion
Scottish Information Commissioner**

Kinburn Castle
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Decision 187/2006 – Dr JR Cuthbert and Mrs M Cuthbert and the Scottish Executive

Request for information held by the Scottish Executive on the subject of the financing of the Water Industry in Scotland – information withheld from the applicants on the basis of section 25, section 28(1), sections 29(1)(a) & (b) and sections 30(a) and 30(b)(i)&(ii) of the Freedom of Information (Scotland) Act 2002 - decision partially upheld by Commissioner.

Facts

Dr and Mrs Cuthbert submitted an information request to the Scottish Executive (the Executive) on 2 January 2005 for information held by the Scottish Executive Environment and Rural Affairs Department and the Finance Division, on the subject of the financing of the Water Industry in Scotland. Some information was provided to Dr and Mrs Cuthbert in response to their request. However, various documents, including briefings prepared for ministers in relation to their appearances at the Finance Committee, were withheld by the Executive.

Outcome

The Commissioner found that the Executive had complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in withholding certain information from Dr and Mrs Cuthbert, but found that it had breached Part 1 of FOISA in not disclosing other information to Dr and Mrs Cuthbert.

The Commissioner also found that the Executive failed to comply with Part 1 of FOISA in failing to meet the timescales specified in section 10(1) (in that the Executive did not respond to Dr and Mrs Cuthbert's original application within 20 working days) and in section 21(1), in that the Executive did not respond to Dr and Mrs Cuthbert's request for review within 20 working days.



Appeal

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

Background

1. On 2 January 2005, Dr and Mrs Cuthbert submitted a request for information to the Executive asking for information in relation to the financing of the Water Industry in Scotland. The letter from Dr and Mrs Cuthbert was made up of five separate information requests, asking for various items of correspondence, notes and briefings prepared for Ministers in relation to their appearances at the Finance Committee on the subject of the Water Industry.
2. The Executive replied on 8 February 2005 and released to Dr and Mrs Cuthbert all of the information they had asked for, other than some internal correspondence and the briefing prepared for Ministers in relation to their appearances at the Finance Committee. The Executive relied on the following exemptions under FOISA to withhold the information from Dr and Mrs Cuthbert: section 25, section 28(1), sections 29(1)(a) & (b) and sections 30(a) and (b)(i)&(ii).
3. Dr and Mrs Cuthbert were dissatisfied with the response from the Executive and asked the Executive to review its response on 8 February 2005 on the basis that the public interest lay in the release of the information.
4. The Executive carried out a review and advised Dr and Mrs Cuthbert of the outcome of the review on 13 May 2005. The Executive upheld its decision to withhold the information on the basis of the exemptions that it had applied in its original response to Dr and Mrs Cuthbert.
5. On 20 May 2005, I received an application from Dr and Mrs Cuthbert for a decision as to whether the Executive had been correct to withhold this information from them. Again, Dr and Mrs Cuthbert argued that the public interest lay in the release of the information. The case was subsequently allocated to an investigating officer within my Office.



The Investigation

6. Dr and Mrs Cuthbert's case was validated by establishing that they had made a valid information request to a Scottish public authority under FOISA (i.e. the Executive) and had appealed to me only after asking the authority to review its response to their request.
7. A letter was sent by the investigating officer to the Executive on 6 June 2005 asking for its comments on Dr and Mrs Cuthbert's application in terms of section 49(3)(a) of FOISA. The letter also asked the Executive to:
 - provide my Office with a copy of the information which it had provided to Dr and Mrs Cuthbert and a copy of the information which had been withheld from them and
 - confirm which exemption or exemptions was/were used to withhold information and to explain why the exemption(s) had been used, together with an explanation of the Executive's consideration of the public interest test in relation to that/those exemptions, where relevant.
8. The Executive responded in full on 22 July 2005. Further correspondence took place between my Office and the Executive until February 2006.

Submissions from the Scottish Executive

9. In its submissions to my Office, the Executive recognised that the operation and funding of the Water Industry in Scotland is of considerable public interest. Scottish Water, the public body responsible for delivering water and wastewater services, is funded by loans from Scottish Ministers and charges from customers. Funding levels for Scottish Water are agreed in four yearly review periods. The Current Strategic Review Period covers 2002 to 2006.



10. The Executive also advised me that, in the light of rapidly increasing charges, particularly in the business sector, the Finance Committee decided at the end of 2003 to carry out an inquiry into the financing of Scottish Water. This inquiry sought evidence from Ministers, Scottish Water, the (then) Water Industry Commissioner, customer representatives and also from Dr and Mrs Cuthbert. At the end of the inquiry, the Committee published a report which may be viewed on the Parliament's website at <http://www.scottish.parliament.uk/business/committees/finance/reports-04/fir04-02-vol01-01.htm>.
11. The Executive commented that, in response to their initial request, a substantial amount of information was released to Dr and Mrs Cuthbert.
12. In relation to the information which the Executive withheld from Dr and Mrs Cuthbert, the Executive relied on the following exemptions to withhold the information:
 - Section 25 – this exempts information which an applicant can reasonably obtain other than by requesting it under section 1(1) of FOISA;
 - Section 28(1) – this exempts information if its disclosure under FOISA would, or would be likely to, prejudice substantially relations between any administration in the United Kingdom or any other such administration;
 - Section 29(1)(a) – this exempts information held by the Scottish Administration if it relates to the formulation or development of government policy;
 - Section 29(1)(b) – this exempts information held by the Scottish Administration if it relates to Ministerial communications;
 - Section 30(a) – this exempts information if its disclosure under FOISA would, or would be likely to, prejudice substantially the maintenance of the convention of the collective responsibility of the Scottish Ministers;
 - Section 30(b)(i) – this exempts information if its disclosure under FOISA would, or would be likely to, inhibit substantially the free and frank provision of advice and
 - Section 30(b)(ii) – this exempts 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.



13. Except for the exemption in section 25, these exemptions are qualified exemptions and are therefore subject to the public interest test contained in section 2(1)(b) of FOISA. This means that even where a public authority finds that one of these qualified exemptions applies to the information which has been requested, it must go on to consider whether, in all the circumstances of the case, the public interest in maintaining the exemption is outweighed by the public interest in disclosing the information. If the two are evenly balanced, the presumption should always be in favour of disclosure.

Submissions from Dr and Mrs Cuthbert

14. Dr and Mrs Cuthbert submitted that there are very strong grounds why it is in the public interest in this case to over-ride the exemptions in FOISA cited by the Executive. Dr and Mrs Cuthbert are researchers in the field of Scotland's public finances and first raised concerns about whether there had been errors in the financial control of the water industry in an article published in academic literature in December 2003. (The article, "Did Flaws in the Application of Resource Accounting and Budgeting Distort the Strategic Review of Water Charges in Scotland" was published in the Fraser of Allander Institute Quarterly Economic Commentary.) Since then, Dr and Mrs Cuthbert have carried out a substantial amount of further research which, they advise me, has confirmed their original concerns and has uncovered further errors in financial control from 2002 to 2006. Dr and Mrs Cuthbert feel that it is very much in the public interest that the detailed advice contained in the briefings which officials have prepared for Ministers be made public.

The Commissioner's Analysis and Findings

15. In its response to my Office, the Executive provided copies of the documents that it had withheld from Dr and Mrs Cuthbert, together with a schedule detailing the documents which had been withheld from Dr and Mrs Cuthbert and listing the exemptions the Executive had relied on to withhold the information.
16. In all, the Executive submitted 46 documents to my Office. In the main, the Executive relied on a combination of the exemptions in sections 29 and 30 for withholding the documents and, in addition, relied on the exemptions in section 25 and 28 for certain documents.



17. The Executive has indicated that it no longer wishes to apply any exemptions to document 6 (a draft of an article for the Scotsman) and, as such, this can be released to Dr and Mrs Cuthbert. Also, in relation to document 34, the Executive has advised that one of the items making up this document, i.e. a letter to The Sunday Herald from Ross Finnie, which was subsequently published, can be released to Dr and Mrs Cuthbert. Given that the Executive is content to release both of these documents, I will not consider them further.

The application of section 25 – information otherwise accessible

18. As mentioned above, the exemption contained in section 25 of FOISA is an absolute exemption and is not subject to the public interest test.
19. The Executive has applied this exemption to parts of documents 33 and 46. Document 33 is made up of two emails, a letter to the editor of The Scotsman newspaper and articles which appeared in The Scotsman. Document 46 is a briefing pack for Ross Finnie, Minister for Environment & Rural Development, including copies of letters. The Executive has submitted that the letters in documents 33 and 46 are available in the public domain on either the Scottish Parliament website or the Water Industry Commission website.
20. In its submissions on document 33, the Executive has indicated that the articles dated 10 November, 20 November and 25 November 2003 all appeared in the Scotsman Newspaper. The Executive has advised that as the letter written by Ross Finnie to the Editor of The Scotsman may have been edited prior to it appearing in The Scotsman on 28 November 2003, they are happy to disclose this letter to Dr and Mrs Cuthbert. I will therefore not consider this letter further. I am satisfied that the articles in question are available in the Scotsman Newspaper of these dates and are therefore otherwise accessible to the applicants. I therefore find that the Executive correctly relied on the exemption in section 25 to withhold the newspaper articles from Dr and Mrs Cuthbert. (The Executive has relied on the exemption under section 30(b)(i) to withhold the emails which form part of document 33 and I will consider the application of this exemption to the emails later on in this decision notice.)
21. In relation to document 46, I am satisfied that all except one of the letters (see below) are otherwise accessible. As such, I am satisfied that the exemption contained in section 25 has been applied correctly by the Executive in relation to the letters which are otherwise accessible and do not require the Executive to provide copies to Dr and Mrs Cuthbert. Some of the letters included in the briefing pack are letters which have been submitted to my Office already with other documents and links to these are provided towards the end of the decision. Other letters included in the briefing pack are available via the links detailed below:



- Letter of 29 March 2004 from the Scottish Executive to the Clerk to Finance Committee was published as part of the reports of the Finance Committee for the 2004 session and can be accessed via the following link:
<http://www.scottish.parliament.uk/business/committees/finance/reports.htm>
 - Letter of 19 April 2004 from Allan Wilson MSP, Deputy Minister for Environment and Rural Affairs to the Convenor of the Finance Committee was published as part of the papers for the Finance Committee. The letter is on page 15 of “Agenda for 13th Meeting of Finance Committee held on 27 April 2004” and can be accessed via the following link:
<http://www.scottish.parliament.uk/business/committees/finance/papers-04/fip04-13.pdf>
 - Letter of 14 June 2004 from Ross Finnie, Minister for Environment and Rural Development to Des McNulty, Convenor of the Finance Committee can be accessed via the following link:
<http://www.scottish.parliament.uk/business/committees/finance/papers-04/fip04-20.pdf>
 - Letter of 23 April 2004 from Ross Finnie, Minister for Environment and Rural Development to Convenor of the Finance Committee was published as part of the reports of the Finance Committee for the 2004 session and can be accessed via this link:
<http://www.scottish.parliament.uk/business/committees/finance/reports-04/fir04-02resp-01.htm>.
22. However, despite relying on the exemption contained in section 25 to withhold all of the letters in question, the Executive has confirmed that it has been unable to locate one of the letters elsewhere. This letter is a letter to the Finance Committee dated 2 April 2004. I am satisfied that the Executive was wrong to withhold this letter on the basis of section 25 of FOISA. The Executive has not cited any other exemptions in relation to this letter and I therefore require the Executive to provide Dr and Mrs Cuthbert with a copy of the letter in question.



The application of section 28(1) – relations within the United Kingdom

23. Document 43 was withheld from Dr and Mrs Cuthbert by the Executive on the basis that it was exempt under sections 28, 29(1)(a), 30(b)(i) and 30(b)(ii) of FOISA. As explained above, section 28 exempts information if its disclosure under FOISA would, or would be likely to, prejudice substantially relations between any administration in the United Kingdom and any other such administration. Section 28(2) defines “administration in the United Kingdom” as the Government of the United Kingdom, the Scottish Administration, the Executive Committee of the Northern Ireland Assembly or the National Assembly for Wales. The exemption in section 28(1) is a qualified exemption in that it is subject to the public interest test contained in section 2(1)(b) of FOISA.
24. The document which has been withheld from Dr and Mrs Cuthbert concerns two email communications within the Executive regarding a communication that has been received from HM Treasury. The Executive argues that release of the information would prejudice substantially its relationship with the Government, that it relies on good communication with the Government and that release of this document would undoubtedly inhibit future correspondence and communication between the Executive and the Government.
25. In considering the two email communications which are contained within document 43, together with the exemption in section 28, it is clear from my briefing on the application of the exemption in section 28 of FOISA that this exemption can apply not just to information which has been provided by one administration in the United Kingdom to another, but also to internally produced information, which may, for example comment on another administrations policy proposals or legislation. Having read the information contained within the emails I am satisfied that this information is internally produced information, which does relate to comments being made on a query which has been raised by another UK administration to the Scottish Executive. I am therefore satisfied that the exemption contained in section 28(1) applies to the email communications in document 43.
26. I am satisfied that in this case the exemption contained in section 28(1) applies to document 43 and I accept the reasons given by the Executive in respect of their reliance on this exemption.
27. As I have found that the Executive was correct to withhold document 43 on the basis of the exemption contained in section 28(1), I am required to consider the public interest test contained in section 2(1)(b) of FOISA. If I am satisfied that, in all the circumstances of the case, the public interest in maintaining the exemption is outweighed by the public interest in the disclosure of the information, I must order release of the information.



28. In considering where the public interest test lies, I have taken account of the general public interest arguments put forward by Dr and Mrs Cuthbert and the public interest arguments specific to this exemption put forward by the Executive. Dr and Mrs Cuthbert's arguments are summarised above. In relation to this particular exemption, the Executive has commented that it is in the public interest that administrations share information frankly and candidly. The Executive considers that disclosure of the information would compromise this. The Executive has also commented that while it appreciates the public interest in the communications between administrations, the Executive has a commitment to respecting the information shared between itself and the Government. The Executive asserts that any limitations that disclosure of this information would place on these important communications would not be in the public interest.
29. My reading of the content of Doc 43 is somewhat different from the gloss put on it by the Executive. It contains free and frank exchange of views within the Executive regarding a communication from HM Treasury. I do not find however in all the circumstances of this case that there is a particular public interest in releasing this information sufficient to outweigh the harm which would or would be likely to occur if the exemption in section 28(1) was not maintained.
30. I am therefore satisfied that the public interest would be better served by maintaining the use of the section 28(1) exemption in relation to document 43.
31. As I am satisfied that document 43 is exempt, I will not consider the application of the exemptions in sections 29(1)(a) or 30(b) to the document.
32. All of the remaining documents have been withheld by the Executive under exemptions in section 29 and/or section 30.

The application of section 29 – formulation of Scottish Administration Policy etc.

33. The exemptions in section 29 relate to the formulation of Scottish Administration policy and are subject to the public interest test contained in section 2(1)(b) of FOISA.
34. In this particular case, the Executive has relied on the exemptions contained in sections 29(1)(a) and 29(1)(b) to withhold information from Dr and Mrs Cuthbert. Information held by the Scottish Administration is exempt information under section 29(1)(a) if it relates to the formulation or development of government policy. Information held by the Scottish Administration is exempt information under section 29(1)(b) if it relates to Ministerial communications.



The exemption in section 29(1)(a)

35. In respect of its reliance on the exemption contained in section 29(1)(a), the Executive has only briefly set out its argument that this information related to the formulation or development of policy. The Executive notes that the information withheld comprises a wide range of documents, including, in its view, policy advice from officials to Ministers, briefings to Ministers and policy deliberation at official level. The Executive simply concludes that the information withheld relates to internal discussions relating to the formulation or development of government policy and is all part of the record of the development of policy on financing the Scottish Water Industry.
36. I am not satisfied that any of the information withheld qualifies for the exemption at section 29(1)(a). As I have set out elsewhere (*Hutcheon and Scottish Executive 075/2006*) I take the view that “formulation” means the output from the early stages of the policy process where options are generated and sorted, risks are identified, consultation occurs and recommendations or submissions are put to a Minister. “Development” is sometimes used interchangeably with “formulation,” but “development” may go beyond this stage. It may refer to the processes involved in improving on, altering or recording the effects of existing policy.
37. The information at issue here is not of that nature. Instead I read it as the articulation and justification of policy which has already been determined and applied. The context in which this was being done was the inquiry being conducted by the Finance Committee of the Scottish Parliament into the financing of Scottish Water. The Inquiry sought evidence from Scottish Ministers, and much of the information withheld in this case relates to the preparation of submissions by the Scottish Executive to that Inquiry and briefings being prepared for the Minister and senior officials in preparation for appearing before the committee, as well as statements to be made to the Committee. In addition, there are materials related to the debate regarding the financing of the water industry with the Executive keen to rebut what they saw as unjustified and inaccurate criticism by other parties involved with the Inquiry. This took the form of further briefings, submissions to the Inquiry but also information which was put into the public domain by way of items for publication in the press.



38. The Executive has argued that all of the information was withheld on the basis that it is in the public interest that administrations, Ministers and officials should be able to develop formulate and appraise options for new policies in a free, frank and candid manner. The Executive has not directed me to any specific document(s) in which such a process is evident – arguing that all the documents concerned are part of that process. To my mind this is simply a broad brush approach which does not stand up. Far from appraising new policies or options, the documents detail the efforts made by officials and Ministers to robustly defend existing policies and to ensure that the complex basis on which the financial arrangements for Scottish Water could be communicated.
39. Accordingly I do not accept that the Executive was correct to withhold the information under s29(1)(a) and I do not need to go on to consider the public interest.

The exemption in section 29(1)(b)

40. In terms of section 29(1)(b) of FOISA, information held by the Scottish Administration is exempt information if it relates to Ministerial communications. The Executive has cited this exemption only in relation to documents 7 and 25. Having considered the terms of the exemption, I am satisfied that the exemption in section 29(1)(b) applies to both of these documents. Both of these documents are from Ministers and express views on matters relating to the Finance Committee Inquiry.
41. The exemption under section 29(1)(b) is also subject to the application of the public interest test contained in section 2(1)(b) of FOISA. As I am satisfied that documents 7 and 25 are exempt under section 29(1)(b), I am now required to consider whether the public interest test lies in the information being released or in the exemption being maintained. In considering the public interest test I have taken account of the submissions from Dr and Mrs Cuthbert and the Executive. The Executive has advanced the case that there is a clear public interest in the ability of Ministers and officials to consider substantial policy issues and to reach agreed conclusions after internal discussion. The Executive is of the view that this would result in a diminishing of the quality of such discussions, to the detriment of future decision making and internal communications, which are vital to the operation of effective government.



42. I have considered the arguments in relation to the specific content of both of these documents. I consider that in the case of documents 7 and 25, the public interest lies in maintaining the exemption. There is a public interest in allowing Ministers to express their views in a free and frank manner so as to ensure that action is taken by officials in response. Although there is a general public interest in disclosing information, the actual content of these documents is such that I am not satisfied that the public interest in the release of these documents outweighs the public interest in maintaining the exemption.

The application of section 30(a) – maintenance of the convention of collective responsibility of the Scottish Ministers

43. As mentioned earlier, information is exempt under section 30(a) if its disclosure under FOISA would, or would be likely to, prejudice substantially the maintenance of the convention of collective responsibility of the Scottish Ministers. The exemption in section 30(a) is a qualified exemption in that it is subject to the public interest test contained in section 2(1)(b) of FOISA. The following documents have been withheld from Dr and Mrs Cuthbert on the basis of section 30(a): documents 7, 10, 25, 28, 29 and 34. I have already concluded that documents 7 and 25 are exempt by virtue of section 29(1)(b) and will not consider them further.
44. The Executive has justified its use of the exemption in section 30(a) on the basis that some of the information comprises internal discussions between Ministers. The Executive has commented that it is important that Ministers feel free to share opinions on what might be difficult policy issues and that there is an expectation that Ministers can share opinions in private in order that an agreed policy can be reached, presented and implemented. The Executive considers that any constraints placed on these discussions would inhibit similar interactions in the future.
45. Having considered the content of the remaining documents and the submissions from the Executive, I am not satisfied that the Executive was correct to withhold any of the remaining documents under section 30(a). In particular I do not recognise the Executive's claim that the information reveals internal discussion between Ministers.
46. The concept of collective ministerial responsibility is a long-standing constitutional convention, which is not regulated by statute, but is formalised in the Ministerial Code, which provides guidance on the convention.
47. Paragraph 2.3 of the Ministerial Code states that "Collective responsibility requires that Ministers should be able to express their views frankly in the expectation that they can argue freely in private while maintaining a united front when decisions have been reached. This in turn requires that the privacy of opinions expressed and advice offered within the Executive should be maintained."



48. I understand that the Executive is applying the exemption in section 30(a) of FOISA to the documents in question on the basis that they contain information about views expressed by Ministers. However, the Executive has not applied this exemption to the specific content of each document. In other words, it has not suggested that Ministers' views are simply redacted and the remainder of the information released. Further, the Executive has taken no account of the nature and content of the views expressed. The views expressed may simply affirm a proposal from officials, indicate changes which they wish made to drafts of documents. It is difficult to see how the disclosure of such information would, or would be likely to, prejudice substantially the maintenance of the convention of the collective responsibility of the Scottish Ministers.
49. The Executive is required to do more than assert that the documents contain views expressed by a Minister and therefore should be protected. It seems to me that that in order for the maintenance of the convention of collective responsibility of the Scottish Ministers to be, or to be likely to be, prejudiced substantially account needs to be taken of the significance of the views and the context in which they are expressed. Circumstances where the disclosure of information might prejudice the maintenance of the convention of collective responsibility could arise where the views expressed were at variance with the final policy or where the information revealed disagreement by other Ministers or where the views expressed were outwith the scope of the Ministers' responsibilities.
50. For these reasons, I consider that the Executive has failed to demonstrate why the exemption in section 30(a) of FOISA applies to the information withheld in each case and how disclosure of this information would, or would be likely to, prejudice substantially the maintenance of the convention of the collective responsibility of the Scottish Ministers.

The application of section 30(b) – free and frank exchange of advice or views

51. In the case of all but 4 documents the Executive is also relying on the exemptions contained in section 30(b)(i) and/or 30(b)(ii) of FOISA to withhold information from Dr and Mrs Cuthbert. Sections 30(b)(i) and 30(b)(ii) allow information to be withheld if its disclosure would, or would be likely to, inhibit substantially the free and frank provision of advice and the free and frank exchange of views for the purposes of deliberation, respectively. Both exemptions are subject to the public interest test contained in section 2(1)(b) of FOISA.



52. As I have said in previous decisions (e.g. 015/2005 and 041/2005), it is my view that the standard to be met in applying the tests contained in sections 30(b)(i) and 30(b)(ii) is high. In applying these exemptions, the chief consideration is not whether the information constitutes advice or opinion, but whether the release of the information would inhibit substantially the provision of advice or the exchange of views. The Executive's own guidance to its staff on the application of section 30(b) points out that the word 'inhibit' suggests a suppressive effect, so that communication would be less likely, more reticent or less inclusive.
53. The Executive did not provide separate submissions to my Office in relation to each of the exemptions contained in section 30, but instead put forward general comments on the use of section 30. In doing so, the Executive has indicated that the policy area in question is of undoubted public interest. However, the Executive argues that Ministers and officials require a degree of private space in which they are afforded the ability to engage frankly and constructively to enable such policy developments to be taken forward.
54. In its submissions, the Executive appears to imply that discussions or deliberations between Ministers and officials should be treated as being exempt from disclosure as a matter of course as the disclosure of this information would inhibit Ministers and officials from speaking frankly in future.
55. However, there is nothing in FOISA to suggest that submissions to Ministers should be treated as a special class of documents. Instead, advice and free and frank exchanges of views are exempt from disclosure only where this would have a substantially inhibiting effect on the free and frank provision of advice or the free and frank exchange of views for the purposes of deliberation.
56. Although in its submissions to my Office the Executive stated that it wished to rely on the exemptions in section 30(b)(i) and section 30(b)(ii) to withhold info from Dr and Mrs Cuthbert, the Executive did not initially state which part of section 30(b) it wished to apply to which document. However, the Executive subsequently advised that it wished to rely on the exemptions in both section 30(b)(i) and 30(b)(ii) for the following documents: 2 - 5, 7 and 8, 10 - 24, 26 and 27, 29 and 30, 34, 36 - 39, 42 and 43. For documents 1, 9, 28, 31 - 33, 35, 40 and 45, the Executive wish to rely on the exemption in the first part of section 30(b)(i) alone. Although the Scottish Executive has applied the exemption in section 30(b) to document 43, as I have already established that the exemption in section 28 applies, I have not considered the application of the exemption in section 30(b) in relation to this document. Similarly I have already concluded that document 7 is exempt by virtue of section 29(1)(b) and will not consider it further under this exemption.



57. Having read the documents which have been withheld from Dr and Mrs Cuthbert, and having considered the submissions from the Executive, I am of the view that the Executive was not correct to apply the exemption under section 30(b)(i) or (ii) to any of the information contained in the following documents on the basis that the disclosure of the information contained within the documents would, or would be likely to, inhibit substantially the free and frank provision of advice or exchange of views for the purposes of deliberation: documents 1, 5,8,9,12,15,18,19,21,22,23,26,27,28,31,32,35, 37,41, 42,44, 45.
58. The information contained within these documents represents the normal exchange of officials in the course of their work. The information largely does not represent free and frank advice or views and I do not believe disclosure would or would be likely to inhibit substantially these or other officials from expressing themselves in the same manner in the future.
59. In respect of documents 2,3,4,10,14,16,24,29,30,34,36, the information contained within them is largely not exempt under either section 30(b)(i) or (ii) except for specific passages which are capable of redaction, as indicated on the attached schedule (which forms part of this decision notice). I accept that those the specific passages represent the free and frank advice or views and would or would be likely to substantially inhibit future such provision or exchanges. I will go on to consider the public interest in disclosing or withholding the redacted passages later.
60. I accept that documents 7, 11,13,17, 38, 39, 40 are exempt by virtue of section 30(b)(i) and /or (ii).These documents contain advice and exchanges which are notably free and frank, which if released, would or would be likely to inhibit substantially the free and frank provision of advice or exchange of views for the purposes of deliberation.

The public interest

61. As the Finance Committee inquiry has shown the method of financing of Scottish Water is a complex matter, and views on the merits and demerits of this arrangement are often centred around interpretations of financial data and options which are debated between a relatively small number of people with a direct knowledge, interest and expertise. That does not make it any less in the public interest to have information on the matter available. The issue of the funding of Scottish Water is undoubtedly of public interest. The cost of supply impacts on every household, business and community in the country, and the basis of that supply is different from that in the rest of the UK.
62. I have already determined contrary to the Executive's claims, that much of the information which has been withheld is not exempt, and so should be disclosed.



63. A limited number of documents are entirely exempt, and in a number of others specific contents are also exempt, by virtue of section 30(b)(i) and/or (ii).
64. I have no doubt that the applicants would find them of interest and perhaps even useful in advancing their case. There is also a wider general interest on a matter of public debate in gaining as detailed as possible an insight into how positions have been arrived at.
65. However I need to set against that the harm to the public interest which would be done if in these few and specific instances the information was disclosed. There is a public interest in maintaining the capacity for Ministers and officials to explore options and develop positions. Sometimes these will be frankly debated and in the course of it some views will be acted upon and others rejected.
66. In large part the information which I have accepted as exempt is part of a refining process which has fed into the submissions, evidence and letters which otherwise the Executive has released or which I have determined should be released. I have considered carefully the information which is exempt and do not believe that the substance of them is such that the public interest in disclosure outweighs the public interest in maintaining the exemption.



Decision

I find that the Scottish Executive (the Executive) partially dealt with the information request from Dr and Mrs Cuthbert in accordance with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in withholding certain information from them.

However, I also find that the Executive has failed to comply with Dr and Mrs Cuthbert's request for information in accordance with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in not disclosing some information to Dr and Mrs Cuthbert and that in doing so the Executive breached section 1(1) of FOISA.

I therefore require the Executive to release the information to Dr and Mrs Cuthbert as detailed above and as set out in the Appendix, which is attached to and forms part of, this decision notice.

I am obliged to give the Executive at least 42 calendar days in which to supply Dr and Mrs Cuthbert with the information set out above. In this case, I require the Executive to take these steps within 45 calendar days of the receipt of this notice.

In addition, I find that the Executive failed to comply with section 10(1) of FOISA, in that the Executive did not respond to Dr and Mrs Cuthbert's original application within 20 working days and that it did not comply with section 21(1) of FOISA, in that it did not respond to Dr and Mrs Cuthbert's request for review within 20 working days. I do not require the Executive to take any remedial action in relation to these technical breaches of FOISA.

Kevin Dunion
Scottish Information Commissioner
12 October 2006



Appendix to Decision 187/2006

Doc No.	Document title	Exemptions cited by the Executive	Exemptions upheld	Public interest in favour of disclosure	Release or withhold	Details of release (where applicable)
1	Letter from Convenor re borrowing	s.29(1)(a) s. 30(b)(i)	No No	n/a n/a	Release	Release in full
2	Finance Committee Report on Water – Handling Strategy	s.30(b)(i) s.30(b)(ii)	Partial No	Partial n/a	Partial release	Withhold Annex A
3	Paper from the Cuthberts	s.29(1)(a) s.30(b)(i) s.30(b)(ii)	No Partial No	n/a Partial n/a	Partial release	Withhold e.mail dated 11 March 2004 at 14:08hrs from A. Scott. Release email dated 11 March 2004 from S Duffy.
4	Finance Committee Water	s.29(1)(a) s.30(b)(i) s.30(b)(ii)	No Partial No	n/a No n/a	Partial	Redact final sentence of email dated 3 March 2004. Redact final sentence in email dated 5 March 2004 as this is outwith the scope of the request.
5	Finance Committee Letter – Scottish Water	s.29(1)(a) s.30(b)(i) s.30(b)(ii)	No No No	n/a n/a n/a	Release	Release in full
6	Draft	s.25	No		Release	Release in full



	Scotsman Article					
7	Finance Committee Letter – Scottish Water	s.29(1)(a) s.29(1)(b) s.30(a) s.30(b)(i) s.30(b)(ii)	No Yes n/c Yes Yes	n/a No n/c No No	withhold	
8	Water Finances	s.29(1)(a) s.30(b)(i) s.30(b)(ii)	No No No	n/a n/a n/a	Release	Release in full
9	Letter to Convenor	s.29(1)(a) s.30(b)(i)	No No	n/a n/a	Release	Release in full
10	Letter to Finance Committee on Water	s.29(1)(a) s.30(a) s.30(b)(i) s.30(b)(ii)	No No No Partial	n/a n/a n/a Partial	Partial release	Release email dated 9 Feb 2004 from D Skilling. Redact sentence starting “On balance I” and ending “(as below)”. Release email dated 6 Feb 2004 from A. Scott. Redact paragraphs 3) 3a) and 3b) from “The arguments for” to “used immediately to lower bills”. Withhold annotated email dated 6 February 2004. Withhold draft letter.
11	Draft letter	s.29(1)(a) s.30(b)(i)	No No	n/a n/a	withhold	



		s.30(b)(ii)	Yes	Yes		
12	Draft letter	s.29(1)(a) s.30(b)(i) s.30(b)(ii)	No Partial No	n/a Partial n/a	Partial release	Release email dated 6 February 2004 and email dated 5 February 2004, but redact personal mobile phone number. Withhold draft letter.
13	Draft letter	s.29(1)(a) s.30(b)(i) s.30(b)(ii)	No Yes Yes	n/a No No	withhold	
14	Letter to Finance Committee on Water	s.29(1)(a) s.30(b)(i) s.30(b)(ii)	No No Partial	n/a n/a Partial	Partial release	Withhold draft letter. Release emails dated 6 Feb 2004.
15	Questions about water	s.29(1)(a) s.30(b)(i) s.30(b)(ii)	No No No	n/a n/a n/a	Release	Release in full
16	Draft letter	s.29(1)(a) s.30(b)(i) s.30(b)(ii)	No No Partial	n/a n/a Partial	Partial release	Withhold draft letter. Release email dated 5 Feb 2004.
17	Finance Committee Letter – Scottish Water	s.29(1)(a) s.30(b)(i) s.30(b)(ii)	No No Yes	n/a n/a No	withhold	
18	Water – Finance Committee	s.29(1)(a) s.30(b)(i) s.30(b)(ii)	No No No	n/a n/a n/a	Release	Release in full
19	Water underspend / EYF	s.29(1)(a) s.30(b)(i) s.30(b)(ii)	No No No	n/a n/a n/a	Release	Release in full
20	Water underspend / EYF	s.29(1)(a) s.30(b)(i) s.30(b)(ii)	No No Yes	n/a n/a Yes	Release	Release in full
21	RAB Formulae v1	s.29(1)(a) s.30(b)(i) s.30(b)(ii)	No No No	n/a n/a n/a	Release	Release in full



22	Appearance at Finance Committee	s.29(1)(a) s.30(b)(i) s.30(b)(ii)	No No No	n/a n/a n/a	Release	Release in full
23	Brief for Finance Committee Tuesday	s.30(b)(i) s.30(b)(ii)	No No	n/a n/a	Release	Release in full
24	Water.xls	s.29(1)(a) s.30(b)(i) s.30(b)(ii)	No Partial Partial	n/a Partial Partial	Partial release	Release email dated 30 Jan 2004 from AG Wright subject to redaction of section beginning "This probably means" to "(if I understood you correctly earlier)" in the fifth paragraph.
25	Immediate: Spring Budget Revisions: Water transfer of £85m	s.29(1)(b) s.30(a)	Yes n/c	No n/c	withhold	
26	Finance Committee	s.29(1)(a) s.30(b)(i) s.30(b)(ii)	No No No	n/a n/a n/a	Release	Release in full
27	RAB and what counts	s.29(1)(a) s.30(b)(i) s.30(b)(ii)	No No No	n/a n/a n/a	Release	Release in full
28	Water Industry: Response to Finance Committee	s.29(1)(a) s.30(a) s.30(b)(i)	No No No	n/a n/a n/a	Release	Release in full
29	Public expenditure: water industry and Cuthbert Paper	s.30(a) s.30(b)(i) s.30(b)(ii)	No Partial No	n/a Partial n/a	Partial release	Release document but withhold Annex A



30	Fraser of Allander Institute quarterly economic commentary - December 2003 – Economic perspective media release	s.29(1)(a) s.30(b)(i) s.30(b)(ii)	No No Partial	n/a n/a Partial	Partial release	Release the following 2 emails only. Email dated 15 Dec 2003 at 19:16hrs from W Page. Email dated 16 Dec 2003 at 10:31hrs from J Egdell.
31	Submission: Fraser of Allander Institute Quarterly Economic Review – December 2003	s.29(1)(a) s.30(b)(i)	No No	n/a n/a	Release	Release in full
32	New brix note on “water bills driven up by error”	s.29(1)(a) s.30(b)(i)	No No	n/a n/a	Release	Release in full
33	Letter to Scotsman 25-11	s.25 s.30(b)(i)	Yes No	n/a	Release	Release apart from press articles dated 10 November 2003, 20 November 2003 and 25 November 2003, which all appeared in the Scotsman Newspaper. Release 3 emails dated 26 November 2003 and the letter which appeared in an edited format in the



						Scotsman of 28 November 2003.
34	Recent Press coverage of Water Issues (16/11 & 17/11)	s.30(a) s.30(b)(i) s.30(b)(ii)	No Partial Yes	n/a Partial Partial	Partial release	Withhold email dated 19 November 2003 and email dated 20 November 2003. Release email dated 17 November 2003. Release draft letter to Sunday Herald Newspaper and draft letter to the Scotsman Newspaper.
35	Public expenditure: Water industry and Cuthbert paper	s.30(b)(i)	No	n/a	Release	Release in full
36	Public expenditure: Water industry and Cuthbert paper	s.29(1)(a) s.30(b)(i) s.30(b)(ii)	No Partial No	n/a Partial n/a	Partial release	Release email dated 14 November 2003. Release 1 page minute dated 14 November 2003. Release Annex A – but redact line 3 in paragraph 1, words from “may have been” to “and”. The BRIX note has already been disclosed to the applicants.



37	Public expenditure: Water industry and Cuthbert paper	s.29(1)(a) s.30(b)(i) s.30(b)(ii)	No No No	n/a n/a n/a	Release	Release in full, but redact information in line 3 of paragraph 1 of Annex A from the words "may have been" to "and".
38	The Jim Cuthbert Experience	s.29(1)(a) s.30(b)(i) s.30(b)(ii)	No Yes No	n/a No n/a	withhold	
39	RE:Water Charges in Sunday's Herald and today's Scotsman	s.29(1)(a) s.30(b)(i) s.30(b)(ii)	No No Yes	n/a n/a No	withhold	
40	Water Charges in Sundays Herald and today's Scotsman	s.29(1)(a) s.30(b)(i)	No Yes	n/a No	withhold	
41	FW: SW borrowing	s.29(1)(a) s.30(b)(i) s.30(b)(ii)	No No No	n/a n/a n/a	Release	Release in full
42	Meeting with Arthur Midwinter	s.29(1)(a) s.30(b)(i) s.30(b)(ii)	No No No	n/a n/a n/a	Release	Release in full
43	RE: resource budgeting – baseline exercise	s.28 s.29(1)(a) s.30(b)(i) s.30(b)(ii)	Yes n/c n/c n/c	No	withhold	
44	Resource number for publication	s.29(1)(a)	No	n/a	Release	Release in full
45	Finance Committee Appearance on Water	s.30(b)(i)	No	n/a	Release	Release in full
46	Briefing for Finance Committee	s.25 s.30(b)(i)	Partial No	n/a	Partial release	Release letter to the Finance Committee



	Appearance on Water					dated 2 April 2004.
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