



Scottish Information
Commissioner

**Decision 007/2007 Mr Rob Edwards and the
Scottish Executive**

Request for documents relating to nuclear exercises

**Applicant: Mr Rob Edwards
Authority: Scottish Executive
Case No: 200502688
Decision Date: 17 January 2007**

**Kevin Dunion
Scottish Information Commissioner**

Kinburn Castle
Doubledykes Road
St Andrews
Fife
KY16 9DS



Decision 007/2007 – Mr Rob Edwards and the Scottish Executive

Request for copies of documents relating to nuclear exercises – numerous documents were released and ten documents were withheld on the basis of the exemptions in section 30(b)(i) and (ii) of FOISA – free and frank provision of advice and free and frank exchange of views for the purposes of deliberation – the Commissioner was not satisfied that the exemptions had been used correctly by the Executive to withhold eight of the ten documents and ordered the eight documents to be released

Relevant Statutory Provisions and other Sources

Freedom of Information (Scotland) Act 2002 sections 1(1) (General entitlement); 10(1) (Time for compliance); 30(b)(i) and (ii) (Prejudice to effective conduct of public affairs).

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

Facts

Mr Edwards asked the Scottish Executive (the Executive) for the contents of six named files relating to nuclear exercises.

The Executive released a large volume of information from the six files on the nuclear exercises. Some documents were redacted to withhold personal information under section 38(1)(b) of the Freedom of Information (Scotland) Act 2002 (FOISA). Other documents had been withheld under exemptions for national security and defence (section 31(1) of FOISA), free and frank provision of advice or the free and frank exchange of views for the purposes of deliberation (30(b)(i) and (ii) respectively of FOISA) and other documents fell outwith the scope of Mr Edwards' request.

While accepting the use of the exemptions in section 38(1)(b) and 31(1), Mr Edwards was not satisfied with the Executive's decision to withhold information under sections 30(b)(i) and 30(b)(ii) of FOISA and asked it to review its decision.

Upon review, the Executive upheld its original decision. In total there were ten documents that were being withheld under sections 30(b)(i) and 30(b)(ii) of FOISA.



Mr Edwards was dissatisfied with the response he received from the Executive and submitted an application for a decision by the Scottish Information Commissioner in order to obtain the documents which had been withheld from him.

(During the investigation, the Executive released part of one of the withheld documents.)

Following an investigation, the Commissioner found that the Executive failed to deal with Mr Edwards' request for information in line with Part 1 of FOISA.

Background

1. Mr Edwards emailed the Executive on 5 May 2005 to ask it for copies of the contents of six named files relating to nuclear exercises.
2. On 17 May 2005 the Executive emailed Mr Edwards, informing him that two agencies within the Executive would provide him with information on nuclear waste and weapons. The Executive requested that Mr Edwards clarify what information he required from the six files on nuclear exercises.
3. Later the same day, Mr Edwards emailed the Executive stating that he would like copies of all the information contained within the six files including all documents, reports, memos and correspondence.
4. The Executive wrote to Mr Edwards on 16 August 2005, apologised for its delayed response and released numerous documents on nuclear exercises contained within the six named files. Some of the documents had been redacted to withhold personal information under section 38(1)(b) of FOISA. Other documents had been withheld on the following grounds; national security (section 31(1) of FOISA), free and frank provision of advice or the free and frank exchange of views for the purposes of deliberation (sections 30(b)(i) and (ii) respectively of FOISA) and other documents fell outwith the scope of Mr Edwards' request.
5. On 19 August 2005, Mr Edwards emailed the Executive to ask it to review its decision to withhold the documents relating to the nuclear exercises under sections 30(b)(i) and (ii) of FOISA, arguing that the public interest lay in the disclosure of the information.
6. The Executive carried out a review and, on 16 September 2005, wrote to Mr Edwards upholding its original decision and informing him that ten documents relating to nuclear exercises were being withheld under sections 30(b)(i) and (ii) of FOISA.



7. Mr Edwards emailed my Office on 21 September 2005, stating that he was dissatisfied with the outcome of the Executive's review and applying to me for a decision in relation to the Executive's decision to withhold the ten documents.
8. The case was then allocated to an investigating officer and the application validated by establishing that Mr Edwards 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

9. The investigating officer wrote to the Executive on 17 October 2005, giving notice that an appeal had been received and that an investigation into the matter had begun and inviting comments from the Executive as required under section 49(3)(a) of FOISA. The Executive was asked to supply my Office with, amongst other items, copies of the information requested and withheld, a detailed application of the public interest test and explanation of the delay in responding to Mr Edwards' request.
10. There followed a discussion between the Executive and the investigating officer as to whether the documents could be viewed in situ at the Executive's offices. Finally it was agreed that the files would be transported to my Office and these were received on 6 November 2005. The files included copies of the documents released to Mr Edwards and the Executive's original documents (minus redactions and withheld documents).
11. On 4 November 2005 the Executive wrote to my Office providing a response to the investigating officer's letter of 17 October 2005, enclosing a detailed schedule of documents and highlighting the reasons for redacting or withholding specific documents.
12. Further clarification was subsequently sought from the Executive in relation to certain matters. In providing this clarification, the Executive agreed that Document 7 (minus its annexes) could be released to Mr Edwards and this was subsequently done.



Overview of documents being withheld

13. Ten documents were withheld from Mr Edwards under both section 30(b)(i) and (ii) of FOISA. These documents are:

General Nuclear Exercises

Document 1 – Minute regarding a nuclear exercise; November 1993

Nuclear Exercise 1

Document 2 – Draft Operational Order (Issue 2) – March 2003

Document 3 – Draft Operational Order (Issue 3) – June 2003

Document 4 – Draft Exercise Report – Issue 1 – 10 November 2003

Document 5 – Draft Exercise Report – Issue 2 – 24 November 2003

Document 6 – Email containing debrief regarding a nuclear exercise – 5 November 2003

Document 7 – Debrief on nuclear exercise, Annex A – hot debrief etc and Annex B - issues identified; November 2003 (this document, minus its annexes, has already been released by the Executive)

Document 8 – Final Exercise Report – Issue 1 – 30 October 2003 (covering letter dated 11 December 2003)

Nuclear Exercise 2

Document 9 – Draft Exercise Report – Issue 1 – 13 July 2004

Document 10 – Draft Exercise Report – Issue 2 – 26 August 2004



The Commissioner's Analysis and Findings

14. I consider that the withheld documents fall into two categories; draft documents, the final versions of which have been released to Mr Edwards (Documents 2, 3, 4, 5, 8, 9 and 10) and comments on the nuclear exercises (Documents 1, 6 and 7). Categorising the documents in this way, I have considered the application of sections 30(b)(i) and 30(b)(ii) of FOISA to the withheld documents. In coming to a decision on this matter, I have considered all of the information and the submissions that have been presented to me by both Mr Edwards and the Executive and I am satisfied that no matter of relevance has been overlooked.

Submissions from the Executive

15. The Executive argued in its letter of 7 November 2005 that, following a nuclear exercise, there are extensive written deliberations and candid observations of the exercise which enables final conclusions to be reached on the effectiveness of the exercises. The Executive argued that if the drafts were released then individuals would be more guarded in their comments.
16. In its letter of 6 November 2006, the Executive provided more detailed arguments on the two sets of documents.

Documents 2, 3, 4, 5, 8, 9 and 10

17. The Executive commented that if the draft documents were disclosed, such drafts would not be kept in the future and this would lead to incomplete records which would impact upon lessons learnt. Individuals would be inhibited substantially from making comments in the future if they knew such documents were released. In addition, if such drafts were released, no useful additional information would be gained and may cause confusion or raise questions about the content of the final document.

Documents 1, 6 and 7 Annex A

18. The Executive also argued that although time has passed between the creation of the documents and the request from Mr Edwards, the sensitivity of the documents is not altered and many of the individuals are still employed within the Executive. If such documents were released, then the individuals who wrote such documents would be more guarded in their comments, which in turn would prejudice substantially the effectiveness of future emergency exercises.



Document 7 Annex B

19. The Executive agreed that this Annex drew on the information released to Mr Edwards in another document. However, the Executive commented that Annex B contained additional views and that releasing such information would substantially inhibit the free and frank exchange of views about future emergency exercises.

Application of section 30(b) of FOISA

20. Section 30(b) of FOISA states that information is exempt if its disclosure under FOISA would, or would be likely to, inhibit substantially the free and frank provision of advice (section 30(b)(i)) or the free and frank exchange of views for the purposes of deliberation (section 30(b)(ii)). I am of the view that it is difficult to see how information not falling within these categories (i.e. advice or deliberations) would engage the exemptions in section 30(b) of FOISA given that the authority must demonstrate that future practice in these areas would be inhibited by disclosure.
21. The public interest test applies to the exemptions in section 30. This means that even if I find that the information is exempt in terms of section 30(b)(i) and/or 30(b)(ii), I must order release of the information unless, in all the circumstances of the case, I find that the public interest in maintaining one or both of the exemptions outweighs the public interest in disclosing the information withheld.
22. Firstly, however, I must consider whether either of the exemptions claimed is capable of applying to the information in question.
23. As will be clear from previous decisions, authorities should be able to demonstrate a real 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 has to take the form of inhibiting substantially the provision of advice and/or exchange of views 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: it suggests that the degree to which the person is likely to be inhibited in expressing themselves is of demonstrable significance.
24. In considering the application of any exemption, I must always look at the actual information withheld, not only the category of information to which it belongs or the type of situation in which the request has arisen. In other words, I must consider whether the disclosure of that information would, or would be likely to, in all the surrounding circumstances, have the inhibiting effects described in section 30(b)(i) and/or 30(b)(ii) of FOISA. 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.



Documents 2, 3, 4, 5, 8, 9 and 10

25. The Executive has argued (as detailed above) that the draft documents withheld incorporate extensive deliberations and candid observations and that the release of these documents would mean that stakeholders would be less likely to provide free and frank comments. However, the draft documents which have been withheld do not include any comments and are stand-alone documents with the changes appearing in the next version of the document. Consequently, it is difficult to see how the release of the drafts would discourage other individuals in the future from making similar comments; the discussion surrounding the changes has not been included within the documents itself and it is impossible to surmise why changes have been made. In looking at the different versions of the documents, the changes themselves appear to be a logical progression of finalising a document.
26. The release of such drafts does not open up the process of deliberation on sensitive matters as no deliberations are included within the documents. I find it difficult to accept that such changes from one version to another can be classified as deliberations. If there had been an attached comment alongside draft text explaining why changes had been made from previous versions, then I may have been able to accept that deliberations were taking place.
27. However, even if the changes and additions to the drafts are the outcomes of a process of deliberation I do not believe that the nature of such redrafting or the specific content of the changed or new material would, if disclosed have the substantially inhibiting effect claimed by the Executive. The draft documents which have been withheld are reduced earlier versions of the documents released to Mr Edwards. In most cases the earlier draft version of the document contains less information than that released in a later version, for example topic headings are listed in the earlier draft and the detail under the topic heading is completed in the released version of the document. In one case, the only difference between the released and withheld documents is a single word change from the name of one public authority to another. In all the circumstances, I cannot accept that the information in question falls within either of the exemptions claimed and therefore cannot uphold the Executive reliance on the exemptions to withhold the information.
28. (The Executive also argued in its later submission on 6 November 2006 (as detailed above) that releasing such drafts will not provide the applicant with useful additional information and would cause confusion, or raise questions about the contents of the final document and that would not be in the public interest. However such public interest arguments against and in favour of release are only engaged if the authority has been able to demonstrate that the exemptions actually apply and I am not persuaded of that in this case.



29. As I have determined that the information withheld from Mr Edwards in Documents 2, 3, 4, 5, 8, 9 and 10 does not fall within the scope of either of the exemptions contained in section 30(b)(i) and section 30(b)(ii) of FOISA, I am not required to go on to consider the application of the public interest test.

Documents 1, 6 and 7

30. Documents 1 and 6 comprise comments from an individual on a nuclear exercise. Document 7 is a general note inviting comments on a nuclear exercise from participants, attached to which is Annex A (which includes text from Document 6) and Annex B (which lists some issues identified about the exercise). Document 7 (minus the annexes) has been released by the Executive to Mr Edwards and so will not be considered in this decision.
31. Even if the information falls within the categories identified in section 30(b) the authority must still demonstrate that release of the information would or would be likely to inhibit substantially the free and frank provision of advice or exchange of views.
32. In its submissions to me the Executive has argued that it was essential that such documents are written on the basis of complete candour and such candid discussion would be inhibited substantially if information of this type of information were to be released.
33. It is my view that the standard to be met in applying the test in sections 30(b)(i) and (ii) of FOISA is high. When considering the application of the exemptions in section 30(b) of FOISA, each request should be considered on a case by case basis, taking into account the effects anticipated from the release of the particular information involved. This is likely to involve considering:
- the subject matter of the advice or exchange of views;
 - the content of the advice or exchange of views;
 - the manner in which the advice or exchange of view is expressed, and;
 - whether the timing of release would have any bearing (releasing advice or views whilst a decision was being considered, and for which further views were still being sought, might be more substantially inhibiting than once a decision has been taken).
34. I have considered each of the withheld documents in turn and whether each document should be withheld or released.

Document 7 –Annex B

35. Document 7 can be split into three parts; the first two pages (which have already been released), Annex A (discussed below) and Annex B.



36. Annex B comprises a written explanation of the issues identified from the nuclear exercise. However, a two page handwritten note released to Mr Edwards contains a bullet pointed list of the issues identified. These bullet points form the basis of the content of Annex B.
37. The Executive has argued that this document contains additional views and that releasing such information would substantially inhibit the free and frank exchange of views about future emergency exercises. However, the crux of the issues identified has been released in the handwritten note. Indeed some are scarcely different. The additional comments are not so sensitive that releasing such a document would have the substantially inhibiting effect claimed by the Executive.
38. The specific comments relate to the conclusions of individuals who took part in the nuclear exercise as to what could have been done better during that particular exercise. The fact that there are lessons to be learned from such exercises is not surprising and is apparent from the material already released. A different nuclear exercise would attract different comments and it would be hoped that lessons from this nuclear exercise would have been taken on board for the next exercise. Consequently it is difficult to understand why the Executive has withheld this section of Document 7.
39. Therefore I cannot accept the Executive's view that Annex B of Document 7 should be withheld under section 30(b)(i) and 30(b)(ii) of FOISA.

Documents 1, 6 and 7 (Annex A)

40. In these instances, the documents withheld contain advice and an exchange of views for the purposes of deliberation. However, there are two issues that require to be addressed in relation to the application of the section 30(b) exemptions under FOISA:
 - a) Firstly, would disclosure mean that those individuals who took part in the exchanges of correspondence would, or would be likely to, be inhibited substantially from continuing to provide free and frank advice or exchange free and frank views for the purposes of deliberation on this matter?
 - b) Secondly, would release of the information inhibit substantially others from providing advice or participating in such exchanges of view?

Would disclosure of these documents have a future inhibiting effect?

41. Document 1 was written some time ago, more than 12 years prior to the date of Mr Edwards request. Document 6 (and Annex A which is essentially Document 6 appended to Document 7) was written 18 months prior to the request. They deal therefore with different nuclear exercises. Both however offer the views of officials who were involved in an exercise.



42. The case made by the Executive is that the manner in which the views are expressed on those occasions is no different from how opinions would be shared now and as a result of future exercises. So if officials saw that those views would at any time in the future be revealed then they would not record them with the same frankness, or indeed may not record them at all. This would affect the effectiveness of future emergency exercises.
43. In the case of the most recent Documents 6 and Annex A I think it is fair to say that release would have a substantially inhibiting effect. The document is not a formal submission or a required report but seems to me to be an aide memoir which captures some thoughts on aspects of a recent exercise. In so doing the author not only proffers his own thoughts in a free and frank fashion but also records free and frank comments made by others in a debrief session immediately after the end of the exercise.
44. At the time of the request the documents were only 18 months old and many of those involved would be, and will be involved in future exercises. In that respect it is not unreasonable to conclude that future such memos may be more careful about proffering opinions or ascribing views to others, to the extent that the author is likely to be substantially inhibited.
45. Document 1 is somewhat similar, but it is much older vintage. It provides the impressions of two Scottish Office officials who participated in a role playing capacity. Again it is forthright in its views of the exercise and the role of individuals who participated. In this case it is unlikely that the officials involved will still be carrying out the same or similar roles, and the other participants mentioned are probably also not any longer engaged in the same capacity. This reduces the inhibiting effect which will be more readily apparent when the information involved is of recent currency.
46. I am prepared to accept then that Documents 6 and Annex A of Document 7 contain information which is exempt under section 30(b)(i), on the grounds that disclosure would, or would be likely too, inhibit substantially the free and frank provision of advice, but that this is not the case for Document 1 and it should be released to Mr Edwards.

The public interest test

47. Having found that Documents 6 and Annex A (of Document 7) contains information which is exempt under s30(b)(i) I have to determine whether in all the circumstances of the case the public interest in disclosing the information is not outweighed by that in maintaining the exemption.
48. The subject matter of the information is clearly of public interest. It concerns civil nuclear exercises designed to simulate adverse events which require a coordinated response authorities.



49. Mr Edwards has been supplied with formal reports and other information on such exercises. These make it clear that evaluation takes place and areas for improvement are identified. The information withheld may expand upon or illuminate more specifically the views of some of those who took part in the exercise, although unlike the reports are limited to the specific function of those participants.
50. There would be no doubt a general public interest in knowing the frank views of those directly involved. However having read the content of the documents it is not clear what compelling public interest requires disclosure to the extent that the harm from disclosure identified in paragraphs 41-46 above is justified.
51. I am assisted in coming to this view in the knowledge that the Executive has provide information in conformity with the Freedom of Information (Scotland) Act 2002 which does provide considerable detail about the exercises and which includes critical comment and has identified areas for improvement. The information withheld in Documents, 6 and Annex A (Document 7) does not seem to me to challenge or undermine those conclusions. Rather in their candour and personal opinions they add colour to those conclusions, I accept that this may contribute to a debate on matters of public interest, and relates to matters of public health and safety, but the information would not alert the public to any dangers to health, safety or the environment.
52. Therefore, I uphold the Executive's reliance on exemptions 30(b)(i) and (ii) of FOISA to withhold Documents 6 and Annex A (of Document 7).

Technical Breaches of FOISA

53. Section 10(1) of FOISA gives Scottish public authorities a maximum of 20 working days from the receipt of the request to comply with the request for information. The Executive did not respond to Mr Edwards's request for information within this timescale.
54. I note, however, that the Executive contacted Mr Edwards twice during the intervening period between the receipt of the request and its response to inform Mr Edwards that it would not be able to respond to the request immediately.



Decision

I find that the Scottish Executive (the Executive) has not dealt with Mr Edwards' request for information in accordance with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA), in that it misapplied the exemptions in sections 30(b)(i) and 30(b)(ii) of FOISA to all but 2 of the documents and consequently failed to comply with section 1(1) of FOISA.

I require the Executive to release the documents withheld from Mr Edwards, with the exception of Document 6 and Annex A of Document 7.

I cannot require the Executive to take any action until the time allowed for an appeal to be made to the Court of Session has elapsed. I therefore require the Executive to release the information to Mr Edwards within 45 days of the date of receipt of this decision notice.

I also find that the Executive failed to comply with Part 1 of FOISA in failing to respond in accordance with section 10(1) of FOISA. However, I do not require the Executive to take any remedial action in relation to this breach.

Appeal

Should either the Executive or Mr Edwards 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 of receipt of this notice.

Kevin Dunion
Scottish Information Commissioner
17 January 2007



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.

10 Time for compliance

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

30 Prejudice to effective conduct of public affairs

Information is exempt information if its disclosure under this Act-

- (a)
- (b) would, or would be likely to, inhibit substantially-
 - (i) the free and frank provision of advice; or
 - (ii) the free and frank exchange of views for the purposes of deliberation; or
- (c)