



Scottish Information
Commissioner

**Decision 211/2007 Mr Rob Edwards and the
Scottish Ministers**

Request for records relating to meetings

**Applicant: Mr Rob Edwards
Authority: The Scottish Ministers
Case No: 200601844
Decision Date: 8 November 2007**

**Kevin Dunion
Scottish Information Commissioner**

Kinburn Castle
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Decision 211/2007 Mr Rob Edwards and the Scottish Ministers

Request for records relating to meetings between the Environment Minister and National Farmers Union Scotland between March and September 2006 – Commissioner required disclosure of the information withheld.

Relevant Statutory Provisions and Other Sources

Freedom of Information (Scotland) Act 2002 (FOISA): sections 1(1) (General entitlement); 30(b)(i), 30(b)(ii) and 30(c) (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 requested all records relating to meetings between the Environment Minister and National Farmers Union Scotland (NFUS) from March to September 2006 held by the Scottish Ministers (the Ministers)

The Ministers stated that the Environment Minister had met with NFUS on three occasions within the specified time-period. The Ministers said that they did not hold any information relating to the first meeting and released a programme note relating to the third meeting. The Ministers refused to release any information regarding the second meeting under sections 30(b)(i), (ii) and 30(c) of the Freedom of Information (Scotland) Act 2002 (FOISA). This decision was upheld following an internal review.

Mr Edwards was dissatisfied with the outcome of the Ministers' review and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the Ministers had failed to deal with Mr Edwards' request for information in line with Part 1 of FOISA and ordered the Ministers to release the three withheld documents to Mr Edwards.



Background

1. On 19 September 2006, Mr Edwards emailed the Ministers requesting copies of minutes, correspondence and any other records, whether draft or final relating, to meetings between the Environment Minister and the NFUS over the previous 6 months (to the date of the request).
2. The Ministers responded to Mr Edwards' information request on 25 October 2006. They confirmed that the Environment Minister had met with the NFUS on three occasions within the specified time-period. The Ministers stated that they did not hold any information relating to the first meeting and released a programme note relating to the third meeting. The Ministers refused to release any information regarding the second meeting (dated 21 June 2006) under sections 30(b)(i), (ii) and 30(c) of FOISA.
3. Mr Edwards requested a review of the Ministers' decision to withhold information regarding the second meeting on 25 October 2006.
4. On 17 November 2006, the Ministers upheld their original decision to withhold information pertaining to the second meeting under sections 30(b)(i), (ii) and 30(c) of FOISA.
5. Mr Edwards emailed my Office on 21 November 2006, stating that he was dissatisfied with the outcome of the Ministers' review and applying to me for a decision in terms of section 47(1) of FOISA.
6. The application was 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 that request.

The Investigation

7. On 19 January 2007, the Ministers were notified in writing that an application had been received from Mr Edwards and were invited to comment on the matters raised by the applicant and 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.



8. On 8 February 2007, the Ministers responded with their comments and the information requested and the case was then allocated to an investigating officer.
9. The Ministers provided copies of the one document (Document 1) that had been released in response to Mr Edwards' request, and three documents (Documents 2, 3 and 4) that had been withheld. The Ministers confirmed that Documents 2 and 3 (internal briefings to the Minister in advance of the meeting of 21 June 2006) were being withheld under the terms of section 30(b)(i) of FOISA and Document 4 (an internal record of the main points discussed at the meeting) was being withheld under sections 30(b)(ii) and 30(c) of FOISA. I will consider the Ministers' submissions on these exemptions in my analysis and findings below.
10. In further communications, the investigating officer requested details of the searches undertaken by the Ministers to locate the requested information, confirmation of whether the Ministers had consulted the NFUS regarding Mr Edwards' request, and further details regarding the nature and sensitivity of the information contained within the withheld documents.
11. After receiving confirmation that the Ministers had not done so, the investigating officer also contacted the NFUS to seek their views on disclosure of information relating to the meeting of 21 June 2006.
12. In a telephone conversation, the investigating officer was informed that the NFUS considered its meetings with the Ministers to be private in which both parties could frankly and openly discuss topics. The NFUS expressed the view that it would not be appropriate to release information relating to these meetings under FOISA.
13. On 2 May 2007, the Ministers wrote to my Office providing further general submissions on the application of the exemptions contained in section 30(b) of FOISA. They indicated that these should be taken into consideration in relation to any ongoing cases where either of the exemptions in section 30(b)(i) or (ii) had been raised, and so I have had regard to these submissions in reaching my decision below.



The Commissioner's Analysis and Findings

14. In this case, I must consider whether the Ministers were correct to withhold 3 documents relating to a meeting between the NFUS and the Environment Minister. As noted above, Documents 2 and 3 contain advice to the Minister in advance of his meeting, and Document 4 contains a record of the key points discussed. I will consider the three exemptions applied by the Ministers to these documents in turn below.
15. In coming to a decision on this matter, I have considered all of the information and the submissions that have been presented to me by both Mr Edwards and the Ministers and I am satisfied that no matter of relevance has been overlooked.

Application of section 30(b)(i) and (ii) of FOISA

16. Generally speaking, the exemptions in section 30(b) of FOISA allow for information to be withheld if its disclosure would, or would be likely to, inhibit substantially the imparting or commissioning of advice, or the offering or requesting of opinions or considerations. Section 30(b)(i) of FOISA states that information is exempt information if its disclosure under FOISA would, or would be likely to, inhibit substantially the free and frank provision of advice. Section 30(b)(ii) of FOISA states 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. These exemptions are both subject to the public interest test required by section 2(1)(b) of FOISA.
17. In *Decision 166/2006 (Mr Martin Williams of The Herald and the Scottish Ministers)* I discussed in detail my views on the issues that should be considered in deciding whether the exemptions in section 30(b)(i) and (ii) apply. I will not repeat my comments in full in this decision notice, but they can be summarised as follows. Information must be treated on a case-by-case basis: release of information in one case need not imply release in another case. The nature of the information in question must be considered, rather than considering "advice" or "exchange of views" as categories of information. If the information withheld does not in itself constitute advice or an exchange of views, the argument for exemption under section 30(b) may be weaker. The standard to be met in applying the tests in 30(b) is high.



18. My consideration of the Ministers' application of the exemptions under section 30(b) has also been informed by the recent case of *Scottish Ministers v Scottish Information Commissioner (re Alexander's Application)* 2007 G.W.D. 3-48 Times, January 29, 2007. In this case, the court stated that the actual content of the information must be considered in determining whether disclosure would be likely to have a substantially inhibitive effect, rather than proceeding on an assumption that disclosure of certain types of information, such as advice to Ministers, would always lead to future substantial inhibition for the purposes of these exemptions.
19. I have also taken into consideration the comments on these exemptions made in the Ministers' letter to my Office of 2 May 2007. I have summarised these in detail in *Decision 089/2007 Mr James Cannell and Historic Scotland*. In that decision, I also responded in some detail to the Ministers' arguments on the application of these exemptions. I will not repeat my arguments or those of the Ministers in this decision, but I have had regard to these when considering the application of these exemptions to the documents under consideration in this case. In particular, it should be clear that I cannot as a rule accept an automatic presumption that harm will be caused by the release of a certain type of information.

Application of section 30(b)(i) to Documents 2 and 3

20. The Ministers have applied the exemption in section 30(b)(i) to Documents 2 and 3. They have stated that each of these comprise advice from officials to the Environment Minister on topics the NFUS wished to raise for discussion at the forthcoming meeting. The Ministers submitted that officials could feel constrained from offering full and frank advice in future occasions if they felt that their comments would be made public in such circumstances.
21. I have considered the contents of Documents 2 and 3 in the light of the Ministers' comments. They include general background information about the anticipated stance of the NFUS on the topics raised, along with factual background to these topics and details of the Scottish Government's stance where relevant. I note that much of the content of these documents is either factual or reflects the Ministers' or the NFUS's publicly available position. The topics to be covered that are identified in these documents are as would be expected give the key farming issues of that period, and which would be expected to be discussed at such meetings.
22. Having considered each paragraph in these documents, I can identify no content, disclosure of which would be likely to have the substantially inhibiting effect claimed by the Ministers.



23. At the time of Mr Edwards' request, officials, whose job it is to provide advice to Ministers, would have been well aware for some time of the existence of freedom of information law, and the possibility of information they generate being disclosed under FOISA. They should also be aware that information is considered on a case by case basis. I take the view that those providing advice in this instance can well distinguish between advice of this type and more sensitive advice, which would be likely to be subject to an exemption under FOISA.
24. I also note that nothing within either of these documents appears to be, as claimed by the Ministers, particularly sensitive in nature, either through the content of that advice or the circumstances in which it was provided. Instead I take the view that the advice provided in these documents is neutral, both in content and tone. I do not accept that the disclosure of documents of this nature would be likely to lead the officials concerned to be less likely to offer advice of this type in future, or that disclosure would have such an effect on other officials.
25. In the light of the above observations, I am not satisfied that disclosure of Documents 2 and 3 in this case would or would be likely to inhibit substantially the free and frank provision of such advice. I therefore conclude that the Ministers incorrectly applied the exemption in section 30(b)(i) in this case. Since I have not upheld the reliance on this exemption, I do not need to consider the public interest test which applies to section 30(b)(i) of FOISA.

Application of section 30(b)(ii) of FOISA to Document 4

26. Document 4 is an internal record of the key points discussed at the meeting between the Ministers and the NFUS. This is not an official minute and, as far as I am aware, has not been accepted by a Minister or passed to the NFUS for comment or agreement.
27. The Ministers stated that the issues raised in Document 4 were and still are sensitive, and release would be likely to inhibit substantially the free and frank exchange of views for the purposes of deliberation. The Ministers submitted that if third parties (such as the NFUS) or the Ministers themselves were concerned that details of their discussions would be disclosed to the public, then they would be less inclined in the future to be so candid, particularly if the issues were of a sensitive nature. The Ministers argued that it is vital that a private space exists in order that discussions can take place which are open and can rigorously explore all options and points of view. The Ministers also stated that if the minutes were released then the quality and range of these debates would be significantly reduced.



28. When asked to identify which issues within Document 4 were still sensitive, the Ministers stated that, to varying degrees, every item on the agenda could be regarded as sensitive at the time of the request. The Ministers considered that if the document was released then the NFUS would be less willing to attend such meetings in the future.
29. Having considered the content of Document 4, I have concluded that disclosure in response to Mr Edwards' request would not be likely to substantially inhibit the future free and frank exchange of views for the purposes of deliberation at the time of Mr Edwards' request.
30. In reaching this view, I have again noted that the content of this Document 4 in various places reflects matters and views that were in the public domain at the time of Mr Edwards' request. Where they were not, I do not accept that the content of the notes is such that disclosure would be likely to inhibit substantially the free and frank exchange of views between the Scottish Government and the NFUS (or indeed with other third parties of this type) in future.
31. I would note that the NFUS is a key representative body acting on behalf of the farming industry in Scotland. I do not accept that it is likely that such a body would be inhibited from engaging in open and constructive dialogue with the Ministers on matters of mutual concern and areas of agreement and disagreement in order to advance the interests of its membership were any information about its discussions be disclosed.
32. While I accept that certain information relating to the discussions between these parties may on occasion be exempt from disclosure, I do not accept that such relationships can or should proceed on the basis of an assumption of absolute privacy. As FOISA had been in force for almost 2 years at the time of this request, I do not accept that either of the parties would reasonably have had such an expectation at that time, and would have expressed their views in the light of expectations modified by the existence of FOISA.
33. I therefore conclude that the Ministers incorrectly applied the exemption in section 30(b)(ii) in this case. Since I have not upheld the reliance on this exemption, I do not need to consider the public interest test which applies to section 30(b)(ii) of FOISA.

Application of section 30(c) of FOISA to Document 4

34. The Ministers have also applied the exemption in section 30(c) to document 4.
35. Section 30(c) of FOISA exempts from disclosure information which would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs. This is a qualified exemption, and as such is subject to the public interest test required by section 2(1)(b) of FOISA.



36. Authorities seeking to rely on the exemption in section 30(c) of FOISA need to show that disclosure will prejudice substantially the way in which they conduct their business. They should be able to demonstrate that the risk of damage being caused by disclosing information is real or very likely, not simply a remote possibility. The harm caused or likely to be caused must be of some real and demonstrable significance, not simply marginal, which would occur in the near (certainly the foreseeable) future rather than in some unspecified distant time. Authorities should therefore consider disclosing the information asked for unless it would (or would be likely to) cause real, actual and significant harm.
37. In this instance the effective conduct of public affairs has been identified by the Ministers as the ability for organisations and individuals to discuss and deliberate issues in a private space. The Ministers argued that individuals and organisations could be less inclined to seek meetings with Ministers if they were denied a private space within which to discuss and deliberate. This would in turn reduce the effectiveness of government as Ministers would be less able to take account of the views of stakeholders and interested parties in policy and decision-making.
38. Submissions were made by the Ministers and NFUS that future meetings would be less open and candid if information regarding such meetings were to be released. The Ministers argued that if Document 4 were released it would hamper the Ministers' ability to engage with a key agricultural stakeholder and representative of farmers' views.
39. Having considered the content of Document 4. I am again unable to accept the Ministers' arguments.
40. Meetings between the Ministers and organisations such as the NFUS are a regular occurrence. The NFUS represents 10,000 farmers, crofters and growers in Scotland, and as such it is an important organisation for the government to engage with in order to understand the views of this stakeholder group and to take them into consideration when formulating policy.
41. One of the purposes of the NFUS is to influence government, the public and consumers in order to further the interests of its members. One of the key ways in which the NFUS could influence the government is by having meetings with Ministers and ensuring that they are aware of the matters of concern to its members. If the NFUS were to forgo, or limit its willingness to engage in frank discussion at meetings with the government it would lose a key way to influence government policy and decision making. I believe it is unlikely that the release of information of the type found in Document 4 would prompt this result, and consequently I do not accept that the release of Document 4 would be likely to have the substantially prejudicial effect described by Ministers.



42. Section 30(c) requires an authority to demonstrate that disclosure, or would be likely to, substantially prejudice the effective conduct of public affairs. As I have said in previous cases, the harm test in section 30(c) is high and an authority must demonstrate that the harm is real, significant and substantial. I do not consider that the Ministers have demonstrated that such harm would be likely to follow disclosure in this case and therefore I do not uphold the application of section 30(c) in respect of Document 4.

Conclusion

43. Having concluded that none of the exemptions relied upon in this case applies to documents 2, 3 and 4, I am not required to go onto consider the public interest as it relates to their contents. I now require these three documents to be provided to Mr Edwards.

Decision

I find that the Scottish Ministers (the Ministers) failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in concluding that the information withheld from Mr Edwards was exempt from release under sections 30(b)(i), (ii) and (c) of FOISA and were wrongly applied, and so the Ministers breached the requirements of section 1(1) of FOISA by withholding this information.

I now require the Ministers to release a copy of Documents 2, 3 and 4 to Mr Edwards within 45 days after the date of intimation of this decision.

Appeal

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

Kevin Dunion
Scottish Information Commissioner
8 November 2007



Appendix

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002

1 General entitlement

- (1) A person who request information from a Scottish public authority which holds is it entitled to be given it by the authority.

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 or advice; or
 - (ii) the free and frank exchange of views for the purposes of deliberation; or
- (c) would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs.-