

Decision Notice



Decision 120/2008 Mr Rob Edwards of the Sunday Herald and the Scottish Ministers

Environmental justice

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Summary

Mr Rob Edwards, Environment Editor of the Sunday Herald (Mr Edwards) requested from the Scottish Ministers (the Ministers) any unpublished reports, documents or correspondence relating to the development of an environmental justice strategy since the First Minister's speech on environmental policy on 18 February 2002. The Ministers responded by withholding a range of information under the terms of regulation 10(4)(e) of the Environmental Information (Scotland) Regulations 2004 (the EIRs). Mr Edwards remained dissatisfied following a review of this request and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the Ministers had partially failed to deal with Mr Edwards' request for information in accordance with the EIRs. He found that some of the information under consideration had been properly withheld in terms of the EIRs. In other cases the Commissioner concluded that the Ministers were not entitled to withhold the information, and he required the Ministers to disclose information to Mr Edwards. The schedule in Appendix 2 sets out the Commissioner's decision and any steps to be taken with respect to each item.

Relevant statutory provisions and other sources

The Environmental Information (Scotland) Regulations 2004 (the EIRs): regulations 2 (Interpretation) (definition of "environmental information"); 5(1) (Duty to make available environmental information upon request) and 10(1), (2), and (4)(e) (Exceptions from duty to make environmental information available)

Freedom of Information (Scotland) Act 2002 (FOISA): sections 1(1) and (6) (General entitlement); 2(1) (Effect of exemptions) and 39(2) (Health, safety and the environment)

The full text of each of the statutory provisions cited above is reproduced in Appendix 1 to this decision. Appendix 1 forms part of this decision.

Scottish Ministers v Scottish Information Commissioner [2007] CSIH 8

The Aarhus Convention: an implementation guide (the Aarhus Convention Implementation Guide): <http://www.unece.org/env/pp/acig.pdf>

Access to Environmental Information: Guidance for Scottish Public Authorities and Interested Parties on the Environmental Information (Scotland) Regulations 2004: <http://www.scottishexecutive.gov.uk/Resource/Doc/26800/0014460.pdf>.



Background

1. On 9 December 2005, Mr Edwards wrote to the Ministers requesting any unpublished reports, documents or correspondence relating to the development of an environmental justice strategy since the First Minister's speech on environmental policy on 18 February 2002.
2. The Ministers wrote on 22 December 2005 to Mr Edwards in response to his request for information. They drew his attention to the publication of their "Review of Progress on Environmental Justice" ("the Review") on 14 December 2005. They indicated that the purpose of this Review was to summarise the work of the Scottish Government and associated agencies and public bodies, including the development of an environmental justice action plan, since the First Minister's speech.
3. The Ministers went on to advise Mr Edwards that an unpublished report had been submitted to the Cabinet Sub-Committee on Sustainable Scotland as a prelude to drafting the Review, and that a number of drafts had preceded the published version of the Review. The Ministers indicated that the report to the Sub-Committee and the internal correspondence relating to the published Review, including the earlier drafts, constituted internal communications in terms of regulation 10(4)(e) the EIRs and so were excepted from disclosure. The Ministers indicated that the public interest favoured the maintenance of this exception because Ministers and their officials require a secure environment in which to develop their thinking and explore options in communications and discussions with other Ministers.
4. Mr Edwards wrote to the Ministers on 15 February 2006 to request a review of their decision. In particular, Mr Edwards questioned whether all the information requested fell within the exception, and whether there really was a powerful public interest in withholding deliberations after the event.
5. The Ministers wrote to notify Mr Edwards of the outcome of their review on 2 March 2006. They upheld their decision that the information fell within the terms of regulation 10(4)(e) of the EIRs and that the public interest favoured non-disclosure.
6. On the same day, Mr Edwards wrote to the Commissioner, stating that he was dissatisfied with the outcome of the Ministers' review and applying for a decision in terms of section 47(1) of FOISA, which also deals with applications under the EIRs. The application was validated by establishing that Mr Edwards had made a request for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its response to that request.



Investigation

7. On 3 March 2006, the Ministers were notified in writing that an application had been received in terms of section 49(3)(a) of FOISA (which, as a result of regulation 17 of the EIRs, covers applications made to the Commissioner under the EIRs and FOISA), giving notice that an application had been received and that an investigation into the matter had begun. The Ministers were invited to comment on matters raised by Mr Edwards' application and were asked to provide the Commissioner with specified items of information required for the purposes of the investigation.
8. The Ministers replied on 26 April 2006 with their submissions and the withheld material. Appendix 2 of this decision notice lists each item provided, and shows the Ministers' position and the Commissioner's decision on each. This Appendix forms part of this decision.
9. Further communications with the Ministers over the course of the investigation sought to clarify various aspects of the Ministers' handling of this case and their views on particular documents. The Ministers also reviewed the documents withheld during the investigation and provided certain items to Mr Edwards.
10. Mr Edwards was also invited to comment on this case, particularly in relation to his views on why the public interest would be served by the disclosure of the information withheld.
11. The comments of both parties to this case have been summarised, where relevant, in the Commissioner's analysis and findings section below.

Commissioner's analysis and findings

12. In coming to a decision on this matter, the Commissioner has considered all the information withheld and the submissions presented to him by Mr Edwards and the Ministers and is satisfied that no matter of relevance has been overlooked.
13. The speech referred to in Mr Edwards' information request was made by the (then) First Minister Jack McConnell on 18 February 2002. This speech set out the direction of the Scottish Government's environmental policy, and included commitments to sustainable development and environmental justice.
14. Environmental justice is concerned with the distribution of environmental 'goods' and 'bads' (such as the presence or absence of pollution) between different groups in society. Generally, the concept of environmental justice is based on the hypothesis that disadvantaged members of society may bear a disproportionate burden of environmental risks and, society should redistribute these risks to avoid injustice.



15. The First Minister said:

“The people who suffer the most from a poor environment are those least able to fight back, and I believe government is about standing up for them and changing that situation...

...

No longer can the environment be thought of as a luxury consideration. I want environmental justice so that all our people can live in decent surroundings and can access our countryside”.

16. The documents under consideration in this case reveal the activities taken within the Scottish Government to take forward the policy on environmental justice set out in the First Minister’s speech. The Ministers explained that they do not have an “environmental justice strategy” as such and therefore that Mr Edward’s request did not relate to a concerted programme working to a strategy paper. Instead, the Ministers explained, they held “a stream of papers” following the First Minister’s speech. These relate to internal discussions about how environmental justice considerations might be relevant to the Government’s work in different policy areas, and the development of an action plan covering the various areas identified, and internal progress reports.
17. Mr Edwards’ request was made five days before with the publication of the Ministers’ Review of progress on Environmental justice on 14 December 2005. The Review can be viewed online at: <http://www.scotland.gov.uk/publications/2005/12/12161827/18283>.

Scope of this decision

18. The Ministers initially identified the documents listed in Appendix 2 of this decision as relevant to Mr Edwards’ information request. However, the Commissioner has noted that a number of these items are, or include, published information. Mr Edwards’ request sought only unpublished information, and so the Commissioner has not considered this published information any further. The relevant items are identified in the schedule contained in Appendix 2.
19. During the investigation, the Ministers reconsidered some of the withheld material and decided that, with the passage of time, they could release some material to Mr Edwards. The Ministers informed the Commissioner that they had disclosed documents identified as “released” in the schedule to Mr Edwards. The Commissioner will therefore not consider these items any further.
20. The Commissioner has noted that there is considerable overlap between the documents under consideration in this case. To avoid confusion, he has considered each relevant item in full in this decision. However, he has not required partial disclosure of any item where the only content that would be released duplicates material that has been disclosed elsewhere within the documents considered.



Information claimed to fall outside the scope of the request

21. The Ministers indicated that a number of items listed in the schedule actually did not fall within the scope of Mr Edwards' request. These are items 65, 67, 68, 69, 81, 89 and 132.
22. The Commissioner has considered the contents of each of these items, while noting the terms of Mr Edwards' request (which sought any unpublished information that *relates to* an environmental justice strategy). He accepts that part of item 67, and the whole of items 68, 69, 89 and 132 fall outside the scope of Mr Edwards' request, because they do not relate to the development of any strategy that followed from the First Ministers' speech.
23. However, the Commissioner does not agree with the Ministers' view that item 65, the remaining part of item 67 or item 81 fall outside the scope of the request. These three items were either produced for the purposes of developing the Government's policy concerning environmental justice, or describe the steps taken. In each case the Commissioner considers these items to relate to the development of the Government's strategy on environmental justice following the First Minister's speech.
24. Having drawn these conclusions, the Commissioner has gone on to consider whether the relevant parts of items 65, 67 and 81 should be disclosed to Mr Edwards in what follows below. He has not considered the remaining part of item 67 or items 68, 69, 89 or 132 any further.

FOISA or EIRs?

25. Although neither Mr Edwards nor the Ministers questioned whether the request should have been dealt with under FOISA rather than the EIRs, this decision notice will first consider whether the Ministers were correct to respond to Mr Edwards' request under the terms of the EIRs.
26. Environmental information is defined in regulation 2 of the EIRs. This definition is reproduced in full in the Appendix to this decision. The Commissioner has had regard in this case to part (c) of the definition, which refers to information on:

“measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect elements [of the environment]... as well as measures or activities designed to protect those elements”

He has also noted the terms of part (f) of the definition, which refers to information on:

“the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in paragraph (a) or, through those elements, by any of the matters referred to in paragraphs (b) and (c)”



27. Environmental justice is concerned with the effects of the environment on people and communities, and seeks particularly to identify and eliminate injustices whereby certain groups bear a disproportionate burden of environmental risk. Examples of injustice may include (for example) any correlation between deprived areas and the location of polluting industry, which could in turn lead to greater incidence of health problems within those communities.
28. The Commissioner is satisfied that all of the information withheld in this case is environmental information. This information relates to the Ministers' activities with respect to environmental justice, and the Commissioner considers these activities in general form measures, policies, plans and programmes likely to affect the state of the element of the environment. Given the connection between the environment and its effect on people, the Commissioner is also satisfied that much of the information under consideration concerns, the state of human health and conditions of human life insofar as these might be affected by the state of the elements of the environment, or by the measures relevant for part (c) of the definition.
29. Where a person requests environmental information, they have dual rights of access under general rights provided by FOISA and under specific rights contained in the EIRs.
30. The Ministers confirmed that they considered the exemption in section 39(2) of FOISA to apply to the withheld information. This technical exemption provides that environmental information for the purposes of regulation 2 of the EIRs is exempt information under FOISA (thereby allowing any information held to be considered solely in terms of the EIRs).
31. This exemption is subject to the public interest test in section 2(1)(b) of FOISA. As stated in previous decisions of the Commissioner, since there is a separate statutory right of access to environmental information, the Commissioner considers that the public interest in maintaining this exemption and allowing access in line with the requirements of the EIRs will generally outweigh the public interest in the disclosure of information under FOISA.
32. The Commissioner accepts that the information requested by Mr Edwards is environmental information, and properly considered exempt under section 39(2) of FOISA. He has concluded that the Ministers acted appropriately by considering the request in terms of the EIRs. In what follows, the Commissioner has made his decision solely under the terms of the EIRs.

Regulation 10(4)(e) - internal communications

33. Under regulation 10(4)(e) of the EIRs, a Scottish public authority may refuse to make environmental information available to the extent that the request involves making available internal communications. The Ministers have applied this exception to all of the remaining information withheld in this case.
34. This regulation reflects Article 4.1(e) of European Directive 2003/4/EC on public access to environmental information, and also Article 4.3(c) of the Convention on access to information, public participation in decision-making and access to justice in environmental matters, done at Aarhus, Denmark on 25 June 1998 (the Aarhus Convention). The regulation does not expand upon what is meant by internal communications.



35. As with all the exceptions under regulation 10, a Scottish public authority applying this exception must interpret the exception in a restrictive way (regulation 10(2)(a)) and apply a presumption in favour of disclosure (regulation 10(2)(b)). Even where the exception applies, the information must be released unless, in all the circumstances of the case, the public interest in making the information available is outweighed by that in maintaining the exception (regulation 10(1)(b)).
36. For information to fall within the scope of this exception, it need only be established that the information is an internal communication. Only if it is decided that the information is an internal communication is it necessary to consider the public interest test.
37. The Commissioner accepts that almost all the documents under consideration clearly fall within the terms of regulation 10(4)(e) and are internal communications for the purposes of the EIRs. Most of the documents are internal exchanges within the Scottish Government, between Ministers and officials.
38. In some instances, the Commissioner has accepted that documents which originated from organisations other than the Scottish Government fell under the scope of this exception because they were transmitted within the Government as attachments to internal communications. Where an external document only falls within the scope of an information request by virtue of its circulation as part of an internal communication, the Commissioner accepts that it will fall within the scope of the exception that applies to internal communications.
39. The Commissioner has been unable to accept that the items below are internal communications for the purposes of regulation 10(4)(e):
 - a. Item 15 – an email and attachment from a public appointee working for a UK advisory body sponsored by a UK Government department
 - b. Item 46 – a fax from Friends of the Earth Scotland to the Scottish Government
 - c. Item 139 – an email exchange with Scottish National Heritage (SNH)
40. In each of these cases, the communications concerned were with persons that are legally separate from the Scottish Government. They are not, therefore, internal communications in the sense of communications within a discrete organisation.
41. In December 2007, the Ministers were invited to provide comments on the applicability of the exception to documents withheld under the terms of regulation 10(4)(e) of FOISA where they appeared to involve communications with organisations or appointees outwith the Scottish Government.
42. In response, the Ministers noted the terms of the Aarhus Convention Implementation Guide, which, they acknowledged, provides only limited guidance on the internal communications exception. This states:



"The public authority may refuse to disclose materials 'concerning internal communications,' but only when national law or customary practice exempts such materials. The Convention does not clarify what is meant by "customary practice" and this may differ according to the administrative law of an implementing Party. For example, for some Parties "customary practice" may apply only to those materials covered by evidence of established norms of administrative practice."

43. This lack of specific guidance, the Ministers proposed, suggests that countries have scope to have their own definitions of "internal communications". Paragraph 82 of the Ministers' "Access to Environmental Information – Guidance for Scottish Public Authorities and Interested Parties on the Implementation of the EIRs 2004" states that "information contained in any internal communications of or between Scottish public authorities ... may be excepted from the duty to release if it is of a confidential nature".
44. The Guidance also goes on to say that "this also extends to inter-agency correspondence and correspondence between government departments" and "the concept is of some form of relationship, of consultation or of joint working; and it may be the relationship that decides the confidentiality. It is not just geographically 'internal'."
45. On the basis of these passages, the Ministers submitted that correspondence between the Ministers and SNH was internal communication. The Ministers also indicated that they considered the communication with a public appointee working for an advisory body sponsored by a UK Government department to be an internal communication.
46. As has been noted in previous decisions, the Commissioner does not dismiss the possibility of cases where communications between two or more separate public authorities may be capable of being considered as internal communications for the purposes of regulation 10(4)(e), but expects an authority to be able to highlight particular aspects of the administrative and legal relationship between the two bodies, or about the nature of the communications under consideration, to show why communications should be considered to be internal. This will include consideration, on a case-by-case basis, of matters such as the nature and context of the particular relationship and the nature of the communication itself.
47. The Commissioner, interpreting the exception narrowly and adopting a presumption in favour of disclosure (both of which he is required to do), has not been provided with evidence that persuades him in this case that any of documents 15, 46 and 139 are internal communications for the purposes of this exception. No particular feature of the communications concerned have been drawn to his attention as evidence that these should be considered to be internal. Nor have the Ministers drawn the Commissioner's attention to any aspect of the legal or administrative relationship between the Government and SNH, or between the Government and the appointee concerned.



48. The Commissioner has noted that, had he accepted that the exception in regulation 10(4)(e) applies as widely as has been suggested in this case, this would suggest that communications between the Scottish Government and a large proportion of the separate public authorities making up the public sector in Scotland and the rest of the UK, as well as the voluntary sector (all of which will on occasion engage in joint working on matters of mutual interest), should be considered to be internal communications for the purposes of this exception. The Commissioner takes the view that such an approach would be incompatible with the obligations to interpret the exception in regulation 10(4) (e) restrictively and to apply a presumption in favour of disclosure.
49. Therefore, the Commissioner has concluded that the Ministers wrongly applied the exception in regulation 10(4)(e) to items 15, 46 and 139, and he requires these to be disclosed.

The Public Interest Test

50. Having found most of the documents withheld in this case to be exempt in terms of regulation 10(4)(e), the Commissioner is required to consider the public interest test required by regulation 10(1) of the EIRs in relation to these documents. This specifies that a public authority may only withhold information to which an exception applies where, in all the circumstances, the public interest in making the information available is outweighed by the public interest in maintaining the exception.

Submissions from the Ministers

51. The Ministers did not identify any public interest factors favouring the disclosure of the information that was excepted from disclosure under the terms of regulation 10(4)(e) of the EIRs. They made a number of arguments as to why the public interest favoured the withholding of information.
52. They noted that a number of items record discussions and exchanges between Ministers and contain discussion topics for meetings of the Scottish Cabinet. They argued against the release of such documents on the basis that there is a high public interest in maintaining both collective responsibility and the opportunity for full and frank discussion of policy at the highest levels within government. They suggested that any disclosure could undermine the convention of collective responsibility and could change the rules and practices under which government now functions, to the detriment of the policy-making process. The Ministers submitted that protecting the convention of collective responsibility is conducive to the public interest as the convention creates a space for refining policy positions until Government as a whole can adopt a policy that is sound and likely to be successful. They added that this space also allows for all options to be considered, including radical options, consideration of which, if disclosed, might deter Ministers from raising them at the time or in the future.



53. The Ministers highlighted other documents, which included and related to the drafting of documents. They submitted that these were prepared purely with the intention of circulation among government staff. They noted that for some of the draft papers, the changes between versions are minimal, but, in others, substantial alterations have been made to the content or tone of the material therein. The Ministers noted that there is also a great deal of discussion in these papers regarding the handling and approach taken on the issue of environmental justice. The Ministers submitted that these are extremely sensitive and important issues, and that candid discussions are essential to delivery of policy options and good government, and are integral to the issues on environmental justice. The Ministers argued further that it is also essential to the convention of collective responsibility that the final “policy” to be pursued is the policy of the Scottish Ministers as a whole. They noted that their public interest arguments on these documents concerning drafting therefore tied into their wider arguments with respect to the evolution of policy.
54. With respect to papers concerning the development of government policy, the Ministers argued that there is a strong public interest in high quality policy making and implementation. They submitted that Ministers and officials need to be able to consider all available options, however unpalatable, to debate those rigorously, to expose their merits and demerits, and to understand their possible implications. The Ministers argued further that Ministers’ and officials’ candour in so doing will be affected by their assessment of whether the content of their discussions will be disclosed in the near future, when – it was submitted - it may undermine or constrain the Government’s view on settled policy or policy that is at the time under discussion and development. The Ministers submitted that “inappropriate disclosure” has the potential not only to limit the full and frank discussion of policy between Ministers, but may also distort public perceptions of advice provided by officials. The prospect of early disclosure was argued to have the potential to affect the impartiality of the advice provided.
55. The Ministers indicated that they consider there to be a strong public interest in maintaining the integrity of the process of giving free and frank advice in this sort of case. They suggested that the knowledge of possible disclosure might inhibit provision of advice and impair the candour and freedom within which papers are prepared, deliberated and revised in future.
56. They also argued that there is a strong public interest in ensuring that, where necessary, advice in areas on ongoing policy development can take place in a non-public arena which will, it was argued, enable rigorous and frank debate about the merits and demerits of alternative courses of action, without fear that such consideration will be picked over out of context. They noted that it is in the public interest for decision making to be based on the best advice available, with a full consideration of all the options, including those that may not be immediately considered to be broadly politically acceptable.
57. The Ministers argued also that one aspect of this public interest is in protecting the impartiality of the civil service, indicating that this applies where a particular release of official advice might create the risk that officials could come under political or public pressure not to challenge ideas in the formulation of policy, thus leading to poorer decision making.



58. They went on to submit that the public interest also applies in ensuring that Ministers and officials can conduct rigorous and candid risk assessments of their policies and programmes, including considerations of the pros and cons without there being “premature” disclosure which might close off discussion and the development of better options and without fear that the exploration of potential solutions would be subdued or inhibited.
59. The Ministers acknowledged that the public interest test must be considered on a case by case basis, but suggested that in cases such as this one where the information relates to an important process (such as the provision of advice to reach policy decisions), there can be a public interest in the protection of the process itself. They suggested that the public interest should not be applied to protect internal communications only where officials have used strong or trenchant language, since this approach would appear to focus on rigorous, outlandish or unusual statements rather than any underlying effects likely to suppress future communication.
60. The Ministers finally noted that, although they had withheld a large number of documents in this case, a large number of the papers involved were extremely sensitive, frank, and ensured rigorous debate on a fundamental topic. The Ministers noted that the Ministers’ Review of Progress on Environmental Justice was published just five days after Mr Edwards made his information request, and provides insight into the Government’s work on this topic. They argued that disclosure of the documents that led to the review would add little to the publications, especially at a time so recent to publication of the Review. The Ministers submitted that it is essential that the Government is afforded the opportunity to develop and provide effective policy and that “premature disclosure” of the information withheld would be extremely likely to cut off this essential developmental process.

Submissions from Mr Edwards

61. Mr Edwards noted that he had some difficulty in arguing why the public interest favoured disclosure without the benefit of access to the documents concerned. However, he noted that the (then) First Minister had made a high-profile pledge to improve environmental justice in Scotland in 2002, and almost four years later the published Review of progress made it plain that, although some progress had been made, it was “not all good news”. In that context, he argued that it could be in the public interest to see and understand in full the deliberations and considerations of officials and Ministers, to check whether any attempts were made to “soften”, or “spin”, the review in the interests of reputation damage limitation. Mr Edwards indicated that he was interested in establishing whether or not there were any significant discussions about the content, timing and publication of the review.
62. Mr Edwards went on to note that, if there were any such discussions, they would have taken place prior to publication of the review. He acknowledged that there would be a need to keep such discussions confidential while they are taking place, and before the final document is published, but argued that as soon as the document is published, the public interest in seeing the internal discussions that led up to it are greatly strengthened. He argued further that as more time passes, so that public interest argument increases.



63. Mr Edwards submitted also that, in this case, the public interest case for disclosure was further strengthened by the fact that the Ministers that oversaw the matter have now been replaced following the change of Government following the Scottish Parliamentary elections in May 2007. He asked whether it was really be in the public interest two years on, to keep any significant issues that arose in the preparation of the Review of progress on environmental justice secret.

Conclusions on the public interest

64. The Commissioner has considered fully the submissions on the public interest made by the Ministers and Mr Edwards, taking into consideration the content of the documents withheld and all the circumstances of the case.
65. Given Mr Edwards' comments on the effect of the passage of time, it should be made clear that the Commissioner has considered whether the Ministers complied with FOISA at the date of the authority's notice (under section 21(5) of FOISA) of the outcome of its review of its handling of Mr Edwards' request. This approach was confirmed by the Court of Session in *Scottish Ministers v Scottish Information Commissioner* [2007]:
- “It is correct that any issue of alleged failure by a public authority to comply with its statutory obligations falls to be determined as at the date of the authority's notice under section 21(5) of the Act. “
66. The Ministers notified Mr Edwards of the outcome of their review on 2 March 2006 and so the Commissioner has disregarded circumstances after this date in reaching his decision In this case.
67. The Commissioner has noted that, while Mr Edwards' initial information request was made in the days before the Ministers published the Review of Progress on Environmental Justice on 14 December 2005, the relevant point time for the Commissioner's consideration of this case is more than two months after the publication of the Review.
68. The Commissioner considers there to be a number of public interest factors weighing in favour of the disclosure of information concerning the steps taken by the Scottish Government (whether or not these amounted to a formal “strategy”) in response to the First Minister's speech. He agrees that this was a significant speech conveying the First Minister's policy priorities with respect to the environment.
69. The Commissioner has noted that this speech was on a subject in which there is significant public interest. Environmental justice is concerned with the distribution of environmental burdens and benefits within society, and issues which can have significant implications for the health and quality of life of communities and individuals. The Commissioner considers there to be significant public interest in understanding the steps that were taken by the Government both to take forward the First Minister's stated policy aims with respect to environmental justice, and to identify and address specific areas where environmental injustice might arise.



70. He is satisfied that disclosure would be in the public interest where this provides transparency and accountability in the actions taken by the Government in this significant policy area. Similarly, disclosure would be in the public interest if it would contribute to public understanding of the steps taken and policy development that followed from this speech. While the Commissioner accepts that the Review's publication in December 2005 provided considerable insight, he believes there remains a significant public interest in understanding the steps taken by the government in response to the First Minister's policy announcement and their progress over the period between that time and the preparation of the Review of progress.
71. The Commissioner accepts that there will often be a considerable public interest in allowing the process of policy development to proceed without disclosure of documents revealing details of the matters under active consideration before any decision or settled policy has been reached. He considers this particularly to be the case where discussions between Ministers are concerned. He agrees also that there will often be a significant public interest in allowing the process of drafting and discussing the presentation of documents for publication to proceed with a degree of privacy. While this public interest may diminish over time, the Commissioner accepts that the public interest in favour of maintaining the exception in regulation 10(4)(e) in relation to documents revealing a drafting process may well continue beyond the point where a document is published.
72. The Commissioner accepts that it is in the public interest that (for instance) officials or Ministers are not inhibited from considering the merits of a wide range of options, expressing their views upon them, and rigorously challenging the arguments for and against any proposed approach. The fear of (near) contemporaneous disclosure may well inhibit the putting forward of controversial opinions or policy options, or limit the recording of these, and the Commissioner accepts (as he has previously, for example in *Decision 077/2006 Mr Paul Hutcheon and the Scottish Executive*) that the benefits of open government need to be balanced against this risk in the interests of sound policy development.
73. On the other hand, the Commissioner has also made it clear (see again *Decision 077/2006*) that it is inappropriate to "ring-fence" all internal deliberations on public interest grounds. Although the exception in regulation 10(4)(e) applies widely to a class of information, this should not be taken to suggest that the public interest will automatically favour the maintenance of that exception once it has been found to apply to a certain type of communication. The Commissioner does not accept the argument that this information requires protection simply because it is of a general type or subject matter. Consideration must be given to the content of the information in deciding whether the public interest demands its protection, and the balance of public interest may well change over time.
74. Having considered all of the information found to fall under the scope of regulation 10(4)(e) in all the circumstances of this case, the Commissioner has concluded that in the majority of instances, the public interest in the disclosure of the excepted information outweighs that in maintaining the exception. In other cases, the Commissioner has accepted the Ministers' arguments that the public interest in maintaining the exception outweighs that in disclosure of the information.



75. The Commissioner's findings on the public interest in relation to each item found to be excepted from disclosure under regulation 10(4)(e) are set out in the schedule in Appendix 2 of this decision.
76. In reaching his decision on each item, the Commissioner has noted in many instances that this information relates to activities in the period following the First Minister's speech in 2002, rather than the period immediately leading up to the publication of the Review. He found that the passage of time would have diminished the sensitivity that may have earlier existed in relation to these by the time of the Ministers' notification to Mr Edwards of the outcome of their review.
77. For documents where he concluded that the balance of public interest favoured disclosure, the Commissioner does not accept that disclosure at that point would have been likely to have the level of inhibitive and harmful effects on the work of government that was described in the Ministers' submissions. The Commissioner considers many of the documents to be of a type that would be expected to be produced routinely in the aftermath of a significant policy announcement; exploring issues surrounding environmental justice; clarifying concepts, methodology, developing a programme of action and allocating responsibilities. The Commissioner does not accept that disclosure of these documents some years later would be likely to inhibit communication or discussion in the way suggested by the Ministers. He is of the view that release of the majority of the withheld information carries little prospect of harm to ongoing or future internal communications and would note that the information demonstrates officials seeking to develop thinking and action on the issue of environmental justice in a manner which is constructive and thoughtful.
78. Release of these same documents would inform public understanding of the government's response to a major policy announcement in an area of significant public interest. These documents provide insight into the seriousness with which this policy area was taken forward; how the concept of environmental justice was understood and developed in the Scottish context; how an action programme was developed, and the areas in which progress was sought; the way in which decisions were made and by whom; and how progress was monitored. The Commissioner does not agree with the Ministers that disclosure of this information close to the publication of the Review would not add to the public debate on environmental justice. Instead, he takes the view that it would contribute to discussions of whether the policy had been taken forward effectively and in the manner suggested in the First Minister's speech.
79. For other items, the Commissioner has concluded that the public interest in maintaining the exception outweighed those factors in favour of disclosure. While the reasons for this judgement are not uniform, in each case the Commissioner accepts that disclosure would not contribute to public understanding or serve the public interest to the extent that this would outweigh the public interest in allowing the specific communication concerned to remain private. In so doing, he has noted that the information concerned, for example, contains expressions of opinion, the disclosure of which might inhibit future discussion; concerns the drafting process and discussion on how to report progress; or relates to discussions between Cabinet Ministers on taking forward the environmental justice agenda.



80. The Commissioner accepts that release of the information concerned (at the relevant point in March 2006) would be likely to be harmful to the effective conduct of government, and so contrary to the public interest. However, it should be noted that he has not accepted that any particular category of documents should be considered in all cases to be withheld. His decision has considered the actual content in each item, along with the type of communication and the context in which it was created and exchanged.
81. As noted above, the schedule in Appendix 2 sets out the Commissioner's conclusion on the public interest test in relation to each item where the exception in regulation 10(4)(e) was judged to apply. In each case where the Commissioner concluded that the public interest in maintaining the exception was outweighed by that in the disclosure of the information, the Commissioner has found that the exception was misapplied and the Ministers acted in breach of the EIRs by withholding this information. He now requires this information to be provided to Mr Edwards, as specified within the Schedule.
82. Where the Commissioner has concluded that the public interest in maintaining the exception outweighs that in disclosure of the information, he has found that the exception in regulation 10(4)(e) was correctly applied by the Ministers and that they acted in accordance with the EIRs by withholding these items.

DECISION

The Commissioner finds that the Scottish Ministers (the Ministers) did not deal with Mr Edwards' request for information fully in accordance with the EIRs, in that they partially misapplied regulation 10(4)(e) of the EIRs to the information withheld and consequently failed to comply with regulation 5(1) of the EIRs.

He requires the Ministers to provide Mr Edwards with a copy of the information to be disclosed, as specified in Appendix 2, by 7 November 2008.

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Appeal

Should either Mr Edwards or the Scottish Ministers wish to appeal against the Commissioner's 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
22 September 2008



Appendix 1

Relevant statutory provisions

Environmental Information (Scotland) Regulations 2004

2 Interpretation

(1) In these Regulations –

"environmental information" has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on –

- (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
- (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in paragraph (a);
- (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in paragraphs (a) and (b) as well as measures or activities designed to protect those elements;
- ...
- (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in paragraph (a) or, through those elements, by any of the matters referred to in paragraphs (b) and (c);

5 Duty to make available environmental information on request

(1) Subject to paragraph (2), a Scottish public authority that holds environmental information shall make it available when requested to do so by any applicant.



10 Exceptions from duty to make environmental information available

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

[...]

- (4) A Scottish public authority may refuse to make environmental information available to the extent that-

[...]

- (e) the request involves making available internal communications.

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.

[...]

- (6) This section is subject to sections 2, 9, 12 and 14.

2 Effect of exemptions

- (1) To information which is exempt information by virtue of any provision of Part 2, section 1 applies only to the extent that –
- (a) the provision does not confer absolute exemption; and
 - (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.



39 Health, safety and the environment

[...]

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



Appendix 2 Schedule of documents

No.	Document description	Exception applied / Ministers' position	Y/N	PI favours disclosure? Y/N/partial	Decision and any steps required
1	First Minister's Speech.	Published	n/a	n/a	Outside scope of request
2	Email exchange (20 and 21 February 2002).	10(4)(e)	Yes	Yes	Release
3	Minute (22 February 2002).	10(4)(e)	Yes	Partial	Release except for paragraph 4.
4	Email (25 February 2002)	10(4)(e)	Yes	Yes	Release.
5	Email (27 February 2002) & attached document.	10(4)(e)	Yes	Yes	Release
6	Oral PQ answer and background note (S1F-01687)	10(4)(e)	Yes	Yes	Release
7	Email and attached minute (28 February 2002)	10(4)(e)	Yes	Yes	Release
8	Draft Minute (March 2002).	10(4)(e)	Yes	Yes	Withhold
9	Email (8 March 2002)	10(4)(e)	Yes	Yes	Release
10	Email (14 March 2002).	10(4)(e)	Yes	No	Withhold
11	Email (21 March 2002) and attached grant application form	10(4)(e)	Yes	Partial	Release, excluding bank account details set out in Box 12 of attached form.
12	Draft speech for First Minister, 2 September 2002.	10(4)(e)	Yes	No	Withhold
13	Emails (28 March 2002).	10(4)(e)	Yes	Yes	Release
14	Minute (8 April 2002).	10(4)(e)	Yes	Partial	Release, excluding final sentence of paragraph 2.
15	Email 17 April 2002 two attachments	10(4)(e)	No	N/a	Release
16	Email exchange (2 May 2002)	10(4)(e)	Yes	No	Withhold
17	Email 21 May 2002 [16:34]	10(4)(e)	Yes	Yes	Release
18.	Minute (23 May	10(4)(e)	Yes	Yes	Release

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	2002)				
19	Email exchange (24 and 30 May 2002)	10(4)(e)	Yes	Yes	Release
20	Sustainable Development Commission – Vision for Sustainable Regeneration (June 2002)	Published	n/a	n/a	Outside scope of request
21	Email (5 July 2002 [15:22])	10(4)(e)	Yes	Yes	Release
22	Email exchange (11 July 2002)	10(4)(e)	Yes	No	Withhold
23	Email (24 July 2002) with attached note and published article	10(4)(e) (email and note)/ Article published	Yes	Yes	Release email. And attached note. Attached article: outside scope of request.
24	Email exchange (8, 19 and 30 July 2002)	10(4)(e)	Yes	Yes	Release
25	Email and attachment (31 July 2002)	10(4)(e)	Yes	Yes	Release
26	Email and 2 attachments (31 July 2002)	10(4)(e)	Yes	Yes	Release.
27	Email and attachment (31 July 2002)	10(4)(e)	Yes	Yes	Release
28	Emails (3 July and 1 August 2002) and attachment.	10(4)(e)	Yes	Yes	Release
29	Email (11 July and 1 August 2002) and 2 attachments	10(4)(e)	Yes	Yes	Release
30	Email (1 August 2002). Includes duplicates of items 26 and 21, which are here disregarded.	10(4)(e)	Yes	No	Withhold
31	Email and attachment (6 August 2002)	10(4)(e)	Yes	Yes	Release
32	Email exchange (6 and 7 August 2002)	10(4)(e)	Yes	Yes	Release
33	Email (7 August 2002_) and attachment	10(4)(e)	Yes	Yes	Release
34	Email (13 August 2002)	10(4)(e)	Yes	Yes	Release

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35	Emails (29 July and 15 August 2002)	Released	n/a	n/a	n/a
36	Notes from seminar	10(4)(e)	Yes	No	Withhold
37	Presentation (26 August 2002)	10(4)(e)	Yes	Yes	Release
38	Email (28 August 2002)	Released	n/a	n/a	n/a
39	First Minister's speech (2 September 02)	Published	n/a	n/a	Outside scope of request
40	Copy of First Minister's speech (2 September 02)	Published	n/a	n/a	Outside scope of request
41	Statement on South African Summit	Published	n/a	n/a	Outside scope of request
42	Email (6 September 2002)	10(4)(e)	Yes	Yes	Release
43	Draft Minute (August 2002)	10(4)(e)	Yes	No	Withhold
44	Emails (20 September 2002)	Released	n/a	n/a	n/a
45	Email exchange (23 September 2002)	10(4)(e)	Yes	Partial	Release, excluding fourth paragraph of email timed 11:05 (starting "As you")
46	FOE correspondence	10(4)(e)	No	n/a	Release
47	Email exchange (24 September 2002) enclosing minute.	10(4)(e)	Yes	Yes	Release
48	Email exchange (19 and 24 September 2002)	10(4)(e)	Yes	Yes	Release
49	Annotated minute (24 September 2002) and attached paper.	10(4)(e)	Yes	Partial	Release, excluding handwritten notes on minute.
50	Article for Social justice annual report 2002	Published	n/a	n/a	Outside scope of request
51	Minute (24 September 2002)	10(4)(e)	Yes	Yes	Release
52	Email exchange (24 and 25 September 2002)	10(4)(e)	Yes	Partial	Release
53	Emails (25, 26 and 30 September 2002)	10(4)(e)	Yes	Partial	Release email of 30 September 2002 [11:13]
54	Email exchange (30 September 2002)	10(4)(e)	Yes	No	Withhold
55	Email exchange on	10(4)(e)	Yes	Partial	Release emails of 30

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	community planning draft guidance (30 September and 1 October 2002) Includes duplicate of part of item 54.				September [16:41], and 1 October [14:08] Withhold content duplicating item 54.
56	Email exchange (30 September - 7 October 2002) and attachment	10(4)(e)	Yes	Yes	Release
57	Email (7 October 2002)	10(4)(e)	Yes	Yes	Release
58	Emails (9-15 October 2002)	10(4)(e)	Yes	No	Withhold
59	Emails (6 and 7 November 2002)	10(4)(e)	Yes	No	Withhold
60	Press release	Published	n/a	n/a	Outside scope of request
61	Minute (November 2002)	10(4)(e)	Yes	Partial	Release minute but Withhold Annex A
62	BBC article (31 October 02)	Published	n/a	n/a	Outside scope of request
63	Email exchange (31 October 2002 and 1 November 2002)	10(4)(e)	Yes	Partial	Release, excluding text from "In another" (sentence 4) to end of first paragraph of email dated 1 November 2002.
64	News Release with annotations	Published	n/a	n/a	Outside scope of request
65	Email exchange (1 and 8 November 2002)	10(4)(e)/outside scope of request	Yes/ Within scope of request	Yes	Release
66	Email (19 November 2002)	10(4)(e)	Yes	Yes	Release
67	Email exchange (19 and 20 November 2002)	10(4)(e)/outside scope of request	Yes/ Partly outside scope of request	Yes	Email of 19 November 2002 outside scope of request. Release email of 20 November 2002.
68	Letter to European Commission (undated)	10(4)(e)/outside scope of request	Outside scope of request.	N/a	Outside scope of request
69	Emails and attached document (November 2006)	10(4)(e)/outside scope of request	Outside scope of request.	N/a	Outside scope of request.
70	Email (29 November 2002)	10(4)(e)	Yes	No	Withhold
71	Briefing from Friends	Published	n/a	n/a	Outside scope of request

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	of the Earth website				
72	Friends of the Earth webpages	Published	n/a	n/a	Outside scope of request
73	Response to FM speech of 18 February 2002	Published	n/a	n/a	Outside scope of request
74	FM's speech 18 February 2002.	Published	n/a	n/a	Outside scope of request
75	Email (18 February) and attachment (FM's speech.	Email released, attachment published	n/a	n/a	Attachment outside scope of request
76	Email (27 February 2002) and attached conference proceedings	Released	n/a	n/a	n/a
77	Sustainable Development Commission paper	Published	n/a	n/a	Outside scope of request
78	Article from Joseph Rowntree Foundation	Published	n/a	n/a	Outside scope of request
79	Article in Social Justice annual report 2002	Published	n/a	n/a	Outside scope of request
80	Minute (31 January 2003)	10(4)(e)	Yes	Yes	Release
81	Email (24 March 2003) and paper	10(4)(e)/Outside scope of request	Yes/within scope of request	Yes	Release
82	Email (31 July 2003) and attached minute	10(4)(e)	Yes	Yes	Release
83	Letter (19 September 2003) and enclosed conference programme	Released	n/a	n/a	n/a
84	First Minister's speech 28 September 2003.	Released	n/a	n/a	n/a
85	Email exchange (19 September and 6 October 2003)	10(4)(e)	Yes	Yes	Release
86	Presentation slides (15 September 2004)	Released	n/a	n/a	n/a
87	Email exchange (18 and 25 October and 18 November 2004)	10(4)(e)	Yes	No	Withhold
88	BBC article	Published	n/a	n/a	Outside scope of request
89	Letter from member of the public and note	10(4)(e)/outside scope	Outside scope of	N/a	Outside scope of request

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	on issues raised	of request	request		
90	Internal note (11 January 2005)	10(4)(e)	Yes	Yes	Release
91	Email (12 January 2005)	10(4)(e)	Yes	No	Withhold
92	Email of 2 February 2005 [9:21]	10(4)(e)	Yes	Yes	Release
93	Email exchange (24 August 2005) and attached minute (16 June 2005)	10(4)(e)	Yes	Yes	Release
94	Strathclyde Environmental Research Seminar (28 October 2005) – Guest list and presentation	Released	n/a	n/a	n/a
95	Published article from journal <i>Local Environment</i>	Published	n/a	n/a	Outside scope of request
96	Article on Friends of the Earth website	Published	n/a	n/a	Outside scope of request
97	Email exchange (13 and 14 March 2002)	10(4)(e)	Yes	No	Withhold
98	Email (7 March 2002)	10(4)(e)	Yes	Yes	Release
99	Email (14 March 2002) duplicating item 10 and paper	10(4)(e)	Yes	No	Withhold
100	Minute (25 March 2002) Email (12 March 2002) and attached draft paper. Minute of 28 February 2002 (duplicating item 7) with annotations not present in item 7.	10(4)(e)	Yes	Partial	Disclose annotated minute of 28 February 2002. Withhold minute of 25 March, email and attached draft paper.
101	Email (27 March 2002). Attached draft paper.	10(4)(e)	Yes	No	Withhold
102	Emails (27 and 28 March 2002) and attached draft paper	10(4)(e)	Yes	No	Withhold
103	Email exchange (19 September, 18 and 28 October 2002) and attached minute and action plan (18	10(4)(e)	Yes	No	Withhold

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	October 2002)				
104	Minute (19 December 2002)	10(4)(e)	Yes	Yes	Release
105	Email (18 December 2002) and attachments	10(4)(e)	Yes	No	Withhold
106	Minister (23 December 2002) and attachment	10(4)(e)	Yes	No	Withhold
107	Email 23 December 2002) and attachments	10(4)(e)	Yes	No	Withhold
108	Email (6 January 2003) and three attachments.	10(4)(e)	Yes	No	Release
109	Email (6 January 2003) and three attachments. Duplicates item 108 but with annotations.	10(4)(e)	Yes	Yes	Withhold
110	Minute (6 January 2003), email exchange and attached document.	10(4)(e)	Yes	No	Withhold
111	Email (30 January 2003) and duplicate of item 109	10(4)(e)	Yes	Yes	Release
112	Email (30 January 2003) and attached revised minute.	10(4)(e)	Yes	Yes	Release
113	Note (16 April 2003) and enclosed documents for filing.	10(4)(e)	Yes	Yes	Release.
114	Email (17 July 2003)	10(4)(e)	Yes	Partial	Release email of 17 July 2003 [13:26] excluding 1 st and 3 rd paragraphs. Withhold remaining parts and original message.
115	Email (12 February 2004) and attachment	10(4)(e)	Yes	Yes	Release
116	Email exchange (11 March 2004)	10(4)(e)	Yes	Yes	Release
117	Emails (24 March, 21 and 26 April 2004) and Annex	10(4)(e)	Yes	Partial	Withhold emails of 21 April 2004 and section headed "Sensitivities" in Annex A. Release emails of 24 and 26 April 2004 and remaining parts of Annex A

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118	Emails (28 and 30 April 2004) and 3 attachments	10(4)(e)	Yes	Yes	Release.
119	Minute (25 May 2004) (Enclosed table duplicates part of item 118 and disregarded here)	10(4)(e)	Yes	No	Withhold
120	Email (6 September 2004) and attached table	10(4)(e)	Yes	Yes	Release
121	Paper to Cabinet Sub-Committee on sustainable Scotland (5 September 2004) and minutes.	10(4)(e)/ Minutes published	Yes Minutes are outside scope of request	Yes	Release paper Minutes are outside scope of request.
122	Email (18 October 2004) considered in item 87, here with annotations.	10(4)(e)	Yes	No	Withhold
123	Email (17 February 2005) and attached draft document and contact list.	10(4)(e)	Yes	Partial	Release email and attached contact list Withhold attached draft.
124	Email exchange (4 and 10 March 2005) and attached draft document	10(4)(e)	Yes	Partial	Release emails Withhold attachment.
125	Email exchange (10 and 14 March 2005)	10(4)(e)	Yes	Partial	Release email of 10 March excluding text "options include" to "exercise". Withhold email of 14 March
126	Email exchanges (16 March -18 May 2005)	10(4)(e)	Yes	No	Withhold
127	Email and attachment (30 September 2005)	10(4)(e)	Yes	Yes	Release email Withhold attachment
128	Email (1 December 2005), with attached minute and document	10(4)(e)	Yes	No	Withhold
129	Email exchange (1 - 5 December 2005)	10(4)(e)	Yes	No	Withhold
130	Email exchange (7 - 9 December 2005)	10(4)(e)	Yes	No	Withhold
131	Email (29 November 2002). Includes	10(4)(e)	Yes	No	Withhold

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	duplicate of email dated 19 November 2002 considered at 66 above – here disregarded.				
132	Email exchange (29 November December 2002)	10(4)(e)/ outside scope of request	n/a	N/a	Outside scope of request.
133	Email (2 December 2002 [16:40])	10(4)(e)	Yes	No	Withhold
134	Email (2 December 2002)	10(4)(e)	Yes	No	Withhold
135	Email exchange (2 and 3 December 2002). Includes duplicate of email dated 19 November 2002 considered at 66 above – here disregarded.	10(4)(e)	Yes	No	Withhold.
136	Email exchange (2 and 3 December 2002) – including duplicates of items 66 and 135, here disregarded.	10(4)(e)	Yes	No	Withhold
137	Minute (5 December 2002)	10(4)(e)	Yes	Yes	Release
138	Email exchange (6 December 2002]) includes email of 4 December [11:52] contained in item 139, here disregarded.	10(4)(e)	Yes	No	Withhold
139	Email exchange with SNH (4 and 9 December 2002)	10(4)(e)	No	N/a	Release
140	Email exchange (11 December 2002)	10(4)(e)	Yes	No	Withhold
141	Email (13 December 2002)	10(4)(e)	Yes	Yes	Release
142	EJ in the UK agenda with annotation (18 December 2002)	Released	n/a	n/a	n/a
143	Emails (18 December 2002)	10(4)(e)	Yes	Yes	Release
144	First page of chapter on social integration	Published	n/a	n/a	Outside scope of request

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