

Decision Notice



Decision 064/2011 Mr David Rule and the Scottish Ministers

Information on the Copenhagen Climate Change Summit and relations between Scotland and the United Kingdom and China

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Summary

Mr David Rule made two separate requests to the Scottish Ministers for information concerning the Copenhagen Climate Change Summit (the Summit) and relations between Scotland and the United Kingdom and China. In responding to the requests, the Ministers disclosed some information to Mr Rule, but withheld the remainder under a number of exemptions in FOISA. Following a review, Mr Rule remained dissatisfied and applied to the Commissioner for a decision.

During the investigation, the Commissioner took the view that the withheld information comprised environmental information and asked for the Ministers' comments as to whether the request should have been dealt with under the EIRs. The Ministers agreed that the information was environmental information and indicated that they wished to rely on section 39(2) of FOISA.

Following an investigation, the Commissioner found that the Ministers should have dealt with the requests under the EIRs and that, in initially failing to do so, they had failed to comply with the EIRs. The Commissioner also found that the Ministers had incorrectly withheld some information, to which they had applied the exceptions under regulations 10(4)(d), 10(4)(e), 10(5)(f) and 11(2) of the EIRs. He required the Ministers to disclose this information to Mr Rule. The Commissioner also required the Ministers to disclose certain information to which no exceptions under the EIRs had been applied.

However, the Commissioner found that the Ministers were entitled to withhold some of the information under regulations 10(4)(d), 10(4)(e) and 11(2) of the EIRs. He concluded that the Ministers had acted in accordance with the EIRs by withholding this information.

The Commissioner also found that the Ministers had failed to deal with the information requests made by Mr Rule in accordance with the EIRs, by failing to provide the requested information, or to respond to Mr Rule's requests for information within the timescales laid down by regulations 5(2) and 13(a) of the EIRs. Additionally, the Commissioner found that the Ministers failed to comply with the technical requirements of regulation 13(b) and (c) in responding to Mr Rule's requirement for review in relation to his first information request.

Relevant statutory provisions and other sources

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 Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (Interpretation) (definitions (a), (b) and (c) of “environmental information”); 5(1) and (2)(b) (Duty to make environmental information available on request), 10(1), (2), (3), (4)(d), (4)(e) and (5)(f) (Exceptions from duty to make environmental information available); 11(2), (3)(a)(i) and (b) (Personal data) and 13(a), (b) and (c) (Refusal to make information available)

Data Protection Act 1998 (the DPA) sections 1(1) (Basic interpretative provisions) (definition of “personal data”); Schedules 1 (The data protection principles) (the first principle) and 2 (Conditions relevant for purposes of the first principle: processing of any personal data) (Condition 6(1))

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

The Aarhus Convention: an Implementation Guide

Department for Environment, Food and Rural Affairs’ “Guidance to the Environmental Information Regulations 2004”

Background

1. This decision concerns two separate applications for decisions made by Mr Rule concerning the Ministers responses to two similar requests for information. These are described as Mr Rule’s first and second information requests in what follows below.

Mr Rule’s first information request

2. On 11 January 2010, Mr Rule emailed the Ministers requesting all information held by the First Minister’s Office as of 1 December 2009 regarding the Summit and relations between Scotland and the United Kingdom and China.
3. As the Ministers had not responded to his request for information, Mr Rule requested a review of their failure to respond on 9 February 2010.
4. The Ministers notified Mr Rule of the outcome of their review on 19 March 2010. They provided Mr Rule with some information but advised him that the remainder was being withheld under the exemptions in sections 29, 32(1)(a) and 41 of FOISA.
5. On 23 March 2010, Mr Rule wrote to the Commissioner, stating that he was dissatisfied with the outcome of the Ministers’ review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA. By virtue of regulation 17 of the EIRs, Part 4 of FOISA applies to the enforcement of the EIRs as it applies to the enforcement of FOISA, subject to certain specified modifications.



6. The application was validated by establishing that Mr Rule 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.

Mr Rule's second information request

7. On 19 March 2010, Mr Rule emailed the Ministers requesting all information held by the First Minister's Office, produced on or after 2 December 2009 regarding the Summit.
8. As the Ministers had not responded to his request for information, Mr Rule requested a review of their failure to respond on 22 April 2010.
9. The Ministers notified Mr Rule of the outcome of their review on 26 April 2010. The Ministers advised Mr Rule that the requested information was considered exempt from disclosure under sections 25, 29(1)(b) and 30(b)(i) of FOISA.
10. On 15 June 2010, Mr Rule wrote to the Commissioner, stating that he was dissatisfied with the outcome of the Ministers' review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
11. The application was validated by establishing that Mr Rule 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

12. Given that the subject matter of the requests under consideration in these cases overlapped considerably, the two cases have been conjoined for the purposes of this decision.
13. On 8 April 2010, the Ministers were notified in writing that Mr Rule's first application had been received and were asked to provide the Commissioner with any information withheld from him. The Ministers responded with the information requested (which was contained within 13 numbered documents) and the case was then allocated to an investigating officer.
14. On 6 July 2010, the Ministers were advised that Mr Rule's second application had been received and were asked to provide the Commissioner with any information withheld from him. The Ministers responded with the information requested (which was contained within 8 numbered documents) and the case was then allocated to the same investigating officer.
15. In each case, the investigating officer subsequently contacted the Ministers, giving them an opportunity to provide comments on the applications (as required by section 49(3)(a) of FOISA) and asking them to respond to specific questions.



16. In each case, the investigating officer pointed out that, having considered the requests and the nature of the withheld information, the Commissioner was likely to find this to be environmental information and therefore subject to the EIRs. The Ministers were asked to comment on this point and to provide submissions as to whether they considered that the withheld information fell within the scope of any of the exceptions contained in the EIRs. The Ministers were also asked whether they wished to apply the exemption in section 39(2) of FOISA, which applies to information that is environmental information which the authority is obliged to make available to the public in accordance with the EIRs.
17. In relation to Mr Rule's first information request, the Ministers initially responded by stating that they did not consider the information to be environmental information and provided submissions on the exemptions under FOISA which they considered applicable to the withheld information.
18. Following further correspondence with the investigating officer, the Ministers reconsidered their position, accepted that the information was environmental information and confirmed that they now considered the information covered by the first request to be exempt under section 39(2) of FOISA. The Ministers indicated that they considered the withheld information to be excepted from disclosure under regulations 10(4)(d), 10(4)(e), 10(5)(f) and 11(2) of the EIRs and provided submissions on the application of these provisions.
19. In relation to Mr Rule's second information request, the Ministers responded on 3 September 2010 confirming that they considered the information to be environmental information and also confirming that they considered the information covered by the second request to be exempt under section 39(2) of FOISA. The Ministers stated that they considered the majority of the withheld information to be excepted from disclosure under regulations 10(4)(d) and 10(4)(e) of the EIRs and provided submissions on the application of these exceptions.
20. During the investigation, the Ministers disclosed additional information to Mr Rule which has not been considered any further in this decision. This comprises the information within documents 1 and 2 in the first information request and document 4 in the second information request.
21. Additionally, the Ministers provided Mr Rule with the information contained in document 10 in his first information request, subject to the redaction of certain personal data. Mr Rule expressed dissatisfaction with this redaction and indicated that he wished the Commissioner to investigate whether the Ministers had been justified in withholding the redacted information. This information is therefore considered in what follows.
22. Within their submissions regarding Mr Rule's second information request (dated 3 September 2010), the Ministers stated that they were considering the release of the majority of the information within document 5 but had not yet completed their deliberations. The Ministers did not apply any of the exceptions in the EIRs or provide any submissions to the Commissioner in respect of document 5.



23. On 6 August 2010, the investigating officer sought an update on the Ministers' position with respect to this information; asking whether any parts of document 5 had been disclosed, and if not, whether the Ministers wished to apply any exceptions within the EIRs to its contents. The investigating officer also noted that the Ministers' schedule of documents had referred to a covering email associated with the information therein but this had not been supplied. A copy of the covering email was requested.
24. Reminders regarding these requests were sent to the Ministers on 26 August and 18 December 2010. Having received no response, a final reminder was sent on 10 January 2011. This indicated that, in the absence of any submissions to explain the Ministers' reasons for withholding this information under the EIRs, the Commissioner would require disclosure of this information in his decision. It was noted that, most unusually, the decision would also require disclosure of the covering email, without the Commissioner having had the opportunity to consider its content.
25. No substantive response to this final request had been received by the time of this decision being issued.
26. The investigating officer also contacted Mr Rule during the investigation seeking his submissions on the matters to be considered in the case. Mr Rule's submissions, along with those of the Ministers are summarised and considered (where relevant) in the Commissioner's analysis and findings section below.

Commissioner's analysis and findings

27. In coming to a decision on this matter, the Commissioner has considered all of the withheld information and the submissions made to him by both Mr Rule and the Ministers and is satisfied that no matter of relevance has been overlooked.

FOISA or EIRs?

28. The Commissioner set out his thinking on the relationship between FOISA and the EIRs in some detail in *Decision 218/2007 Professor A D Hawkins and Transport Scotland* and need not repeat it in full here.
29. In this case, in relation to both information requests, the Ministers confirmed in the course of the investigations that they wished to withhold the information requested, as environmental information, under section 39(2) of FOISA. For this exemption to apply, any information requested would require to be environmental information as defined in regulation 2(1) of the EIRs, which is reproduced in the Appendix below.



30. Given the subject matter of the information withheld from Mr Rule, and having considered that information, the Commissioner's view is that the information would meet the definition of environmental information within paragraphs (a), (b) and (c) of regulation 2(1) of the EIRs, being information on the state of the elements of the environment referred to in paragraph (a), factors affecting or likely to affect the elements of the environment referred to in paragraph (a) of regulation 2(1) and measures affecting or likely to affect the elements and factors referred to in paragraphs (a) and (b) of regulation 2(1).
31. While the Commissioner is pleased to note that the Ministers accepted this in the course of the investigation, he must also note that they did not do so (and act accordingly under the EIRs) when initially dealing with Mr Rule's information requests and his subsequent requests for review. Consequently, the Commissioner finds that in failing to identify the information requested as environmental information (as defined in regulation 2(1)) and deal with the request accordingly under the EIRs, the Ministers failed to comply with regulation 5(1) and 2(b) of the EIRs.

Section 39(2) of FOISA - environmental information

32. The exemption in section 39(2) of FOISA provides that environmental information as defined by regulation 2(1) of the EIRs is exempt from disclosure under FOISA, thereby allowing any such information to be considered solely in terms of the EIRs. This exemption is subject to the public interest test required by section 2(1)(b) of FOISA. In these cases the Commissioner finds that the Ministers were entitled to apply the exemption to the withheld information, given his conclusion that it is properly considered to be environmental information.
33. As there is a separate statutory right of access to environmental information available to the applicant in this case, the Commissioner also accepts that the public interest in maintaining this exemption and dealing with the request in line with the requirements of the EIRs outweighs any public interest in disclosure of the information under FOISA. The Commissioner has consequently proceeded to consider this case in what follows solely in terms of the EIRs.
34. Having accepted that the information is environmental, the Ministers submitted that the exceptions in regulations 10(4)(d), 10(4)(e) and 10(5)(f) of the EIRs applied to various parts of the withheld information. The Ministers also submitted that the provisions of regulation 11(2) were applicable to certain personal data contained in the withheld information.
35. The Commissioner first considered the application of regulation 10(4)(d).

Regulation 10(4)(d)

36. Regulation 10(4)(d) of the EIRs provides an exception from the duty to make environmental information available where the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data.



37. 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)).
38. Regulation 13(d) provides that where a Scottish public authority refuses to make information available on the basis of the exception in regulation 10(4)(d), the authority shall state the time by which it considers that the information will be finished or completed.
39. The Ministers applied this exception to documents 3, 4, 8, 9, 11 and 12 in the first information request and to documents 1, 3, 6 and 7 in the second information request.
40. The Ministers applied this exception to documents which they maintained were drafts of documents that were either issued in their final form or were never issued, or related to documents that were either issued in their final form or never issued. The Ministers stated that they considered the exception to apply as the relevant information constituted “unfinished documents”. The Ministers made no reference to the requirement contained in regulation 13(d) of the EIRs.
41. In this case and others which consider the application of regulation 10(4)(d) of the EIRs, the Commissioner has considered the relevant paragraphs of *The Aarhus Convention: an Implementation Guide*¹ for guidance on the application of exception in regulation 10(4)(d).
42. This guide (at page 58) indicates that the mere status of something as a draft does not automatically bring it under the exception: other articles of the Convention require public access to certain drafts. It goes on to suggest that the term “materials in the course of completion” refers to individual documents that are actively being worked on by the public authority, or will have more work done on them within a reasonable time-frame. Once these documents are no longer in the “course of completion”, the guide takes the view that they may be released, even if they are still unfinished and even if the decision to which they pertain has not yet been resolved.
43. However, the Commissioner has taken account of the views of the Information Tribunal in Decision EA/2008/0052² which considered the application of the exception in regulation 12(4)(d) of the Environmental Information Regulations 2004 (which is the equivalent of regulation 10(4)(d) of the EIRs). The Tribunal’s view was that if the exception was interpreted too restrictively, no draft of any document could ever fall within the exception once there was a final version. The Commissioner’s view is that where there is a completed version of a document, the drafts of that document can also be said to be that finished document in the course of completion.

¹ <http://www.unece.org/env/pp/acig.pdf>

² [www.informationtribunal.gov.uk/DBFiles/Decision/i307/Sec%20of%20State%20for%20Transport%20v%20IC%20\(EA-2008-0052\)%20-%20Decision%2005-05-09.pdf](http://www.informationtribunal.gov.uk/DBFiles/Decision/i307/Sec%20of%20State%20for%20Transport%20v%20IC%20(EA-2008-0052)%20-%20Decision%2005-05-09.pdf)



44. In this case, the Commissioner accepts that some of the documents to which this exception has been applied are draft documents. These are documents 3, 4, 8 and 9 in the first information request and documents 1, 3 (draft press release only), 6 (draft press release only) and 7 (draft newspaper article only) in the second information request. Consequently he accepts that these comprise material which is still in the course of completion and therefore fall within the scope of regulation 10(4)(d).
45. However, the Commissioner is unable to accept that the exception is engaged in relation to the emails contained in documents 11 and 12 in the first information request and the emails to which draft press releases and an article were attached in documents 3, 6 and 7 in the second information request. The Commissioner notes that this exception can only apply to “material which is still in the course of completion, to unfinished documents or to incomplete data”. His view is that, whilst the emails may refer and relate to documents which the Commissioner has accepted are in the course of completion, they are not, in themselves, material which is still in the course of completion, unfinished documents or incomplete data for the purposes of the exception.
46. As the Ministers have applied this exception, and no other, to document 6 in the second information request, the Commissioner concludes that the Ministers acted in breach of the EIRs by withholding the email therein, and he requires the Ministers to disclose this to Mr Rule.

Consideration of the public interest test

47. Having upheld the use of the exception contained within regulation 10(4)(d) to the information noted at paragraph 44 above, the Commissioner is required to consider the public interest test required by regulation 10(1)(b) of the EIRs. The test 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.
48. In their submissions, the Ministers argued that the disclosure of draft letters would add nothing to the public understanding of the issues involved. They submitted that there is an overriding public interest in allowing Ministers and officials some private space to develop their thinking and arrive at a settled view without their discussions or incomplete lines being released into the public domain with the risk that this would undermine or lead to misunderstanding of their settled views.
49. In his submissions, Mr Rule argued that there is a need for transparency and openness of government. He considered any damage to relations between the Scottish and UK Governments would be limited and that the public interest lay in favour of disclosure of the information.
50. In this case, the Commissioner must consider the public interest as it stood on the dates when the Ministers issued the notices stating the outcome of their reviews i.e. 19 March 2010 (in relation to the Mr Rule’s first information request) and 26 April 2010 (in relation to Mr Rule’s second information request)



51. In considering the public interest test in relation to the information found to be excepted from disclosure under regulation 10(4)(d), the Commissioner accepts that there is a general public interest in making information available to the public and in transparency and accountability in decision making, but this must be balanced against any detriment to the public interest as a consequence of disclosure.
52. In this case, the Commissioner's view is that there is no particular public interest in the disclosure of drafts of letters that were never sent. The Commissioner considers that there is a public interest in ensuring that officials are able to create draft correspondence with candour and that the disclosure of these draft letters may inhibit such candour in future. In any case, the Commissioner is of the opinion that they provide no further substantive information in addition to that which has already been placed in the public domain.
53. Accordingly, the Commissioner is of the view that the public interest in the disclosure of the information is outweighed by that in maintaining the exception in relation to documents 8 and 9 in the first information request and document 1 in the second information request. The Commissioner therefore finds that the Ministers acted in accordance with the EIRs by withholding this information when responding to Mr Rule's information requests.
54. However, having balanced the public interest in maintaining the exception against that in disclosure of the withheld information contained in the remaining information to which the exception in regulation 10(4)(d) was correctly applied, the Commissioner has concluded that the public interest in disclosing this information outweighs that in maintaining the exception.
55. The Commissioner notes that, prior to the Summit (which took place between December 7 and December 18 2009), there had been debate between the Scottish and UK Governments concerning the issue of Scottish Ministerial representation at the Summit. However, in both cases, at the time the Ministers conducted their reviews, several months had elapsed since the conclusion of the Summit and the public debate concerning representation at the Summit was no longer a live issue
56. The Commissioner also notes that document 1 in Mr Rule's first information request (a letter from the First Minister to the Prime Minister in September 2009) was released into the public domain by the Scottish Ministers on 27 September 2009³. This letter expresses disappointment at the fact that the UK Government has not responded to requests from the Scottish Government to join the UK delegation at the Summit. Additionally, the substance of document 2 in the first information request (a letter from the Northern Ireland Environment Minister)⁴ is also in the public domain.

3 http://scotland.wwf.org.uk/wwf_articles.cfm?unewsid=3326

4 <http://news.stv.tv/scotland/127708-first-minister-claims-support-in-climate-talks-bid/>



57. In their submissions to the Commissioner, the Ministers had indicated that document 3 in the first information request was a draft of document 1 in the first information request which is referred to at paragraph 56 above. However, on checking the contents of both documents, it appeared to the investigating officer that the documents were entirely different. Additionally, a further withheld letter provided by the Ministers (document 5 in the first information request), appeared to suggest that document 3 was in fact a draft of an entirely different letter which had been sent in a finalised version.
58. The investigating officer brought this to the attention of the Ministers who agreed that the conclusion the investigation officer had reached appeared to be correct, but further comments on this point were not received in response to the investigating officer's request.
59. The Commissioner has not been given access to the finalised version of document 3 in order to confirm whether there are any differences between it and the draft version. However, the references to what the Commissioner understands to be the finalised version of document 3 which are made in document 5 in the first information request, suggest that the content of the final version of the letter in document 3 was broadly consistent with the content within document 3. In the absence of further comments from the Ministers, the Commissioner is unable to conclude that the disclosure of this draft letter would undermine the ability of Ministers and officials to candidly discuss options in the preparation of correspondence of this type.
60. Document 4 in the first information request is a draft of a letter which was subsequently issued without alteration (the final version – document 6 in the first information request - has also been withheld by the Ministers under a different exception in the EIRs and will be considered later in this decision). Since document 4 does not differ from document 6, the Commissioner is again unable to accept that disclosing this version of this particular letter would undermine the ability of Ministers and officials to candidly discuss options in the preparation of such correspondence.
61. Turning to the substance of the draft letters in documents 3 and 4, it is the Commissioner's view that these simply continue the discussion and debate prompted by the First Minister's initial letter. Given that the Ministers considered it expedient to publicly disseminate the initial letter, the Commissioner is unable to conclude that the public interest will be harmed by the disclosure of documents 3 and 4 in the first information request. Indeed, he considers this will provide insight into the discussions between the two Governments concerning attendance at the Summit thereby contributing to the public interest.
62. The Commissioner is also unable to conclude that there would be any detriment to the public interest by the disclosure of the draft press releases and newspaper article in documents 3, 6 and 7 in the second information request. These are virtually identical to the final published versions and the Commissioner does not consider that their disclosure would harm the public interest.



63. In the light of the observations above, the Commissioner has concluded that the public interest in making the information available outweighs the limited public interest that has been identified in maintaining the exception in regulation 10(4)(d). Accordingly, he concludes that the Ministers were not entitled to withhold documents 3 and 4 in the first request, or the draft documents contained within documents 3, 6 and 7 in the second request in terms of regulation 10(4)(d).
64. As noted above, the Ministers have applied this exception, and no other, to document 6 in the second information request. In the light of his conclusions set out in paragraph 63, the Commissioner has found that the Ministers also acted in breach of the EIRs by withholding the draft press release within that document. He requires them to disclose the draft press release to Mr Rule, as well as the email. Additionally, as no other exception has been applied to document 3 in the first information request, the Commissioner has concluded that the Ministers withheld this in breach of the EIRs and he requires the Ministers to disclose this information to Mr Rule.

Regulation 10(4)(e)

65. 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.
66. For information to fall within the scope of the exception in regulation 10(4)(e), it need only be established that the information is an internal communication. However, the regulation does not expand upon what is meant by internal communications.
67. In this case, the Commissioner has considered the guidance contained in *The Aarhus Convention: An Implementation Guide* which 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."
68. The Ministers applied this exception to documents 4, 5, 6, 7, 7a, 8, 11, 12 and 13 in the first information request and to documents 2, 3, 7 and 8 in the second information request. Since the Commissioner has already found that document 8 in the first request was correctly withheld under regulation 10(4)(d), he has excluded it from his consideration of regulation 10(4)(e).



69. The Ministers argued that all of the relevant documents comprised internal communications for the purposes of the EIRs, noting that a number of these documents were communications within the Scottish Government. The Ministers also considered that the exception applied to a number of documents comprising communications between the Scottish and UK Governments. They argued that these communications between the two governments were “internal communications” for the purposes of the exception because of the need for the Scottish Government to work so closely with the UK Government departments on environmental and European matters. The Ministers stated that there is nothing in the EIRs or related guidance to indicate that authorities need to be part of the same UK administration for this exception to apply.
70. The Ministers argued that there was support for their approach in Chapter 7 of the Department for Environment, Food and Rural Affairs’ (DEFRA) “Guidance to the Environmental Information Regulations 2004”. This states (at paragraph 7.4.5.5):
- “The purpose of this exception covers government administration in the broad sense. The Directive 2003/4/EC on which the Regulations are based, and the exception for “internal communications” are intended to apply equally to all Member States. Its scope should not vary from country to country depending on how particular governments divide their internal functions. Member States include some countries with simple structures of government and others, like the UK and Germany, which are large and complex. Government structure should not determine the scope of the exception for internal communications in relation to information law. It appears that the proper scope of the exception for “internal communications” is communications internal to the whole area of the state covered by the definition of “public authority” in Article 2(2)”.*
71. The Commissioner is satisfied that the majority of the documents to which this exception was applied are communications within the Scottish Government and therefore clearly fall within the scope of the exception.
72. In relation to the communications between the Scottish and UK Governments (documents 5, 6, 7, 7a and 13 in the first information request) the Commissioner notes that the DEFRA guidance referred to by the Ministers is not binding on him and has no legal status in relation to the EIRs.
73. 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 he 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.



74. Having considered the Ministers submissions and the nature of the communications under consideration, the Commissioner is unable to accept in this case, that the correspondence between the Scottish and UK Governments can be classed as internal communication for the purposes of regulation 10(4)(e).
75. The Commissioner acknowledges that both governments have an interest in the matters discussed in the correspondence, and that they will work together on matters of mutual interest, which include environmental and European matters. However, he is aware of nothing particular in the administrative or legal relationship between the Ministers and the UK Government, or in the particular communications under consideration that gives credence to a suggestion that the communications under consideration should be regarded as internal, rather than between two distinct public authorities with an interest in matters of mutual concern.
76. As such, the Commissioner is unable to conclude that communications between the Scottish and UK Governments that are under consideration in this case are internal communications for the purposes of the exception.
77. The Commissioner therefore concludes that the exception in regulation 10(4)(e) has been wrongly applied by the Ministers to the communications between the Scottish and UK Governments within documents 5, 6, 7, 7a and 13 in the first information request.. As the Ministers have applied this exception and no others to documents 5, 6 and 13 in the first information request, he concludes that the Ministers acted in breach of the EIRs when withholding the information therein, and he now requires them to disclose this information to Mr Rule.

Consideration of the public interest test

78. Having upheld the use of the exception contained within regulation 10(4)(e) to documents 4, 11 and 12 in the first information request and to documents 2, 3, 7 and 8 in the second information request, the Commissioner is required to consider the public interest test required by regulation 10(1)(b) of the EIRs. As noted above, the test 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.
79. As noted above, in his submissions to the Commissioner, Mr Rule has argued that there is a need for transparency and openness of government. He submitted that it is public knowledge that there has been a disagreement between the two administrations regarding attendance at the Summit and that any damage to relations caused by disclosure of the information would therefore be limited. He further argued that there is a public interest in understanding the Scottish Government's actions regarding the Summit and its relationship with China.



80. In their submissions, the Ministers recognised that there is a public interest in understanding the views of the Scottish Government regarding issues relating to its relationship with the UK Government. However, they also considered that there was a stronger public interest in ensuring that the devolved administrations are able to discuss, in private, issues of mutual interest and in ensuring that relations within the UK are not jeopardised.
81. The Ministers again argued that it is in the public interest to ensure that Ministers and officials should be entitled to private space in order to consider, debate and discuss matters of mutual importance. They contended that, if it was considered that the withheld information referring to issues discussed in private were to be routinely made public, this would limit the ability of Ministers and officials to fully debate matters arising amongst the four administrations. Consequently, public curiosity may be satiated, but to the detriment of the longer term public interest in the full and informed development of policies and relations with the UK Government.
82. The Ministers also considered there was a public interest in allowing Ministers and officials the space to develop policy, arguments and lines to take in order to develop an understanding of the subject matter and to therefore ensure that the Government is responding in the interests of its people. The Ministers considered that the release of discussions or incomplete lines into the public domain would risk undermining, or leading to a misunderstanding of their settled views.
83. As noted above, the Commissioner must consider the public interest as it stood on the dates when the Ministers issued the notices stating the outcome of their reviews i.e. 19 March 2010 (in relation to the Mr Rule's first information request) and 26 April 2010 (in relation to Mr Rule's second information request).
84. In considering the public interest test, the Commissioner again accepts that there is a general public interest in making information available to the public and a general need for transparency and accountability in political debate and decision making, but this must be balanced against any detriment to the public interest as a consequence of disclosure.
85. As the Commissioner has already indicated, the Ministers released a letter from the First Minister to the Prime Minister concerning attendance at the Summit into the public domain on 27 September 2009. For the reasons already outlined in relation to the consideration of the public interest test in respect of regulation 10(4)(d), the Commissioner considers that there will be no harm to the public interest by the disclosure of document 4 in the first information request.
86. The Commissioner is also unable to conclude that there would be any detriment to the public interest by the release of document 11 in the first information request. This comprises an email regarding possible correspondence concerning attendance at the Summit. However, the Commissioner does not consider that the release of this email would jeopardise relations between the two Governments nor would it harm the public interest.



87. The Commissioner is again unable to conclude that the release of document 2 in Mr Rule's second information request would cause any detriment to the public interest. This comprises a standard form revealing a routine exercise and he is unable to accept that disclosure of the information would have any of the harmful effects argued by the Ministers.
88. Documents 3 and 7 in Mr Rule's second information request comprise a draft press release and newspaper article respectively along with attached email discussions. As noted above, the final versions of the press release and newspaper article are virtually unaltered from the drafts and he does not therefore consider that the public interest will be harmed by their disclosure.
89. Having undertaken the balancing exercise required by the public interest test, the Commissioner concludes that the public interest in disclosure of documents 4 and 11 in the first request, and document 2 and the draft press release and article associated with documents 3 and 7 in the second information request outweighs the public interest in maintaining the exception in regulation 10(4)(e) in relation to that information.
90. However, in relation to the email exchanges contained in documents 3 and 7 in the second request, the Commissioner considers that the disclosure of these emails may harm the candour with which comments concerning draft documents may be made in future and accordingly, he accepts that the public interest in favour of maintaining the exception outweighs the limited public interest in the disclosure of such information. The Commissioner therefore accepts that the Ministers were entitled to withhold these emails.
91. For the same reasons, the Commissioner considers the public interest in maintaining the exception outweighs that in disclosure in relation to document 12 in the first information request and document 8 in the second information request.
92. In the light of these conclusions, the Commissioner now concludes that the Ministers acted in breach of the EIRs by withholding the information contained in documents 4 and 11 in Mr Rule's first information request and, in Mr Rule's second request, document 2, and the draft press release and article contained within documents 3 and 7 respectively. He requires the Ministers to disclose this information to Mr Rule.
93. The Commissioner has concluded that the Ministers acted in accordance with the EIRs by withholding under regulation 10(4)(e) the information in document 12 in Mr Rule's first information request and the emails within documents 3 and 7 and document 8 in the second information request.

Regulation 10(5)(f)

94. The Ministers also applied the exception in regulation 10(5)(f) of the EIRs to documents 7 and 7a in Mr Rule's first information request. Document 7a is simply a transcript of the text of document 7, which is held by the Ministers in a poor quality copy.



95. Under regulation 10(5)(f), a Scottish public authority may refuse to make environmental information available to the extent that its disclosure would, or would be likely to, prejudice substantially the interests of the person who provided the information where that person (i) was not under, and could not have been under, any legal obligation to supply the information; (ii) did not supply it in circumstances such that it could, apart from the EIRs, be made available; and (iii) has not consented to its disclosure.
96. The Ministers explained that the information under consideration comprised a letter from a UK Government Minister who was under no obligation to provide the information therein and who had not consented to disclosure of the information. The Ministers submitted that the interests of the devolved and UK Governments would be likely to be substantially prejudiced as it would expose internal discussions on a sensitive and controversial subject with the risk that the policy position of the UK Government could be misunderstood or misrepresented.
97. The Commissioner accepts that the information under consideration was provided to the Ministers by a third party, in circumstances where the third party was not under an obligation to supply it. He also notes that, at the point where the Ministers considered Mr Rule's request for review, the third party had not given their consent to disclosure.
98. However, the Commissioner is unable to conclude that disclosure of the information at the time of the Ministers' response to Mr Rule's request for review (on 19 March 2010) would have, or would have been likely to prejudice substantially the interests of the sender. The Commissioner does not consider there is any content within the documents which would cause any harm to relationships between the UK Government and the devolved administrations of the type envisaged by the Ministers.
99. Having concluded that the exception was incorrectly applied, the Commissioner has not gone on to consider the public interest test required by regulation 10(1)(b) of the EIRs. The Commissioner now concludes that the Ministers acted in breach of the EIRs by withholding the information contained in documents 7 and 7a when responding to Mr Rule's first information request, and he therefore requires them to disclose these documents to Mr Rule.

Regulation 11(2) of the EIRS – third party personal data

100. Regulation 11(2) of the EIRs allows authorities to withhold third party personal data if either "the first condition" (set out in regulation 11(3)) or "the second condition" (set out in regulation 11(4)) applies to the information.
101. The Ministers stated that the information redacted from document 10 in Mr Rule's first information request comprised personal data, the release of which would contravene the first data protection principle of the DPA. Document 10 comprises a series of email exchanges between officials in the Scottish and Maldivian Governments.
102. As the Ministers' arguments relate to "the first condition" and, in particular, the parts of the first condition which consider whether disclosure of the information would breach the data protection principles (regulation 11(2) read in conjunction with either regulation 11(3)(a)(i) or (b)), this is what the Commissioner will focus on in this decision.



103. In order for a public authority to rely on this exception, it must show firstly that the information under consideration is personal data for the purposes of the DPA and secondly that disclosure of the information would contravene one or more of the data protection principles set out in Schedule 1 to the DPA.

Is the information under consideration personal data?

104. Personal data is defined in section 1(1) of the DPA as data which relate to a living individual who can be identified from those data, or from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller (the definition is set out in full in the Appendix).
105. In this case, the Commissioner is satisfied that the majority of the withheld information comprises the personal data of various officials within the Governments of Scotland and the Maldives and includes details such as their position, email address and telephone contact details.
106. However, the Commissioner notes that one of the withheld email addresses is that of a newspaper. The Commissioner also notes that another of the email addresses withheld from Mr Rule is a generic email address for the First Minister's Office. This email address is publicly available on the Scottish Government website. As this information does not relate to living individuals, the Commissioner does not consider it to be personal data. The Commissioner therefore concludes that this information was incorrectly withheld by the Ministers in terms of regulation 11(2) of the EIRs, and he requires the Ministers to disclose these email addresses to Mr Rule.
107. The Commissioner must now go on to consider whether disclosure of the personal data of the officials of the Scottish and Maldivian Governments would breach any of the data protection principles contained in Schedule 1 to the DPA. As noted above, the Ministers argued that disclosure would breach the first data protection principle.

Would disclosure contravene the first data protection principle?

108. The first data protection principle states that personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless at least one of the conditions in Schedule 2 to the DPA is met and, in the case of sensitive personal data, at least one of the conditions in Schedule 3 to the DPA is also met.
109. The Commissioner has considered the definition of sensitive personal data set out in section 2 of the DPA and is satisfied that the personal data in this case does not fall into any of the relevant categories. It is therefore not necessary to consider the conditions in Schedule 3 in this case.
110. There are three separate aspects to the first data protection principle: (i) fairness, (ii) lawfulness and (iii) the conditions in the schedules. However, these three aspects are interlinked. For example, if there is a specific condition in Schedule 2 which permits the personal data to be disclosed, it is likely that the disclosure will also be fair and lawful.



111. The Commissioner will now go on to consider whether there are any conditions in Schedule 2 to the DPA which would permit the personal data to be disclosed. If any of these conditions can be met, he must then consider whether the disclosure of this personal data would be fair and lawful.

Can any of the conditions in Schedule 2 to the DPA be met?

112. The Ministers considered that of the six conditions for processing, as set out in Schedule 2 of the DPA, only the sixth may be of relevance. However, they argued that in practice, condition 6 was not met.

113. The Commissioner agrees that, in the circumstances, condition 6 would appear to be the only condition which would permit disclosure to Mr Rule. Condition 6 allows personal data to be processed if the processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject (the individuals to whom the data relate).

114. There are a number of different tests which must be satisfied before condition 6 can be met. These are:

- Does Mr Rule have a legitimate interest in obtaining the personal data?
- If yes, is the disclosure necessary to achieve these legitimate aims? In other words, is the disclosure proportionate as a means and fairly balanced as to ends, or could these legitimate aims be achieved by means which interfere less with the privacy of the data subject?
- Even if the processing is necessary for Mr Rule's legitimate purposes, would the disclosure nevertheless cause unwarranted prejudice to the rights and freedoms or legitimate interests of the data subjects? There is no presumption in favour of the release of personal data under the general obligation laid down by FOISA. Accordingly, the legitimate interests of Mr Rule must outweigh the rights and freedoms or legitimate interests of the data subjects before condition 6 will permit the personal data to be disclosed. If the two are evenly balanced, the Commissioner must find that the Ministers were correct to refuse to disclose the personal data to Mr Rule.

Does the applicant have a legitimate interest?

115. In their submissions, the Ministers stated that the information redacted from document 10 in Mr Rule's first information request did not relate directly to the information request and that understanding of the information would not be hampered by the redactions. In the Ministers view, there was therefore no legitimate interest to be served by releasing the information.



116. In his submissions, Mr Rule argued that he (and the general public) had a legitimate interest in knowing the identities of those involved in the email exchanges as this was necessary to fully understand the events described in the emails and to allow proper public scrutiny of the discussions which took place. Mr Rule also considered there was a legitimate interest in knowing the role of any officials of the Maldivian Government as this would also contribute to public understanding and scrutiny of the discussions.
117. The Commissioner has considered the submissions made by both Mr Rule and the Ministers and accepts that members of the public are entitled to have some insight into discussions between the Scottish Government and overseas administrations, particularly on matters of public debate and interest. He recognises that such discussions cannot be fully understood without knowing the identities and roles of those involved. Accordingly, the Commissioner is satisfied that Mr Rule (and the wider public) has a legitimate interest in obtaining this information.

Is disclosure of the information necessary to achieve those legitimate interests?

118. The Commissioner must now consider whether disclosure is necessary for those legitimate interests and in doing so he must consider whether these interests might reasonably be met by any alternative means.
119. In this case, the Commissioner considers it is necessary for at least some of the information to be disclosed to Mr Rule in order to achieve those legitimate aims.
120. The Commissioner is unable to identify any viable means of meeting Mr Rule's legitimate interests which would interfere less with the privacy of the relevant data subjects other than by his obtaining the names of the senders, and all recipients of the relevant emails and (where available within the email correspondence), their roles and Departmental locations within the two Governments. The Commissioner therefore considers that disclosure of any personal data which reveals the name and status of the parties to the exchanges is necessary for the purposes of Mr Rule's legitimate interests.
121. In general, however, the Commissioner is satisfied that it is not necessary for the purposes of the legitimate interest identified by Mr Rule for full contact details for these individuals to be disclosed, once their name and status is known.
122. In a number of cases throughout the exchanges in document 10, the senders and recipients are identified simply by their names (as a result of the automatic replacement of email addresses with the names of the relevant person by the email software used by the Scottish Ministers). The Ministers have generally not sought to withhold the names of these individuals where they are identified as sender or recipient of an email in this way.



123. At three points within the exchanges, however, the Ministers have redacted the email addresses of senders or recipients of relevant message in circumstances where their name is otherwise not present in the fields identifying the sender and recipients of the message. The effect of these redactions is that it is not entirely clear who had sent or received these messages. The Commissioner recognises that without the identification of the persons whose email addresses have been removed in this context, Mr Rule's legitimate interest cannot be met.
124. However, the Commissioner considers that the legitimate interest could be met in a manner less intrusive to the individuals concerned if they were identified by their name and the government which they represent, rather than by their email address. The Commissioner is satisfied that the email address formats of the two Governments concerned allow this information to be extracted from the address itself. In what follows, the Commissioner has considered that disclosure of only this information extracted from the email addresses is necessary for the purposes of Mr Rule's legitimate interests.
125. In the light of the above, the Commissioner has concluded that disclosure of the personal data is necessary for the purposes of Mr Rule's legitimate interests only insofar as it reveals the name and roles of the individuals concerned (in line with the comments above) .
126. Since information that solely provides the email, telephone or fax contact details contributes nothing more to this purpose, the Commissioner does not consider that disclosure of this information is necessary in this instance. The Commissioner concludes that condition 6 cannot be met with respect to this information, and so disclosure would breach the first data protection principle. This information was therefore correctly withheld in terms of regulation 11(2) of the EIRs.

Would disclosure cause unwarranted prejudice to the rights and freedoms or legitimate interests of the data subjects?

127. As the Commissioner is satisfied that disclosure of some of the withheld personal data (as identified above) would be necessary to fulfil Mr Rule's legitimate interests, the Commissioner is now required to consider whether that disclosure (i.e. in relation to the names and roles of the data subjects) would nevertheless cause unwarranted prejudice to the rights and freedoms or legitimate interests of the data subjects. As noted above, this involves a balancing exercise between the legitimate interests of Mr Rule and the data subjects. Only if the legitimate interests of Mr Rule outweigh those of the data subjects can the information be disclosed without breaching the first data protection principle.
128. In the Commissioner's briefing on section 38 of FOISA⁵ (which is equally applicable to the consideration of the exception in regulation 11(2) of the EIRs), he notes a number of factors which should be taken into account in carrying out this balancing exercise. These include:
- a) whether the information relates to the individual's public life (i.e. their work as a public official or employee) or their private life (i.e. their home, family, social life or finances);

⁵ <http://www.itspublicknowledge.info/nmsruntime/saveasdialog.asp?IID=3085&sID=133>



- b) the potential harm or distress that might be caused by disclosure;
 - c) whether the individual has objected to the disclosure;
 - d) the reasonable expectations of the individuals as to whether the information would be disclosed.
129. In his submissions to the Commissioner, Mr Rule argued that, as the information relates to the data subjects' public life and employment, there seems little reason to withhold it as the data subjects could reasonably have expected it to be released.
130. In their submissions, the Ministers argued that there would have been no expectation that this information would be released into the public domain. Accordingly, they considered the processing of the information in this way would be prejudicial to the rights and freedoms or legitimate interests of the individuals concerned.
131. The Commissioner considers that officials working for Scottish public authorities would have some expectation that details such as their names and roles should be available in the public domain, particularly where they have some involvement in matters which have generated public debate and concern matters of considerable public interest.
132. The Commissioner notes that some of the information under consideration relates to representatives of a foreign Government. He also recognises that the expectations of those officials may differ from those of officials within Scottish public authorities in relation to the dissemination of their personal data into the public domain. However, the Commissioner is aware that references to each of those individuals under consideration, including their roles within the Maldives' Government is already publicly available. Accordingly, the Commissioner cannot conclude that these officials would have an expectation that their identity and roles would never be publicly disclosed.
133. Having balanced the legitimate interests of the data subjects against the legitimate interests identified by Mr Rule, the Commissioner finds that the legitimate interests served by disclosure to Mr Rule (and the wider public) of the names and roles of the data subjects outweigh the unwarranted prejudice that would be caused to the rights, freedoms or legitimate interests of the data subjects. The Commissioner is therefore satisfied that condition 6 of schedule 2 of the DPA can be met in this case in relation to the names and roles of the data subjects, where these have been withheld.
134. Having reached this conclusion, the Commissioner has gone on to consider whether (as required by the first data protection principle) disclosure of the information concerning the data subject would be fair and lawful.
135. In this case, the Commissioner considers that that disclosure would be fair, for the reasons already outlined in relation to condition 6 above. He is aware of no reason why disclosure should be unlawful (and none has been drawn to his attention) and therefore has concluded that disclosure of this information would not breach the first data protection principle.



136. The Commissioner has therefore concluded that the exception in regulation 11(2) was wrongly applied by the Ministers to the withheld information relating to the names and roles of the data subjects, and so they acted in breach of the EIRs withholding this.
137. The Commissioner requires the Ministers to disclose to Mr Rule the names and (where available within the email correspondence) roles and Departmental location of the data subjects that have been withheld under regulation 11(2) of the EIRs.

Document 5 in Mr Rule's second information request

138. As noted above, in their submissions to the Commissioner of 3 September 2010, the Ministers indicated that they were considering the release of the majority of the information in document 5 in Mr Rule's second information request.
139. As noted above, the investigating officer has subsequently contacted the Ministers to ascertain their position regarding the information contained in this document. However, as at the date of this Decision Notice, the Ministers have failed to advise the investigating officer that any information has been released and have failed to provide any submissions to justify withholding this document under any exception(s) in the EIRs.
140. In the circumstances, and in the absence of any submissions to justify withholding the information under the EIRs, the Commissioner is unable to conclude that the information contained in this document should be excepted from disclosure under the EIRs. He therefore requires the Ministers to disclose this document in its entirety to Mr Rule.
141. The information disclosed should include the covering email which is referred to in the schedule of documents supplied to the Commissioner. Most unusually, the Commissioner requires disclosure of this covering email without having had the opportunity to view its content. However, having received no response to the request for this email to be supplied more than 4 months after that request was made (and more than 6 months after the Ministers were first asked to supply the information that was withheld when responding to Mr Rule's second information request), the Commissioner considers it unreasonable to delay the completion of this case any further.

Timescales for compliance

142. In his applications to the Commissioner, Mr Rule noted that the Ministers had failed to provide a response to his requests for information within 20 working days.
143. Regulation 5(1) of the EIRs requires a Scottish public authority that holds environmental information to make it available when requested by any applicant, while regulation 5(2)(a) states that this must be done as soon as possible and in any event no later than 20 working days after the date of receipt of the request.
144. Regulation 13(a) of the EIRs gives a Scottish public authority which is refusing to comply with a request to make environmental information available a maximum of 20 working days after the date of receipt of the request to give that refusal in writing.



145. The Ministers did not provide responses to Mr Rule's requests for information in terms of regulations 5(2)(a) or 13(a) within the timescales laid down in the EIRs. The Commissioner therefore finds that the Ministers failed to respond to Mr Rule's requests for information within the 20 working days allowed under regulations 5(2)(a) and 13(a) of the EIRs.

Content of notices

146. In his first application to the Commissioner, Mr Rule indicated that he was dissatisfied with the content of the Ministers' response to his request for review. In particular, he argued that the review response did not provide any reasons for the information being withheld, other than citing certain statutory provisions, and made no mention of the public interest test.
147. Regulation 13 of the EIRs provides that, where a request to make environmental information available is refused by a Scottish public authority, the refusal must be provided in writing and must specify the authority's reasons for refusal. This should include details of any exception the authority considers applicable under regulation 10(4) or 10(5) or provision of regulation 11, with the basis on which these are considered to apply, and also how the public authority has reached its decision with respect to the public interest under regulation 10(1)(b).
148. The Ministers' response to Mr Rule's requirement for review did not comply with the requirements above. In particular, the Ministers did not state the basis on which any provision relied upon applied and did not provide any consideration of the public interest.
149. For this reason, the Commissioner has concluded that the Ministers failed to comply with the requirements of regulation 13(b) and 13(c) of the EIRs in responding to Mr Rule's request for review.

Conclusion on technical breaches

150. The Commissioner does not require the Ministers to take any action with regard to the technical breaches noted above in response to these particular applications. However, he notes that, in relation to both information requests, Mr Rule received no response to his initial requests and was required to submit a requirement for review in order to prompt any response. The Commissioner considers this unsatisfactory and would urge the Ministers to take steps to ensure that all requests for information are dealt with timeously and that the contents of any refusal notices issued by them comply with statutory requirements.

Information held by the Ministers

151. In his first application to the Commissioner, Mr Rule stated that he did not believe that the search for information undertaken by the Ministers was complete and that additional information ought to be held by the First Minister's Office.



152. The Ministers explained that Mr Rule had specifically asked for information held by the First Minister's Office. They further explained that, due to the amount of correspondence that is received by the First Minister's Office, there is a three month limit on holding information and all information for the permanent record will subsequently be filed by the relevant policy area dealing with a particular subject. The Ministers also explained the searches that had been undertaken in the First Minister's Office to identify any information falling within the scope of Mr Rule's request.
153. The Commissioner is satisfied by the Ministers' explanation of why no further information is held by the First Minister's Office and the searches that have been undertaken to identify information falling within the scope of the request. Accordingly, he is satisfied that no further relevant information is held by the First Minister's Office.

DECISION

The Commissioner finds that the Scottish Ministers (the Ministers) partially failed to comply with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in dealing with Mr Rule's requests for information.

In failing to identify the information requested as environmental information (as defined in regulation 2(1)) and deal with the request accordingly under the EIRs, the Ministers failed to comply with regulation 5(1) and (2)(b) of the EIRs.

The Commissioner finds that the Ministers acted in accordance with the EIRs by withholding information contained in documents 8 and 9 in Mr Rule's first information request and document 1 in Mr Rule's second information request, since this information was excepted from disclosure under regulation 10(4)(d) of the EIRs.

The Commissioner also finds that the Ministers acted in accordance with the EIRs by withholding information contained in document 12 in Mr Rule's first information request and the emails contained in documents 3 and 7 and document 8 in its entirety in Mr Rule's second information request, since this information was excepted from disclosure in terms of regulations 10(4)(e). The Commissioner finds that the Ministers were entitled to withhold some of the information redacted from document 10 in Mr Rule's first information request in terms of regulation 11(2).

However, the Commissioner finds that the Ministers wrongly withheld the remainder of the withheld information to which they had applied the provisions of regulations 10(4)(d), 10(4)(e), 10(5)(f) and 11(2) of the EIRs. By withholding this information, the Ministers breached regulation 5(1) of the EIRs.

In the absence of any submissions from the Ministers to justify its non-disclosure in terms of the EIRs, the Commissioner also finds that they acted in breach of regulation 5(1) of the EIRs by withholding the information contained in document 5 of Mr Rule's second information request.

The Commissioner now requires the Ministers to provide Mr Rule with the information detailed in the schedule of documents at the end of this decision by 9 May 2011.

Decision 064/2011
David Rule
and the Scottish Ministers



The Commissioner also finds that by failing to respond to Mr Rule's information requests within the timescales laid down in regulations 5(2) and 13(a), the Ministers failed to comply with the EIRs. Additionally, the Commissioner finds that the Ministers failed to comply with the technical requirements of regulation 13(b) and (c) in responding to Mr Rule's requirement for review in relation to his first information request. However, the Commissioner does not require the Ministers to take any action in respect of these breaches in response to these particular applications.

Appeal

Should either Mr Rule 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
23 March 2011



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.

...

- (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.

...

The 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 released 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;

...

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.

(2) The duty under paragraph (1)–

...

(b) is subject to regulations 6 to 12.

...

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.
- (3) Where the environmental information requested includes personal data, the authority shall not make those personal data available otherwise than in accordance with regulation 11.
- (4) A Scottish public authority may refuse to make environmental information available to the extent that
- ...
- (d) the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data; or
 - (e) the request involves making available internal communications.
- (5) A Scottish public authority may refuse to make environmental information available to the extent that its disclosure would, or would be likely to, prejudice substantially-
- ...
- (f) the interests of the person who provided the information where that person-
 - (i) was not under, and could not have been put under, any legal obligation to supply the information;
 - (ii) did not supply it in circumstances such that it could, apart from these Regulations, be made available; and
 - (iii) has not consented to its disclosure; or

...

11 Personal data

...

- (2) To the extent that environmental information requested includes personal data of which the applicant is not the data subject and in relation to which either the first or second condition set out in paragraphs (3) and (4) is satisfied, a Scottish public authority shall not make the personal data available.



- (3) The first condition is-
- (a) in a case where the information falls within paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998 that making the information available otherwise than under these Regulations would contravene-
 - (i) any of the data protection principles; or
 - ...
 - (b) in any other case, that making the information available otherwise than under these Regulations would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.
 - ...

13 Refusal to make information available

Subject to regulations 10(8) and 11(6), if a request to make environmental information available is refused by a Scottish public authority in accordance with regulation 10, the refusal shall-

- (a) be given in writing as soon as possible and in any event no later than 20 working days after the date of receipt of the request for the information;
- (b) specify the reasons for the refusal including, as appropriate, any exception under regulation 10(4) or (5) or provision of regulation 11 and how the Scottish public authority has reached its decision with respect to the public interest under regulation 10(1)(b);
- (c) state the basis on which any exception relied on under regulation 10(4) or (5) or provision of regulation 11 applies if it would not otherwise be apparent;
- ...

Data Protection Act 1998

1 Basic interpretative provisions

- (1) In this Act, unless the context otherwise requires –

...

“personal data” means data which relate to a living individual who can be identified –

- (a) from those data, or



- (b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,

and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual;

...

Schedule 1 – The data protection principles

Part I – The principles

1. Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –
- (a) at least one of the conditions in Schedule 2 is met, and
 - (b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.

...

Schedule 2 – Conditions relevant for purposes of the first principle: processing of any personal data

...

6. (1) The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.

...



Schedule of documents

Application 201000638 (first information request) – Decision schedule

Document no.	Exceptions - upheld (Y/N)	P.I. in disclosure – Y/N	Withhold / disclose
1	Link provided – discounted from consideration in decision		N/A
2	Released – discounted from consideration in decision		N/A
3	10(4)(d) – Y	Y	Disclose
4	10(4)(d) – Y 10(4)(e) – Y	Y Y	Disclose
5	10(4)(e) - N		Disclose
6	10(4)(e) - N		Disclose
7	10(4)(e) - N 10(5)(f) - N		Disclose
7a	10(4)(e) - N 10(5)(f) - N		Disclose
8	10(4)(d) - Y 10(4)(e) – n/a	N	Withhold
9	10(4)(d) - Y	N	Withhold
10	11(2) (redacted information) – partially upheld	N/A	Release with redacted information reinstated, except for telephone and fax numbers. Where individuals are identified as senders or recipients of emails only by their email address, replace this with their name and the identity of the government they represent. Release newspaper email address and generic email address for First Minister's Office
11	10(4)(d) – N 10(4)(e) – Y	Y	Disclose
12	10(4)(d) – N 10(4)(e) – Y	N	Withhold
13	10(4)(e) - N		Disclose



Application 201001292 (second information request) - Decision Schedule

Document no.	Exceptions upheld – Y/N	P.I. in disclosure – Y/N	Withhold / disclose
1	10(4)(d) – Y	N	Withhold
2	10(4)(e) – Y	Y	Disclose
3	10(4)(d) – Y (draft release); N (email) 10(4)(e) – Y	Y (draft release) Y (draft release); N (emails)	Disclose draft release; withhold emails
4	Link provided – discounted from consideration in decision		N/A
5	No submissions provided		Disclose
6	10(4)(d) – Y (draft release); N (email)	Y (draft release)	Disclose both
7	10(4)(d) – Y (draft article); N (email) 10(4)(e) – Y	Y (draft article) Y (draft article; N (emails))	Disclose draft article; withhold emails
8	10(4)(e) – Y	N	Withhold