

# Decision Notice



Decision 140/2012 Tom Gordon of the Sunday Herald and the Scottish Ministers

Internal audit reports relating to the Enterprise and Environment Directorate

Reference No: 201101545

Decision Date: 23 August 2012

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**Rosemary Agnew**

Scottish Information Commissioner

Kinburn Castle

Doubledykes Road



## Summary

Tom Gordon of the Sunday Herald asked the Scottish Ministers (the Ministers) for 15 internal audit reports relating to their Enterprise and Environment Directorate, and its predecessor directorates. The Ministers dealt with the request under the Freedom of Information (Scotland) Act 2002, and withheld the reports in their entirety.

During the investigation, the Commissioner recognised that most of the reports constituted environmental information and so should be considered under the Environmental Information (Scotland) Regulations 2004. Following discussions with the investigating officer, the Ministers disclosed most of the information that had previously been withheld. However, Mr Gordon still wished to receive a decision concerning the Ministers' handling of his request.

Having considered each report under the appropriate law, the Commissioner concluded that most of the information should have disclosed when the Ministers first dealt with Mr Gordon's request. However, she found that the public interest favoured withholding certain information contained in nine of the reports. Since the Ministers had disclosed all of the information that had been wrongly withheld prior to the issue of this decision, the Commissioner did not require any further action to be taken.

## Relevant statutory provisions

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

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

The full text of each of the statutory provisions cited above is reproduced in Appendix 1 to this decision. Both Appendices 1 and 2 form part of this decision.



## Background

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1. Although this decision is concerned with a single information request, it is relevant to note at the outset that this was made alongside a number of others, and it has been considered together with these by the Ministers.
2. On 21 June 2011, Mr Gordon sent six emails to the Ministers. Each contained a separate information request seeking all information contained in one or more internal audit report(s), relating to the work of a particular Government Directorate, or the Cabinet Secretariat. The Commissioner understands that the titles and issue dates of these reports had been disclosed to Mr Gordon in response to a previous request for information. In total, Mr Gordon requested 80 internal audit reports.
3. In the request under consideration in this decision, Mr Gordon requested all items of information contained in 15 internal audit reports relating to the Enterprise and Environment Directorate and its predecessor directorates. A full list of these reports is provided in Appendix 2.
4. The Ministers responded to Mr Gordon's request on 19 July 2011, having considered it as one made in terms of FOISA. They notified Mr Gordon that they considered the reports to be exempt from disclosure in terms of section 30(c) of FOISA. The exemption in section 30(c) applies to information, the disclosure of which would or, would be likely to, prejudice substantially the effective conduct of public affairs. The Ministers explained that they believed that disclosure of the reports would lead to both staff and auditors being substantially inhibited in fulfilling their roles in the internal audit process. They maintained that this would undermine the effectiveness of internal auditing, which would substantially prejudice the effective conduct of public affairs. The other requests made by Mr Gordon on 21 July 2011 (seeking a further 65 internal audit reports) were all separately refused on the same grounds on or around the same date.
5. On 20 July 2011, Mr Gordon sent six emails to the Ministers separately requesting reviews of their decisions in relation to each of the information requests he made on 21 June 2011, asking the Ministers to rethink their decisions and release the information requested. In each request for review (including that concerning the request under consideration in this decision), Mr Gordon commented that it appeared from the arguments put forward in the Ministers' refusal notices that they were advancing a class argument; that the information he was requesting should be exempt because it is a certain type of information, regardless of its content. Mr Gordon argued that this was not a valid approach and noted that the Commissioner had ruled against class arguments on numerous occasions.
6. He also commented that there appeared to have been no serious attempt to sift the material he had requested to establish what information within it might be releasable, and which, if any, was truly exempt from disclosure under section 30(c), despite the claim that the public interest test had been applied.



7. Mr Gordon maintained that there was nothing sacrosanct about internal audit reports, and indicated that in recent weeks he had received internal audit reports from a number of other Scottish public authorities. He commented that the work of those authorities continued as before. He also highlighted a decision by the Commissioner<sup>1</sup> relating to the release of internal audit reports by VisitScotland.
8. The Ministers conducted a single review in relation to their handling of Mr Gordon's six requests for information, and notified Mr Gordon of the outcome of the review on 17 August 2011. The Ministers upheld their original decisions to withhold all of the information sought in each request under section 30(c) of FOISA.
9. On 18 August 2011, Mr Gordon wrote to the Commissioner, stating that he was dissatisfied with the outcome of the Ministers' review in relation to the request set out in paragraph 3 above, 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.
10. Mr Gordon made separate applications for a decision in relation to his five other requests for internal audit reports, which are not under consideration in this decision.
11. The application was validated by establishing that Mr Gordon 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

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12. On 6 September 2011, the Ministers were notified in writing that an application had been received from Mr Gordon and were asked to provide the Commissioner with the information withheld from him (the 15 reports). The Ministers responded with the information requested and the case was then allocated to an investigating officer.
13. The investigating officer subsequently contacted the Ministers, giving them an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking them to respond to specific questions. In particular, the Ministers were asked to justify their reliance on any provisions of FOISA they considered applicable to the information requested.
14. In this letter (and in similar letters relating to the separate investigations concerning Mr Gordon's other requests for internal audit reports), the Ministers were advised to reconsider their application of the exemption in section 30(c) to all of the information requested by Mr Gordon. The investigating officer highlighted that the then Commissioner had, on a number of occasions, required the disclosure of full or partial content of internal audit reports, and indicated that this approach was understood to be in line with practice elsewhere in the UK.

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<sup>1</sup> <http://www.itspublicknowledge.info/applicationsanddecisions/Decisions/2010/200900988.asp>



15. The investigating officer indicated that it was highly unlikely that the Commissioner would accept that internal audit reports should be treated as a class of information which is automatically exempt from disclosure simply on the basis that they are internal audit reports, and without any reference to the content and context of the reports. The investigating officer went on to suggest that it may therefore be appropriate for the Ministers to reconsider the content of the reports and to determine whether they could be disclosed to Mr Gordon, either in full or in part.
16. The Ministers responded to this letter, and the other five letters expressed in similar terms, with a single submission on 27 October 2011. The Ministers maintained that all information within the 80 reports sought by Mr Gordon's six information requests was exempt from disclosure in terms of section 30(c) of FOISA. They provided submissions explaining their reasoning when applying that exemption and the associated public interest test to the information in the 80 reports.
17. During the investigation, Mr Gordon was also asked for his submissions on the matters to be considered in this case. Since the Ministers adopted the same general arguments in relation to all information sought by his six requests for internal audit reports, Mr Gordon was invited to make a single response in relation to all six of his cases. This was received on 5 January 2012.
18. At a late stage in the investigation, it was recognised that much the information under consideration in this case was environmental information. The Ministers were advised of this and asked whether they would wish to apply the exemption in section 39(2) of FOISA should the Commissioner take the view that the some or all of the information should have been considered under the EIRs.
19. This request followed the issue, on 10 July 2012, of *Decision 117/2012 Mr Tom Gordon of the Sunday Herald and the Scottish Ministers*<sup>2</sup>; the fifth to consider one of Mr Gordon's requests for internal audit reports. Paragraph 39 of that Decision, expressed disappointment that it appeared that the Ministers had not taken the opportunity to review their approach to the outstanding cases, in the light of the series of decisions issued since March 2012. After discussions in the light of those comments, the Ministers were also given the opportunity to review the reports requested in this case, and consider whether to disclose the majority of that information prior to a decision requiring them to do so. The Ministers were advised on the Commissioner's initial view on which information had been properly withheld, and which should be disclosed, based on the submissions received.
20. Following further discussions, the Ministers provided Mr Gordon with the information in the reports which the Commissioner considered was not exempt from disclosure. However, the Commissioner understands that Mr Gordon still wishes to receive a decision regarding the Ministers' initial handling of his request.

<sup>2</sup> <http://www.itspublicknowledge.info/applicationsanddecisions/Decisions/2012/201101539.asp>



21. To enable the Commissioner to do so and consider the environmental information under the appropriate law, the Ministers have confirmed that they would apply the exemption in section 39(2) to information that the Commissioner judged to be environmental information. They also indicated that they considered the exception in regulation 10(4)(e) of the EIRs to be the one they would have used when withholding that environmental information. They asked the Commissioner to consider the submissions previously made in relation to section 30(c) of FOISA when she considered regulation 10(4)(e), and to take account of the public interest arguments they had previously made.
22. The relevant submissions received from both the Ministers and Mr Gordon will be considered fully in the Commissioner's analysis and findings below.

## Commissioner's analysis and findings

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23. In coming to a decision on this matter, the Commissioner has considered all of the withheld information and the submissions made to her by both Mr Gordon and the Ministers and is satisfied that no matter of relevance has been overlooked.
24. Appendix 2 lists the reports that are under consideration in this decision. The numbering of the reports (67-81), which is used to identify them where relevant in the discussion below, is drawn from the schedule of documents provided to the Commissioner by the Ministers. This numbered all of the reports covered by Mr Gordon's six requests in a single schedule.
25. Although most of the withheld information was disclosed prior to the issue of this decision, the Commissioner must consider (as in any other decision) whether the Ministers complied with Part 1 of FOISA and the EIRs at the point where they notified Mr Gordon of the outcome of their review. The relevant point, therefore, is 17 August 2011, some time prior to the disclosures during the investigation.

### FOISA or EIRs?

26. As noted above, the Ministers responded to the request under consideration solely in terms of FOISA. However, during the investigation, the Commissioner recognised that the subject matter of most of the reports under consideration was such that their content was likely to constitute environmental information.
27. The Commissioner has not departed from the thinking of the previous Commissioner who set out his views on the relationship between FOISA and the EIRs in detail in *Decision 218/2007 Professor A D Hawkins and Transport Scotland*. It need not be repeated in full here, although the Commissioner would reiterate some of the key points:
  - The definition of what constitutes environmental information should not be viewed narrowly, but in line with the definition of environmental information in the EIRs.



- There are two separate statutory frameworks for access to environmental information and an authority is required to consider any request for environmental information under both FOISA and the EIRs.
  - Any request for environmental information therefore must be dealt with under the EIRs.
  - In responding to a request for environmental information under FOISA, an authority may claim the exemption in section 39(2).
28. The definition of environmental information is set out in regulation 2(1) of the EIRs, and it is reproduced in full in Appendix 1 below.
29. In this case, the Commissioner considers that the content of all of the reports under consideration, except for that in reports 67, 68, 79 and 80, constitutes environmental information.
30. The subject matter of reports 69-78 and 81 is varied, covering agricultural subsidies and rural development programmes, official controls over feed, food and animal welfare, sponsorship to the National Botanical Gardens in Edinburgh and the Climate Challenge fund. Given that the focus of the reports is on administrative systems and processes, there is only limited information in the reports that relates directly to the state of the elements of the environment, and so falls within part (a) of the definition of environmental information.
31. However, the Commissioner considers that the areas of work being audited and discussed in these reports constitute measures (including policies, plans and programmes) affecting or likely to affect the state of the elements of the environment, or factors that affect the elements of the environment. In some instances (particularly where the audit considers the management of funding programmes), the information under consideration includes economic analyses, used in the framework of those measures.
32. Accordingly, the Commissioner is satisfied that all of the information within reports 69-78 and 81 constitutes environmental information defined in part (c) of the definition in the EIRs. Some of that information is, additionally, environmental information in terms of part (e) of the definition.
33. Having drawn this conclusion, the Commissioner must conclude that, by failing to consider this information, and respond to Mr Gordon's request (insofar as it related to documents 69-78 and 81) in terms of the EIRs, the Ministers failed to comply with regulation 5(1) and (2)(b) of the EIRs.
34. As noted above, the Ministers confirmed during the investigation that they wished to apply the exemption in section 39(2) of FOISA to any information that the Commissioner found to be environmental information.



35. The exemption in section 39(2) of FOISA provides in effect that environmental information as defined by regulation 2(1) of the EIRs is exempt from disclosure under FOISA, with a view to any such information being considered primarily in terms of the EIRs. The Commissioner agrees that the Ministers were entitled to apply the exemption in section 39(2) of FOISA to the information in reports 69-78 and 81, given her conclusion that it is properly considered to be environmental information.
36. This exemption is subject to the public interest test in section 2(1)(b) of FOISA. As there is a separate statutory right of access to environmental information available to Mr Gordon in this case, the Commissioner 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.
37. Having reached the above conclusions, in what follows the Commissioner will first consider reports 69-78 and 81 in terms of the EIRs before going on to consider reports 67, 68, 79 and 80 in terms of FOISA.

#### **EIRS – reports 69-78 and 81**

38. The Ministers indicated that they would have applied the exception in regulation 10(4)(e) of the EIRs to the environmental information in the reports.
39. 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. 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.
40. The Commissioner is satisfied that each of the reports under consideration is clearly an internal communication. In each case, the report was both prepared and circulated within the Scottish Government. The Commissioner therefore finds that the Ministers were entitled to apply the exception in regulation 10(4)(e).
41. Having reached this conclusion, the Commissioner is required to consider the public interest test required by regulation 10(1)(b) of the EIRs. 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.
42. When considering this test, the Commissioner has considered the submissions received from both parties.





43. The Ministers' submissions (which are those considered in previous decisions concerning Mr Gordon's other five requests for internal audit reports in relation to the exemption in section 30(c) of FOISA) focussed on the harm to the audit process that they anticipated would follow from disclosure of the audit reports. While they recognised that there was some public interest in disclosure of the withheld information in the interests of open and transparent government, they considered there to be a greater public interest in ensuring that candid and comprehensive audit reports are always produced, to enable staff to identify and learn lessons from them, and continue to develop and improve processes.
44. The Ministers argued that, if these audit reports were released into the public domain, it is likely that both staff and auditors would be substantially inhibited in fulfilling their roles in the audit process. Also, as these reports contain only part of the audit process, no consideration would be taken by the requester of the steps that have been taken to deal with issues raised in the reports and this would therefore be likely to lead to negative reporting without the benefit of the whole picture of the audit process.
45. Mr Gordon agreed that effective audits depend on staff talking freely with auditors, and auditors making frank conclusions and recommendations, but he did not accept that disclosure would substantially inhibit this as claimed by the Ministers. He did not accept that staff or auditors would withhold or distort information under audit because it might be disclosed. He recognised that auditors' duties include an obligation to be frank and deliver sometimes unpalatable truths, but argued that they continue to fulfil these duties regardless of whether the reports they create are publicly disclosed or not.
46. Mr Gordon also responded to the Ministers' argument that disclosure of the internal audit reports would lead to "negative reporting". He argued that his profession is of no relevance and should have no bearing on how Ministers respond to a request under FOISA, and noted that the Ministers were "perfectly capable" of explaining what remedial action has been taken in response to the audit reports.

### **Conclusions on the public interest**

47. When considering the public interest balancing exercise, the Commissioner has recognised that internal audit reports are important and valuable tools that enable an organisation to evaluate its processes and policies in specific areas, highlighting both strengths and weaknesses, thereby enabling learning and improvement. It is clear that such processes contribute significantly to the public interest, by encouraging efficient and effective government.
48. The Commissioner recognises that disclosure of the reports that follow on from these internal audits would go a considerable way to informing the public of the effectiveness of the Scottish Government, and would facilitate a greater understanding of how the Scottish Government and its internal audit process operates.



49. However, balanced against this, the Commissioner recognises that there is a public interest in ensuring that the comprehensiveness of the internal audit process is not undermined, and that the individuals conducting the audit and staff in the area being audited remain able to be frank and open about the matters under consideration, and when reporting findings and recommendations.
50. Having considered the content of reports 69-78 and 81 (and having had no particular content highlighted to her within the Ministers' submissions), the Commissioner is unable, for the most part, to accept that disclosure, at the time when the Ministers reviewed their handling of Mr Gordon's request, would have been likely to prompt the types of inhibition and harm to the audit process that the Ministers have described.
51. The Commissioner notes that each of the reports are set out in a standardised form, with the methodology, findings and outcome of the audit expressed in professional and dispassionate terms. As with any internal audit, practice in the relevant area is assessed, and areas in which improvement can be made are identified.
52. In the absence of submissions highlighting particular concerns relating to the information under consideration, the Commissioner can see nothing in the vast majority of the content of reports 69-78 and 81 which would have been likely to prompt either auditors or officials engaging with the audit process to be less open or frank in future internal audits. She can also find nothing within it which would, in her view, have prevented or substantially inhibited staff or auditors from fulfilling their roles in any future internal audit.
53. The Commissioner can also see no reason (and has been given no explanation as to) why the Ministers should anticipate that reporting of the content of these reports in the media would have been so unduly negative, or would have so inaccurately represented the practice of the Ministers, so as to be likely to cause harm of the type suggested.
54. Given that the Commissioner has been unable to accept that the types of harm proposed by the Ministers would be likely to follow disclosure of much of the information within these reports, she has for the most part given only limited weight to the public interest arguments raised by the Ministers when conducting the balancing exercise.
55. On the other side of that balancing exercise, she has given considerable weight to the public interest in allowing understanding of the Ministers' internal audit processes, and demonstrating the effectiveness of their procedures for reviewing their systems, learning from mistakes and making recommendations for improvements.
56. However, having regard to the particular nature of the information in the reports, she has identified certain limited parts for which she accepts that disclosure would be likely to limit the effectiveness of the audit process, to the detriment of the public interest.



57. The information concerned (contained in reports 69, 71, 72, 73, 74, 75, 76 and 81) includes the identities of specified projects or recipients of funding (of various types – including farm subsidies, and other types of grants) that are named in the context of discussions around the work of the Government. It includes their names or farm codes and field numbers that might identify the persons or organisations.
58. Where these persons or organisations are identified, the focus of the report is on the Government's controls and processes in the relevant areas. The reason for reference to individual cases is to draw attention to particular issues that had arisen within those systems, rather than to suggest any failings on the part of the third parties concerned.
59. The Commissioner accepts that disclosure of information identifying the recipients of the grants in question would, or be likely to, inhibit the audit process by prompting auditors to avoid presenting full details of particular cases considered in the course of an audit, in order to avoid creating an impression of wrong-doing on the part of a recipient of funding, or in relation to the Scottish Government's management of their grant.
60. Disclosure of information relating to a specific grant recipient in such circumstances could also lead to staff members being less willing to contribute frankly and engage fully with the audit process, if they were concerned that the identity of such third parties was likely to be disclosed into the public domain in similar contexts in future.
61. In one case, the Commissioner has also identified information which relates to an individual employee who had worked on a case that is discussed. The Commissioner considers this information is of a nature that would be expected to be kept confidential. The Commissioner considers that disclosure of such information would make it likely that employees would be less open with the audit process, and for audit reports to be less complete.
62. For the information discussed in paragraphs 57 to 61, the Commissioner considers that the weight of the public interest in maintaining the exception in regulation 10(4)(e) is substantial, given that she believes that its disclosure would be likely to undermine the effectiveness of the audit process. For that information, having conducted the balancing exercise, the Commissioner concludes that the public interest in maintaining the exception in regulation 10(4)(e) is not outweighed by the public interest in disclosure.
63. The Commissioner is therefore satisfied that the Ministers complied with the EIRs when withholding that information.
64. However, having undertaken the public interest test in relation to the remaining information within reports 69-78 and 81, the Commissioner has concluded that the public interest in maintaining the exception in regulation 10(4)(e) is outweighed by the public interest in disclosure.
65. For that reason, the Commissioner finds that the Ministers failed to comply with the EIRs when initially withholding that information.

**FOISA – reports 67, 68, 79 and 80**

66. The Ministers withheld these documents under the exemption in section 30(c) of FOISA, on the basis that disclosure would, or would be likely to, undermine the effectiveness of their internal audit processes.
67. Section 30(c) exempts information if its disclosure “would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs”. The use of the word “otherwise” distinguishes the harm required from that envisaged by the exemptions in section 30(a) and (b). This is a broad exemption and the Commissioner expects any public authority citing it to show what specific harm would (or would be likely to) be caused to the conduct of public affairs by release of the information, and how that harm would (or would be likely to) be expected to follow from release.
68. Section 30(c) applies where the harm caused, or likely to be caused, by disclosure is at the level of substantial prejudice. There is no definition in FOISA of what is deemed to be substantial prejudice, but the Commissioner considers the harm in question would require to be of real and demonstrable significance. The authority must also be able to satisfy the Commissioner that the harm would, or would be likely to, occur and therefore needs to establish a real risk or likelihood of actual harm occurring as a consequence of disclosure at some time in the near (certainly the foreseeable) future, not simply that the harm is a remote possibility.
69. The Commissioner has previously stated that it is important for public authorities to treat each request for information on a case by case basis. Release of information in one case should not be taken to imply that information or communications of a particular type will be routinely released in future. The circumstances of each case, including the content of the specific information under consideration, must be taken into consideration and (where required) the public interest in each case assessed on its own merits.
70. The submissions from both Mr Gordon and the Ministers regarding the application of this exemption are summarised in brief within the discussion of the public interest test under the EIRs above. They have been set out in full and discussed at length in the decisions relating to Mr Gordon’s other five information requests seeking internal audit reports<sup>3</sup>. The Commissioner will not repeat the summary of those submissions and the discussion of them here, but would make clear that she has followed the same approach in this case as in those previous cases.
71. She has reviewed the actual content of each report, to consider whether disclosure of the specific information therein would (at the relevant time) have, or would have been likely to, prejudice substantially the effective conduct of public affairs in the manner the Ministers have suggested.

<sup>3</sup> Decisions [050/2012](#), [067/2012](#), [076/2012](#), [085/2012](#) and [117/2012](#).



72. Having considered the content of the reports 67, 68, 79 and 80 along with the submissions from the Ministers, the Commissioner is unable to accept, for the most part, that disclosure of that information would have, or would have been likely to have had the prejudicial effects claimed by the Ministers. Her reasoning when reaching this conclusion is in line with that set out in the previous decisions addressing Mr Gordon's requests for internal audit reports, and prompts her to conclude that the exemption in section 30(c) of FOISA was incorrectly applied to the vast majority of the content of these reports.
73. However, she accepts that disclosure of certain content in report 79 (two sentences on page 4 and a further sentence on page 11) would be likely to be harmful to the effective conduct of public affairs with respect to the Ministers' internal audit processes. This is because the information sets out the terms of certain legal advice given the Ministers and related considerations. The Commissioner recognises that this information is subject to legal professional privilege, and so of a type that would be expected to be kept confidential.
74. The Commissioner recognises that disclosure of such information into the public domain could lead to staff in the areas being audited being less open, or providing less complete background information to auditors to avoid the loss of privilege in advice given through its disclosure. She also recognises that disclosure could prompt auditors to report relevant matters in less specific terms in future, to the detriment to the thoroughness and completeness of the audit process.
75. For this reason, the Commissioner accepts that the exemption in section 30(c) of FOISA was correctly applied to the limited information described in paragraph 73.

### **Consideration of the public interest test**

76. As noted above, the exemption in section 30(c) is subject to the public interest test in section 2(1)(b) of FOISA, and so the Commissioner must now consider whether, in all the circumstances of the case, the public interest in disclosing the information found to be exempt is outweighed by that in maintaining the exemption. Unless it is, the Commissioner must require the Ministers to disclose this information.
77. The submissions made by both the Ministers and Mr Gordon are summarised fully in the previous decisions concerning Mr Gordon's request and they are also summarised in brief in the discussion of the EIRs above. They have been fully considered by the Commissioner in coming to a decision on where the balance of the public interest lies in relation to the exempt information within report 79.
78. Once again, the Commissioner recognises that disclosure of internal audit report reports go a considerable way to informing the public of the effectiveness of the Scottish Government, and would facilitate a greater understanding of how the Scottish Government and its internal audit process operates.



79. However, balanced against this, the Commissioner recognises that there is a public interest in ensuring that the comprehensiveness of the internal audit process is not undermined, and that the individuals conducting the audit and staff in the area being audited remain able to be frank and open about the matters under consideration, and when reporting findings and recommendations.
80. On balance, having considered the nature of the particular information contained in reports 79 that she has found to be exempt under section 30(c), and the submissions from both the Ministers and Mr Gordon, and also recognising the strong public interest in protecting legally privileged information, the Commissioner finds that the public interest in disclosing that information is outweighed by maintaining the exemption in section 30(c) of FOISA. She has therefore concluded that the Ministers were entitled to withhold this information under section 30(c) of FOISA.

### **Conclusion**

81. In this case, all of the information that the Commissioner found to have been incorrectly withheld was disclosed to Mr Gordon by the Ministers prior to the issue of this decision.
82. The Commissioner welcomes the Ministers' decision to disclose that information. Since these disclosures have rectified the previous deficiencies in the Ministers' handling of Mr Gordon's information request, the Commissioner requires no further action to be taken in response to this decision.



## DECISION

The Commissioner finds that the Scottish Ministers (the Ministers) initially generally failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) and the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by Mr Gordon.

The Commissioner finds that, by failing to identify and respond to Mr Gordon's information request (insofar as it sought reports 69-78 and 81) as one seeking environmental information as defined in regulation 2(1) of the EIRs, the Ministers breached regulations 5(1) and 2(b) of the EIRs.

The Commissioner finds that the Ministers were entitled to withhold certain information within document 79 on the basis that it was exempt from disclosure under section 30(c) of FOISA, and that the public interest in maintaining that exemption was not outweighed by the public interest in disclosing the information. By withholding that information, the Ministers complied with Part 1 of FOISA.

The Commissioner finds that the Ministers failed to comply with Part 1 and in particular section 1(1) by withholding the information in reports 67, 68 and 80, and the remaining information in report 79 under section 30(c) of FOISA.

The Commissioner finds that the Ministers were entitled to withhold the following information on the basis that it was excepted from disclosure under regulation 10(4)(e) of the EIRs, and that the public interest in maintaining that exception was not outweighed by the public interest in disclosure of that information:

Report 69 – farm codes

Report 71 – farm codes, field numbers and information relating to an employee

Report 72-76 (inclusive) and 81 – recipients of funding

However, the Commissioner finds that, although the remaining information in reports 69-78 and 81 constituted internal communications for the purposes of regulation 10(4)(e) of the EIRs, the public interest in maintaining that exception was outweighed by the public interest in disclosing the information.

Since the Ministers disclosed all of the information that was found to have been incorrectly withheld prior to the issue of this decision, the Commissioner does not require any further action to be taken in relation to these breaches.

Decision 140/2012

Mr Tom Gordon of the Sunday Herald



## Appeal

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Should either Mr Gordon or the Scottish 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.

**Margaret Keyse**  
**Head of Enforcement**  
**23 August 2012**





## Appendix 1

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### 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 –

...

- (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 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;
- (d) reports on the implementation of environmental legislation;
- (e) costs benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in paragraph (c); and
- (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.

(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.

...

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

...

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



## Appendix 2

### List of audit reports

No.	Report description	Date of report	Decision
67	Rural Payments & Inspections IT Security 2009/10	18/12/2009	Incorrectly withheld
68	Rural Payments & Inspections IT Security 2010/11	31/01/2011	Incorrectly withheld
69	Rural Payments & Inspection Directorate Overarching Review of the Implementation of the SRDP 2009/10	1/04/2010	Farm codes were correctly withheld. Other information was incorrectly withheld.
70	Rural Directorate Official Food and Feed Hygiene Control 2008/2009	31/03/2010	Incorrectly withheld
71	Rural Payments & Inspections Single Farm Payment Scheme (Including SBCS) 2010/11	14/03/2011	Farm codes, field numbers information about a staff member were correctly withheld. All other information was incorrectly withheld.
72	Closure of West of Scotland 2000/06 ERDF Programme	22/09/2010	Recipients of funding were correctly withheld. All other information was incorrectly withheld.
73	Closure of Highlands and Islands 2000/06 ERDF Programme	24/09/2010	Recipients of funding were correctly withheld. All other information was incorrectly withheld.
74	Closure of Highlands and Islands 2000/06 ESF Programme	23/09/2010	Recipients of funding were correctly withheld. All other information was incorrectly withheld.
75	Closure of East of Scotland 2000/06 ERDF Programme	23/09/2010	Recipients of funding were correctly withheld. All other information



			was incorrectly withheld.
76	Closure of West of Scotland 2000/06 ESF Programme	26/08/2010	Recipients of funding were correctly withheld. All other information was incorrectly withheld.
77	Rural & Environment Research & Analysis Sponsorship of the Royal Botanic Garden, Edinburgh 2008/09	21/05/2009	Incorrectly withheld
78	Greener Scotland Division Climate Challenge Fund 2010/11	19/08/2010	Incorrectly withheld
79	Culture, External Affairs and Europe Directorate International Development Fund 2009/10	26/08/2010	Two sentences on page 4 and one on page 11 were correctly withheld. All other information was incorrectly withheld.
80	Enterprise Policy and Delivery Division Sponsorship of Scottish Enterprise and Highland and Islands Enterprise 2009/10	16/11/2009	Incorrectly withheld
81	European Structural Funds Division 2000-06 Operational Programmes Irregularities	9/04/2009	Recipients of funding were correctly withheld. All other information was incorrectly withheld.